SJC

Massachusetts Rules and Orders of the

Supreme Judicial Court

Including amendments effective

June 1, 2025

Including:

Rules of Professional Conduct
Code of Judicial Conduct

Published by the Massachusetts Trial Court Law Libraries

Massachusetts Rules and Orders of the Supreme Judicial Court

Including Amendments effective June 1, 2025

Published by the Massachusetts Trial Court Law Libraries

Rules of Court Disclaimer

The Trial Court Law Libraries make every effort to provide a current, accurate copy of the rules of court. However, this is not an official source for the rules, and the libraries cannot be held responsible for any errors or omissions contained in this document. If you are concerned about the timeliness or accuracy of a rule, please consult one of the print sources for Massachusetts Rules of Court or contact your nearest Trial Court Law Library for assistance.

Print sources for rules:

- Annotated Laws of Massachusetts: Court Rules, LexisNexis, annual
- Massachusetts General Laws Annotated, volumes 43A-43C, West Group, updated annually with pocket parts
- Massachusetts Rules of Court, West Group, annual
- The Rules, Lawyers Weekly Publications, loose-leaf

Chapter One: General Rules

1:01 Definitions; Conflict with Other Rules.

These rules shall be construed to secure the just, speedy and inexpensive determination of every case. Words or phrases importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words importing the masculine gender may include the feminine and neuter. As used in these rules the following terms shall be deemed to have the following meanings:

"Superior Court" shall mean the Superior Court Department of the Trial Court, or a session thereof for holding court.

"Housing Court" shall mean a division of the Housing Court Department of the Trial Court, or a session thereof for holding court.

“Probate Court” shall mean a division of the Probate and Family Court Department of the Trial Court, or a session thereof for holding court.

“Land Court” shall mean the Land Court Department of the Trial Court, or a session thereof for holding court.

“District Court” or **“Municipal Court”** shall mean a division of the District Court Department of the Trial Court, or a session thereof for holding court. Except when the context means something to the contrary, said words shall include the Boston Municipal Court Department.

“Municipal Court of the City of Boston” shall mean the Boston Municipal Court Department of the Trial Court, or a session thereof for holding court.

“Juvenile Court” shall mean the Boston Division, the Worcester Division, the Springfield Division, and the County of Bristol Division of the Juvenile Court Department of the Trial Court, or a session thereof for holding court.

“Chief Justice” of a Trial Court Department shall mean the “Administrative Justice” of that Department.

To the extent of any conflict between the Massachusetts Rules of Civil Procedure, the Massachusetts Rules of Criminal Procedure, the Massachusetts Rules of Appellate Procedure and the rules of the Supreme Judicial Court, the Appeals Court, and the various Departments of the Trial Court, the Massachusetts Rules of Civil, Criminal and Appellate Procedure shall control.

Rule History

Amended May 29, 1986, effective July 1, 1986; amended June 16, 1987, effective July 1, 1987; amended effective June 8, 1989; amended June 9, 1997, effective January 1, 1998; amended March 30, 1999, effective April 5, 1999.

1:02 Sittings of the Supreme Judicial Court.

Sittings of the full court for hearing questions of law pursuant to G.L. c. 211, § 12, as amended, shall be held at Boston on the first Monday of October, November, December, January, February, March, April and May, and at such other places or times as the court from time to time may order.

1:03 Uniform Certification of Questions of Law.

Section 1. Authority to Answer Certain Questions of Law.

This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be

determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

Section 2. Method of Invoking.

This rule may be invoked by an order of any of the courts referred to in Section 1 upon that court's own motion or upon the motion of any party to the cause.

Section 3. Contents of Certification Order.

A certification order shall set forth

(1) the question of law to be answered; and
(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Section 4. Preparation of Certification Order.

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to this court by the clerk of the certifying court under its official seal. This court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of this court, the record or portion thereof may be necessary in answering the questions.

Section 5. Costs of Certification.

Fees and costs shall be the same as in civil appeals docketed before this court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

Section 6. Briefs and Arguments.

Proceedings in this court shall be those provided in these rules, the Massachusetts Rules of Appellate Procedure or statutes governing briefs and arguments, so far as reasonably applicable.

Section 7. Opinion.

The written opinion of this court stating the law governing the questions certified shall be sent by the clerk under the seal of this court to the certifying court and to the parties.

Section 8. Power to Certify.

This court on its own motion or the motion of any party may order certification of questions of law to the highest court of any state when it appears to the certifying court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

Section 9. Procedure on Certifying.

The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

Section 10. Uniformity of Interpretation.

This rule shall be so construed as to effectuate its general purpose to make uniform the law of those states which adopt it; or enact a uniform certification statute.

Section 11. Short Title.

This rule may be cited as the Uniform Certification of Questions of Law Rule.

1:04 Judicial Conference.

G.L. c. 211, § 3B, as amended.

(1)

The Massachusetts Judicial Conference is hereby constituted to consist of the following: (a) the Chief Justice (who shall serve as chairman of the Conference) and the Associate Justices of this court; (b) the Chief Justice of the Appeals Court; (c) the Chief Administrative Justice of the Trial Court; (d) the Administrative Justice of the Superior Court Department; (e) the Administrative Justice of the Probate and Family Court Department; (f) the Administrative Justice of the Land Court Department; (g) the Administrative Justice of the Housing Court Department; h) the Administrative Justice of the District Court Department; (i) the Administrative Justice of the Boston Municipal Court Department; (j) the Administrative Justice of the Juvenile Court Department; (k) the Chairman of the Judicial Council; (l) the Trial Court Administrator; and (m) the Administrative Assistant to the Supreme Judicial Court (G.L., c. 211; § 3A), who shall act as secretary and as the principal administrative officer of the Conference.

(2)

The judges and officers mentioned in paragraph (1) shall serve as the members of the Conference until further order of this court. Any member may designate another member of the court or body which he represents to act for him at any meeting.

(3)

The Conference may invite other judges and members of the bar (a) to participate in any one or more projects, studies, meetings, or other activities, or (b) to prepare and present studies, recommendations, and comments upon matters concerning which the Conference desires information.

(4)

The Conference (a) may consider and make recommendations on matters relating to the conduct of judicial business, the improvement of the judicial system, and the administration of justice in such manner as the Conference from time to time may deem appropriate; (b) may initiate and conduct legal research; (c) shall assist this court in coordinating the activities of the several courts; (d) may conduct general conferences and educational meetings; (e) may appoint reporters, advisers, research assistants, and other employees, either for the general work of the Conference or for designated projects and, subject to the availability of necessary funds, may make expenditures, including the payment of the foregoing persons; (f) may employ such facilities of universities, law schools, colleges, bar associations, foundations, and other institutions, as may be made available to it; and (g) may appoint standing or special committees. The Chief Justice of this court may appoint a vice-chairman of the Conference and may delegate to him duties with respect to the Conference.

(5)

The Conference shall meet at such times as may be designated by the Chief Justice or a majority of the Justices of this court.

1:05 Certain Contracts by Judicial Officers.

(1)

Except as provided by paragraph (4), by statute, or by other rule or order of this court, no judge of a court shall enter into, order, or approve a contract on behalf of the Commonwealth or any of its political subdivisions requiring the expenditure of funds or the incurring of a liability in excess of any appropriation therefor, or for which no appropriation has been made, without the written approval of the appropriate judicial officer designated by this court. The following officers are so designated: for the Appeals Court, its Chief Justice; for each department of the Trial Court, its Administrative Justice. Every judge seeking such approval shall file a written request for approval with the appropriate judicial officer and a copy with the Chief Administrative Justice of the Trial Court. Every request shall be in the form of a memorandum and shall set forth the following: (a) the nature and cost of the facilities, goods or services sought; (b) an explanation of the circumstances causing the judge to consider it reasonably necessary to the proper execution of the court's responsibilities; (c) a chronological account of administrative action previously taken to secure it; and (d) a statement of the action contemplated by the judge.

(2)

The appropriate judicial officer may approve in writing a request made under paragraph (1) only upon a finding that the facilities, goods or services sought are reasonably necessary to the proper execution of the court's responsibilities, and subject to such instructions as he deems appropriate. If such request is approved by the judicial officer, he shall forthwith submit a copy of his approval to the Chief Administrative Justice.

(3)

Any judge whose request under paragraph (1) is denied may appeal in writing to the Chief Administrative Justice, who shall make a final determination thereon.

(4)

The only exception to paragraph (1) shall be in instances where failure to obtain the required facilities, goods, or services expeditiously and without delay will frustrate the execution of the court's responsibilities. In every such instance, the judge entering into, ordering or approving a contract on behalf of the Commonwealth or any of its political subdivisions shall forthwith submit a memorandum of the type required by paragraph (1) to the appropriate judicial officer, with a copy to the Chief Administrative Justice.

(5)

Upon receipt of a copy of a memorandum filed under paragraph (1) or (4) the Chief Administrative Justice shall forthwith notify the Chief Justice of this court.

1:06 Records of the Supreme Judicial Court, of the Appeals Court, and of the Superior Court Department. Form, Style and Size of Papers.

G.L. c. 221, § 27, as amended.

(1)

The records of the Supreme Judicial Court, of the Appeals Court, and of the Superior Court Department in the several counties shall consist of the docket, the files, any extended record, which shall have been made at the promulgation of these rules, and whatever other specific records may be required by special statute, and no others.

(2)

There shall be two dockets in the Supreme Judicial Court: a full court docket and a single justice docket. The single justice docket shall be kept by the clerk in each county.

(3)

There shall be two dockets in the Superior Court Department: a civil action docket and a criminal docket.

(4)

The dockets are records wherein the clerk shall register, by its title, every action, suit or proceeding, civil and criminal, commenced in, or transferred or appealed to, the court whereof he is clerk, according to the date of its actual entry. He shall note therein, according to the date thereof, the filing or return of any paper or process, the making of any order, rule, or other direction in or concerning such action, suit or proceeding, civil and criminal, the verdict or finding, the allowance of exceptions, and the entry of final judgment, final decree or order.

(5)

The criminal docket shall be kept in the form heretofore in common usage, being substantially as provided in paragraph (4) hereof.

(6)

The files are all papers and processes filed with or by the clerk of the court in any action, suit or proceeding therein, or before the justice thereof, including executions, with their returns. So far as reasonably practicable, they shall comply with S.J.C. Rule 1:08 in size and in other respects therein stated. All such papers and processes shall be numbered consecutively in each case as entered.

(7)

Resort may be had to the docket, files, and any extended record, or full extended record, which has been made at the time of the promulgation of these rules, but the full extended record, where one has been made, shall control.

(8)

The docket shall be kept either by the loose-leaf system or by a computer based record keeping system. Under the loose-leaf system the record shall be kept in typewriting, or partly in typewriting and partly in print, except as otherwise ordered by the court. Typewriter ribbons of permanent character shall be used. Those authorized for use on public records shall be regarded as sufficient under this rule, unless otherwise ordered by the court. The leaves of both docket and record when completed shall be strongly bound in volumes of appropriate size. Under the computer based record keeping system upon the completion of each case a printed paper copy of the docket shall be produced to provide a permanent record of the docket. The printed paper copy of the docket shall be strongly bound in volumes of appropriate size.

(9)

Immediately after the final disposition of each action, suit or proceeding, complaint or indictment, papers constituting the files shall be assembled, collated, and arranged in order as theretofore numbered, and thereafter shall be kept in such order, except that executions may for greater safety be kept in a more secure place.

(10)

The docket, files, and such extended and full extended records which shall have been made at the time of the promulgation of these rules, are to be kept in the clerk's office or in the custody of the clerk, and he is to be strictly responsible for them. They shall not be taken from his custody except in cases authorized by statute, by rule of court, for the preparation of the record for the full court, or for use by a justice of the court; but the parties may at all times have copies.

Rule History

Amended effective September 3, 1991.

1:07 Fee Generating appointment and the Maintenance of Appointment Dockets in all Courts.

Preamble

The Justices understand the importance of allowing judges the flexibility of selecting appointees based on the particular expertise needed in a given case. In recognition of the necessity to safeguard judicial discretion, a waiver from the requirement of successive appointments has been included in Rule 1:07. In making an appointment, a judge may select a qualified person who is not on the list or who is not next in order on the list by making a brief notation of the reasons for the selection.

The goal of this rule is to assure that all fee-generating appointments made by the courts of the Commonwealth are made on a fair and impartial basis with equal opportunity and access for all qualified candidates for appointments. The Justices have concluded that the fairest way to accomplish this goal, and at the same time avoid favoritism or the appearance of favoritism, is by requiring each court to create lists of qualified candidates and then generally make appointments from those lists in rotation or sequential order.

(1) Annual Publication.

At the beginning of each fiscal year, the chief justice of each Trial Court department and the chief justices of the appellate courts shall submit to the Chief Justice for Administration and Management (CJAM) a listing of the types of fee-generating appointments made in their department or court and the qualifications for those appointments. The CJAM shall compile the listings into a unified report which shall be published annually by the CJAM. The report shall include a description of the educational, professional, and other qualifications required for each type of appointment. The report shall state the method by which a person may apply to be considered for each particular type of appointment. It shall also include a statement that appointments of counsel for indigent defendants in criminal matters and for parties in certain non-criminal matters are governed by the

Committee for Public Counsel Services (CPCS). An address and telephone number for interested persons to receive information on CPCS appointments shall be included in the report. This annual publication shall be accompanied by a statement from the Supreme Judicial Court that the appointments in the report are open to all qualified persons without regard to race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

(2) Court Lists.

Every individual court making fee-generating appointments shall maintain a list of persons eligible for each type of appointment made by the court. The list shall be generated by the court or, where applicable, by CPCS. All court-generated lists shall be open to all qualified candidates and shall not be restricted to a fixed number of candidates. The method for removing individuals from a list shall be the responsibility of CPCS, in the case of CPCS-generated lists, and of the CJAM, in the case of court-generated lists. The lists shall be public.

(3) Successive Appointments.

Each court appointment shall be made from the list maintained pursuant to section (2) of this rule, except as otherwise provided in section (4). Appointments from the list shall be made successively, except that, if an appointment is not made in successive order, the judge (or other person) making the appointment shall provide a brief written statement of reasons for not following the order of the list. For appointees compensated by CPCS, such written statement shall be kept by the Clerk, Register or Recorder in a separate file marked "CPCS appointments." A judge may direct that an appointment made successively from the list be entered administratively by the clerk, register, or recorder.

(4) Persons Not on List.

If a judge appoints a person not on the list maintained pursuant to section (2), the judge (or other person) making the appointment shall provide a brief written statement of reasons for not appointing from the list.

(5) Appointment Docket.

All clerks, registers, and recorders, for trial and appellate courts, shall establish and maintain, currently indexed, as part of the public records of the court open during regular business hours to public inspection, an appointment docket with respect to the appointment by the court of each fee-generating appointment, excluding appointees compensated by CPCS. The appointment dockets shall include the following:

(a) guardian ad litem,
(b) investigator appointed pursuant to G.L. c. 208, § 16,
(c) appraiser in any estate estimated to have gross assets in excess of $100,000,
(d) commissioner to sell real estate,
(e) appellate court conference counsel,
(f) master or special master,
(g) counsel in any civil matter,

(h) monitor for the administration of anti-psychotic medications,
(i) investigator in care and protection proceedings,
(j) title examiner,
(k) administrator, trustee, guardian, conservator, or receiver, whose appointment was not prayed for by name in a petition, pleading, or written motion, and any guardian or conservator who is an attorney, social worker or other social service professional unrelated to the ward by blood or marriage,
(l) any other fee-generating appointment not compensated by CPCS and not otherwise excluded by this section. The appointment of a guardian ad litem to serve process under G.L. c. 215, § 56B, shall not be entered on the appointment docket. The appointment of an executor, administrator, trustee, guardian, conservator or receiver shall not be entered on the appointment docket except as required by section (5)(k). Appointments shall be entered on the appointment docket regardless of the anticipated source, if any, of payment to the appointee.

(6) Data Collection.

Such docket shall contain at a minimum the following:

(a) the docket number and, if the case file is available for public inspection or if access to the information is not otherwise prohibited, the name of the case,
(b) the date of the appointment,
(c) the name of the appointee,
(d) the position to which appointed,
(e) by whom the appointment was made,
(f) a notation if the appointment was not made successively from the court's list or if the appointee was a person not on the list, and
(g) the amount of any payment received and the source thereof (party, estate, or Commonwealth) or whether payment was waived or declined.

(7) Payments.

No payment shall be made or received on account of any appointment required to be recorded in the appointment docket until a statement under the penalties of perjury, certifying the services provided, amount of payment, and itemization of expenses, is filed with the clerk, register, or recorder, to be placed with the papers in the case. No person holding an appointment required to be recorded in the appointment docket under section (5) of this rule shall make any payment to himself or herself until such payment is approved by the court.

(8) Compliance.

Each appointment made under this rule shall include language on the document of appointment itself that section (7) of this rule must be complied with. After July 1, 2000, no person whose appointment is subject to this rule shall accept reappointment unless he or she has filed a certification that all fee reports for payments received in the previous fiscal year have been filed.

(9) Implementation.

The CJAM shall promulgate, subject to the approval of the Supreme Judicial Court, such uniform practices as are necessary to implement this rule.

(10) Alternative Dispute Resolution Exclusion.

The provisions of this rule are not applicable to fee-generating appointments made pursuant to Rule 1:18, Uniform Rules on Dispute Resolution.

Rule History

Amended December 6, 1988, effective January 1, 1989; amended January 7, 1999, effective July 1, 1999 and April 3, 2000; amended March 6, 2000, effective April 3, 2000.

Uniform Practice I. Removal from Fee Generating Appointment List

1)

All requests for the involuntary removal of an individual from a court generated list of persons eligible for fee generating appointments maintained under paragraph (2) of Rule 1:07, shall be in writing, shall specify the grounds upon which the request for removal is based, and shall be addressed to the Chief Justice of the Department, hereinafter Chief Justice.[1]

2)

If the request for involuntary removal raises serious concerns as to the individual's qualifications or suitability to perform the duties and/or functions of the type of appointment(s) for which he or she is eligible, the Chief Justice shall have the discretion to temporarily suspend the individual from one or more of the court generated lists of his or her Department. The Chief Justice may remove the temporary suspension at any time during the review of a request for involuntary removal.

3)

The Chief Justice shall send a copy of the request to the individual whose involuntary removal is sought along with a notice indicating that the individual may file a written response.

4)

After receipt and review of the individual's written response or upon the expiration of 30 days if no written response is received, the Chief Justice shall determine if an investigation should be conducted into the facts and circumstances that form the basis for the request. If an investigation

---

[1] If the request for involuntary removal is initiated by a Chief Justice, then he or she shall designate another justice of his or her Department to perform the functions of the Chief Justice under this Uniform Practice.

is not needed because the facts are not in dispute, the Chief Justice shall make his or her determination. If the Chief Justice determines that no action is required on the request for involuntary removal, he or she shall inform in writing both the requesting party and the individual whose involuntary removal was sought that no action will be taken on the request. If the Chief Justice determines that the individual should be removed from one or more of the court's lists or that a lesser sanction should be imposed, he or she shall make such recommendation in writing to the Chief Justice for Administration and Management. Lesser sanctions which the Chief Justice may recommend shall include, but are not limited to, suspension from the list for a specific period of time, caseload limits, assignment of a mentor, a directive to obtain additional training or referral to Lawyer's Concerned for Lawyers. If the Chief Justice's decision is that an investigation is necessary, he or she shall appoint an individual to conduct an investigation.

5)

The investigator so selected under paragraph (4) shall conduct a complete and full investigation into the facts and circumstances that provide the basis for the request for involuntary removal and shall report the results of the investigation in writing.

6)

The investigator's report shall be submitted to the Chief Justice and a copy shall be forwarded to the individual whose involuntary removal is sought. The Chief Justice shall afford to the individual whose involuntary removal is sought an opportunity to submit a written response. The Chief Justice may, in his or her discretion, meet with the individual whose involuntary removal is sought and such others as the Chief Justice deems appropriate or he or she may conduct a hearing at which the individual whose involuntary removal is sought may be heard. Based upon the investigator's report and such other information as the Chief Justice has obtained, he or she shall make a determination. If the Chief Justice determines that no action is required on the request for involuntary removal, he or she shall inform in writing both the requesting party and the individual whose involuntary removal was sought that no action will be taken on the request. If the Chief Justice determines that the individual should be removed from one or more of the court's lists or that a lesser sanction should be imposed, he or she shall make such recommendation in writing to the Chief Justice for Administration and Management.

7)

If the Chief Justice decides to recommend the removal of the individual from one or more of the court's lists, or that a lesser sanction be imposed, the Chief Justice shall set forth in his or her written recommendation the basis for said recommendation and forward it along with a copy of the investigator's report and such other documentation as has been submitted, to the Chief Justice for Administration and Management. A copy of the recommendation shall also be sent to the individual whose involuntary removal is sought.

8)

The Chief Justice for Administration and Management shall consider the recommendation submitted by the Chief Justice and shall, within sixty days, either accept or reject the recommendation. That decision shall be final. A copy of the Chief Justice for Administration and

Management's decision shall be sent to the Chief Justice, the requesting party and the individual whose involuntary removal is sought.

9)

The initial request for involuntary removal, any report prepared by an investigator appointed under paragraph 4, any written response submitted under paragraph 3, any written recommendation prepared pursuant to paragraph's 4, 6 or 7, any written response submitted under paragraph 6, and any hearing conducted under paragraph 6 shall be considered to be confidential and shall not be open to the public.

10)

If, within 30 days after the Chief Justice sends the copy referred to in paragraph 3, the individual does not respond in writing objecting to the requested involuntary removal, the person's name may be removed from the list in question (or a lesser sanction imposed) by the Chief Justice without following the procedures set forth in paragraphs 4 through 9. The Chief Justice shall notify the Chief Justice for Administration and Management of the action by the Chief Justice under this paragraph and shall send a copy of that notification to the individual whose name has been removed.

11)

Notwithstanding the foregoing, and provided that a request for involuntary removal is not pending against him or her, any person may voluntarily remove his or her own name from a court list for fee generating appointments by sending a written request for such voluntary removal to the Chief Justice.

Rule History

Adopted December 4, 2003, effective January 1, 2004.

1:08 Case and Filer Information on Papers Filed in All Courts.

(Applicable to all cases and to all courts. See S.J.C. Rules 1:06[7], 2:02, Rule 5[g] of Mass.R.Civ.P., and Rule 20 of Mass. R.A.P., each as amended.)

(1)

All papers filed in connection with a new or pending case in any court in the Commonwealth shall bear the name of the court and the county, the title of the action, the designation of the nature of the pleading or paper, and provide the following information for each self-represented litigant or attorney filing the same:

(A) the self-represented litigant's or attorney's name;
(B) if an attorney, the attorney's Board of Bar Overseers (BBO) number;

(C) the self-represented litigant's or attorney's mailing address;
(D) if an attorney, the name of the firm the attorney is affiliated with, if any;
(E) the self-represented litigant's or attorney's telephone number;
(F) the attorney's business e-mail address;
(G) the self-represented litigant's e-mail address, if any; and
(H) if the self-represented litigant or attorney elects, the self-represented litigant's or attorney's personal pronouns.

The docket number of the case shall appear on each paper filed after the assignment of such a number.

(2)

Any court by rule or order may provide for the effective enforcement of this rule.

Rule History

Amended effective January 1, 1992; amended August 24, 2022, effective October 1, 2022.

1:09 Form of Original Executions for all Courts of the Commonwealth.

G.L. c. 235, §§ 22, 23, as amended.

Original executions to be issued in all courts of the Commonwealth on judgments against executors, administrators, and other fiduciary officers in their representative capacity, including any such original execution running against two or more parties, any one or more of whom are fiduciary officers as aforesaid in their representative capacity, or against sheriffs under G.L. c. 37, § 10, or special judgments entered under G.L. c. 235, § 24, shall in the last sentence after the words "in sixty days from the date hereof" contain the clause "or within ten days after this writ has been satisfied or discharged."

All other original executions to be issued on judgments in all courts of the Commonwealth shall contain a last sentence reading as follows:

"Hereof fail not, and make return of this writ with your doings thereon into the clerk's office of our said Court, at ___within our county of___, within twenty years after the date of the said judgment, or within ten days after this writ has been satisfied or discharged."

No execution shall be invalid which conforms in substance to the provisions of this rule.

1:10 Form of Alias Executions for all Courts of the Commonwealth.

G.L. c. 235, § 22, as amended.

Alias and successive executions to be used in all courts of the Commonwealth shall contain the following: Immediately after the words, "We command you, therefore," there shall be inserted "as we have commanded you." The last sentence shall be:

"Hereof fail not, and make return of this writ with your doings thereon into the clerk's office of our said ___ Court at ___ within our county of ___ within five years from the date hereof, or within ten days after this writ is satisfied in whole or discharged by law."

No execution shall be invalid which conforms in substance to the provisions of this rule.

1:11 Rule Relative to the Disposal of Court Papers and Records.

G.L. c. 221, § 27A, as amended.

Section 1. Scope.

This Rule shall govern the disposal of all court case records, regardless of the form in which they were created or are retained.

Section 2. Definitions.

The following definitions apply in this Rule:

Clerk - the clerks of the Supreme Judicial Court, the clerk of the Appeals Court, the recorder of the Land Court, the registers of Probate, and the clerks of the Boston Municipal Court, District Court, Housing Court, Juvenile Court and Superior Court departments of the Trial Court.

Case records - case papers or records that have been filed or deposited in paper or electronic form in any court of the commonwealth or that are in the custody of any clerk.

Docket - the paper or electronic list of case information maintained by the clerk that contains the case caption, case number, and a chronological entry identifying the date and title of each paper, document, exhibit, order, or judgment filed in a case, and the scheduling and occurrence of events in the case.

Extended record - as described in G. L. c. 34, § 9E: an abbreviated chronicle of all matters entered upon the docket, under the same or a similar title or an abstract thereof, and under the same number, and shall contain a brief and concise narrative of the essential features of the matter. Any final judgment, decree or order affecting the title to land shall be copied therein at length.

Minor violation records - case records, other than dockets, filed in or relating to a proceeding involving civil motor vehicle infractions, parking, littering, bicycles, pedestrians, municipal dog control, the decriminalized disposition of violations of municipal ordinances or by-laws or other decriminalized regulatory offenses.

Sampling - the process of retaining designated case records in accordance with an Order re Sampling of Case Records issued from time to time by the Supreme Judicial Court.

Section 3. Required Permanent Retention of Case Records.

The following types of case records shall be retained permanently and shall not be subject to the provisions of Section 7 regarding the destruction of case records:

A. The Supreme Judicial Court and the Appeals Court.

(1) all trial court transcripts in cases decided by the Supreme Judicial Court shall be retained.
(2) all case records under the custody of the clerks of the Supreme Judicial Court or the clerk of the Appeals Court shall be retained except:
    (a) papers unrelated to the appellate courts' deliberation and decision, after the rescript issues to the trial court;
    (b) record appendices upon final disposition of the case; and
    (c) original exhibits transmitted pursuant to an order or rule of court, which shall be returned to the trial court after review by the appellate court.

B. All Departments of the Trial Court.

The following types of case records shall be retained permanently in all departments of the Trial Court:

(1) case records in all cases decided by the Supreme Judicial Court;
(2) old case records, defined as:
    (a) any records dated or known to have been filed earlier than 1800; and
    (b) all records from any predecessor court to the District Court or the Boston Municipal Court;
(3) dockets and extended records, except for dockets and extended records for minor violation records, which shall be subject to the sampling provisions set forth in an Order issued by the Supreme Judicial Court pursuant to Section 6;
(4) divorce judgments nisi and absolute and judgments in annulment actions; and
(5) naturalization records prior to 1906.

In addition, for time periods in which both dockets and extended records are missing from a trial court in a particular courthouse, all other case records from that time period in that trial court at that courthouse shall be retained.

C. Individual Departments of the Trial Court.

In addition to the case records that shall be retained permanently in every department, the following case records shall be retained by individual departments:

(1) District Court, Boston Municipal Court, Juvenile Court and Probate and Family Court.

The following shall be retained permanently:

(a) all case records, acknowledgments and agreements filed to establish paternity pursuant to G. L. c. 209C; and
(b) all case records filed in or relating to an adoption filed pursuant to G. L. c. 210, or a name change filed pursuant to G. L. c. 210, § 12.

(2) Land Court.

The following shall be retained permanently:

(a) all registration case records, abstracts, plans and proceedings subsequent to registration; and
(b) all case records relating to the foreclosure of the right of redemption pursuant to G. L. c. 60, § 65.

(3) Probate and Family Court.

The following shall be retained permanently:

(a) all case records in conservatorship, trusts and estate administration; and
(b) all orders and judgments in equity.

(4) Superior Court.

The following shall be retained permanently:

(a) all case records filed before 1860;
(b) all case records filed in Barnstable, Dukes, Essex, and Nantucket counties before 2000; and
(c) for time periods in which any case records in a particular courthouse are missing or substantially damaged, all other case records from that time period at that courthouse.

Section 4. Retention Periods for Certain Non-Permanent Case Records in the Probate and Family Court Department.

A.

The following shall be retained for 20 years:

(1) all case records in divorce or annulment actions except for judgments, which must be retained permanently;
(2) all case records in complaints filed pursuant to G. L. c. 208 and G. L. c. 209C except for acknowledgements and agreements which must be retained permanently; and
(3) all case records in equity matters other than orders and judgments which must be retained permanently.

B.

The following shall be retained for 10 years after final disposition or allowance of the accounts, whichever is later, and then may be destroyed without the need to sample under Section 6:

(1) guardian ad litem reports and reports of the office of the commissioner of probation pursuant to G.L. c. 276, § 85B;
(2) fiduciary account subsidiary schedules, but not cover pages; and
(3) financial statements under Supplemental Probate and Family Court Rule 401.

C.

The following shall apply to records in guardianship proceedings:

(1) case records regarding the guardianship of a minor pursuant to G. L. c. 190B, § 5-204 shall be retained for at least 10 years or until the minor has reached the age of 20, whichever is the later date; and
(2) case records regarding the guardianship of an incapacitated person pursuant to G. L. c. 190B, § 5-303 shall be retained for at least 10 years or until 5 years after the incapacitated person's death, whichever is the later date.

Section 5. Retention Periods for Certain Non-Permanent Case Records in the Juvenile Court Department.

All case records filed in or relating to a care and protection case filed pursuant to G. L. c. 119, § 24, or to matters where the Department of Children and Families has responsibility pursuant to G. L. c. 119, § 23(f) shall be retained for at least 10 years, or until the youngest child or young adult named on the petition has reached the age of twenty-two, whichever is the later date.

Section 6. Sampling of Case Records.

Case records not required to be retained pursuant to Section 3 may be sampled in accordance with an Order issued by the Supreme Judicial Court. The Order shall set forth the sampling requirements for case records in all the departments of the Trial Court.

Section 7. Destruction of Case Records.

A.

Case records not required to be retained pursuant to Section 3 may be destroyed ten years after final disposition of a case provided that:

(1) unless this rule states that sampling is not necessary, a sample pursuant to Section 6 has been retained;
(2) the clerk certifies to the appropriate Chief Justice that the dockets for any case records to be destroyed contain essential information including:
    (a) entries indicating that a party was represented by counsel or waived counsel pursuant to S.J.C. Rule 3:10 in cases where counsel is required; and

(b) in civil cases, information sufficient to permit execution on a judgment within twenty years after the date of the judgment.

(3) in any criminal case in which a defendant has been sentenced to more than ten years' imprisonment, the case records shall be retained for the period of time that the defendant remains in the custody of the Commonwealth or under parole or probation supervision in connection with that case;

(4) transcripts in cases not decided by the Supreme Judicial Court may be destroyed ten years after final disposition of a case without the need to sample under Section 6; and

(5) sealed case records not otherwise required to be retained by this rule may be destroyed 100 years after final disposition of the case.

B. Notice.

At least thirty days before destroying case records, the clerk shall give public notice that case records are proposed to be destroyed pursuant to this rule. The notice shall identify the types of cases and the beginning and ending dates of the cases to be destroyed (e.g. civil cases, 1900 through 1950). The Record Management Coordinator of the Trial Court (RMC) shall give such notice for any records under the RMC's custody.

(1)

Before publication, the notice shall be approved by the appropriate clerk, the appropriate Chief Justice and the first justice of the division, if any, in which the case records are stored. The clerk or RMC shall send a copy of the notice to the Chief Justices of the Supreme Judicial Court and of the Trial Court.

(2)

Notice shall be posted on the court's website or in a manner to be determined by the Chief Justice of the Trial Court, or, in the appellate courts, by the appropriate Chief Justice.

C. Court Order.

No case records shall be destroyed in the Land Court, Probate and Family Court or Superior Court without an order of the Chief Justice of the appropriate court. No case records shall be destroyed in the Boston Municipal Court, District Court, Juvenile Court or Housing Court without an order, approved by the Chief Justice of the department and the first justice of the division where the records are stored. Before destroying any records, the clerk or RMC shall notify the appropriate Chief Justice of any responses received as a result of the publication of the notice.

D. Exceptions.

(1) Discretion to preserve case records.

A Chief Justice or clerk may exercise discretion at any time to retain any case records under the clerk's custody even if such records could be destroyed under this rule.

(2) Excess papers.

Regardless of other provisions of this rule, a clerk may destroy any excess case records, such as transmittal letters and duplicate copies.

Section 8. Digital Storage.

A.

With the exception of the case records listed in Section 8B, all case records subject to retention under this rule may be destroyed once the case record has been converted to, and stored in, a PDF-A format or in another archival digital format which has been approved by the Supreme Judicial Court.

B.

The following case records shall be retained in their original form even if electronic copies are available:

(1) any original paper dated or known to have been filed before the year 1800;
(2) all case records created prior to 1900;
(3) all wills, case records filed in or relating to an adoption filed pursuant to G. L. c. 210, a name change filed pursuant to G. L. c. 210 §12, or the establishment of paternity pursuant to G. L. c. 209C;
(4) all dockets and extended records; and
(5) any other paper or record designated for retention by the Chief Justice of the Trial Court, or, in the appellate courts, by the appropriate chief justice.

C.

Section 8A shall take effect in the Trial Court after the Court Administrator and Chief Justice of the Trial Court determine that the Trial Court has adopted adequate policies and procedures to permanently protect case records stored in PDF-A format or any other approved archival digital format. In the appellate courts, such determination shall be made by the appropriate chief justice. Redetermination shall occur at least every five years and before any new archival digital format is used.

Rule History

Amended December 16, 1980, effective January 1, 1981; amended effective October 22, 1982; amended June 16, 1987, effective July 1, 1987; amended effective September 1, 1991; amended effective October 2, 1995; amended June 27, 2018, effective October 1, 2018.

1:12 Rule Relative to the Disposal of Stenographic Notes of Testimony Taken in the Courts of the Commonwealth.

G.L. c. 221, § 27A, as amended.

Stenographic notes of testimony made in any court of the Commonwealth in accordance with any provisions of law may be destroyed by the lawful custodian thereof after the expiration of six years from the date when such notes were taken; provided, however, that this rule shall not apply to notes of which a transcript shall have been ordered and not completed, or to notes as to which the court in which they were taken shall otherwise order.

1:13 Time for Report of Material Facts in the Probate and Family Court Department for Cases Under G.L. c. 215, § 11.

When, in accordance with G.L. c. 215, § 11, a judge of a division of the Probate and Family Court Department has been requested to report the material facts found by him, he shall report such facts within thirty days after the request is made.

1:14 Interest in Pecuniary Legacies and Trust Distributions Under G.L. c. 197, § 20 [Repealed]

Repealed June 18, 2015, effective September 1, 2015.

1:15 Impoundment Procedure.

(Applicable to the Supreme Judicial Court and Appeals Court)

Section 1. Requests for Impoundment in the First Instance.

(a) Supreme Judicial Court.

i. As used herein, "impoundment" shall mean the act of keeping some or all of the papers, documents, or exhibits, or portions thereof, in a case separate and unavailable for public inspection.
ii. Requests for impoundment in proceedings in the Supreme Judicial Court shall be made by written motion describing with particularity the information sought to be impounded and the period of time for which impoundment is sought, and demonstrating good cause for the impoundment. The motion shall be accompanied by an affidavit in support thereof.
iii. An order of impoundment may be entered by the court for good cause shown and in accordance with applicable law. In determining good cause, the court shall consider the nature of the parties and the controversy, the type of information and the privacy interests

involved, the extent of community interest, the reason(s) for the request, and any other relevant factors.

iv. Upon filing of the motion to impound and accompanying affidavit, the motion, affidavit, and the information sought to be impounded shall be treated by the court as temporarily impounded pending a ruling on the motion. Subsequent to the ruling on the motion, the motion, affidavit, and any impoundment order shall be part of the public docket and not impounded unless otherwise ordered by the court. If the motion is denied, the information sought to be impounded shall be part of the public docket.

v. Hearings, if any, on requests under this rule shall be scheduled at the discretion of the court.

vi. Upon entry of an order of impoundment, the Clerk of the Supreme Judicial Court or his or her assistants shall make a notation in the docket indicating what material has been impounded. All impounded material shall be kept separate from other papers in the case and shall not be available for public inspection. Such impounded material shall be available to the court, the attorneys of record, the parties to the case, and the clerk, unless otherwise ordered by the court.

(b) Appeals Court.

Requests for impoundment in proceedings in the Appeals Court shall be governed by the provisions of Trial Court Rule VIII with the following exceptions: (i) the term "clerk" shall mean the Clerk of the Appeals Court and his or her assistants; and (ii) the Appeals Court or a single justice thereof has discretion to enter, either sua sponte or upon motion, any order relating to impoundment without holding a hearing.

Section 2. Maintaining Confidentiality of Previously Impounded Material in Cases on Appeal.

(a) Duties of Trial Court Clerks.

When an appeal has been taken in a case in which material has been impounded, the clerk of the trial court shall notify the clerk of the appellate court, in writing, at the time of the transmission of the record that material was impounded by the trial court. Such notification shall specify those papers, documents or exhibits, or portions thereof, which were impounded below and shall include a copy of the order of impoundment, if any, or a reference to other authority for the impoundment.

(b) Duties of Appellate Court Clerk.

Unless otherwise ordered by the appellate court, or otherwise provided in the trial court order of impoundment, material impounded in the trial court shall remain impounded in the appellate courts and material impounded in the Appeals Court shall remain impounded in the Supreme Judicial Court. The clerk shall keep all impounded material separate from other papers in the case and unavailable for public inspection. Such impounded material shall be available to the court, the attorneys of record, the parties to the case and the clerk, unless otherwise ordered by the court.

(c) Duties of the Parties.

When an appeal has been taken in a case in which material has been impounded, the parties shall protect the confidentiality of the impounded material. Unless it is necessary to do so, the parties shall not include impounded information in briefs and appendices filed with the court. If material filed with the court contains impounded information, the parties shall so notify the clerk and shall identify the impounded material, which shall be unavailable for public inspection. The appellate court, a single justice, or the clerk thereof may require any party filing a document containing impounded information to file a redacted copy of the document that the appellate court may make available for public inspection.

During oral argument in public sessions the parties shall not disclose impounded material, provided that in cases where such disclosure is necessary the parties shall notify the clerk in advance and, in appropriate cases, shall make such disclosures in a manner that protects the confidentiality of the parties.

Rule History

Adopted October 27, 1987, effective January 1, 1988. Amended September 24, 2015, effective October 1, 2015.

1:16 Judicial Performance Enhancement Programs.

Section 1. Confidentiality.

Except as provided in section 2 of this rule, any written, recorded, or oral data, information and materials received or developed under a judicial performance enhancement program shall be confidential and shall not be disclosed. The identity of individuals who furnish information concerning judges under a program shall be confidential and shall not be disclosed.

Section 2. Disclosure.

(a)

Information concerning an individual judge may be disclosed to that judge, to that judge's chief justice or administrative justice, to the Chief Administrative Justice, and to the judges supervising the judicial performance enhancement program, provided that it is presented in a manner that will not disclose the identity of any person furnishing any information.

(b)

From time to time, the Supreme Judicial Court, or the supervisory committee may issue public statements or reports describing the judicial performance enhancement programs and the procedures used in such programs, and summarizing information compiled under such programs,

provided that such statements and reports shall not identify, directly or indirectly, any individual judge or any person who furnished information concerning a judge or judges under a program.

Rule History

Adopted October 24, 1989, effective January 1, 1990.

1:17 Subpoenas to Officials of the Supreme Judicial Court and Appeals Court.

(1)

Subpoenas to compel the testimony of a justice or clerk or assistant clerk of the Supreme Judicial Court or Appeals Court shall be governed by the provisions of Rule 1 of Trial Court Rule IX.

(2)

Subpoenas to compel the production of court records or administrative records of a clerk, assistant clerk or other official keeper of records in the Supreme Judicial Court or Appeals Court shall be governed by the provisions of Rule 2 of Trial Court Rule IX.

(3)

For purposes of this rule, the term "justice," as used in Trial Court Rule IX, shall mean a judge of the Supreme Judicial Court or Appeals Court; the terms "magistrate" or "clerk-magistrate," as used in Trial Court Rule IX, shall mean the Clerk of the Supreme Judicial Court for the Commonwealth, the Clerk of the Supreme Judicial Court for Suffolk County, the Clerk of the Appeals Court, and their employees.

Rule History

Adopted January 6, 1995, effective February 1, 1995.

1:18 Uniform Rules on Dispute Resolution.

Rule 1: Court Connected Dispute Resolution.

(a) Scope, Applicability and Purpose of Rules.

These rules govern court-connected dispute resolution services provided in civil and criminal cases in every department of the Trial Court. The Ethical Standards in Rule 9 also apply to neutrals who provide court-connected dispute resolution services in the Supreme Judicial Court and the Appeals Court. The purpose of the rules is to increase access to court-connected dispute resolution services, to ensure that these services meet standards of quality and procedural fairness, and to

foster innovation in the delivery of these services. The rules shall be construed so as to secure those ends. To the extent that there is any conflict between these rules and the Massachusetts Rules of Civil Procedure, the Massachusetts Rules of Criminal Procedure, the Massachusetts Rules of Appellate Procedure, the Massachusetts Rules of Domestic Relations Procedure, the Juvenile Court Rules, the Standards and Forms For Probation Offices of the Probate and Family Court Department (hereinafter the "Probation Standards") promulgated by the Office of the Commissioner of Probation effective July 1, 1994, or the Rules of the Supreme Judicial Court and the Appeals Court, then the Massachusetts Rules of Civil, Criminal, Appellate, and Domestic Relations Procedure, the Juvenile Court Rules, the Probation Standards, or the Supreme Judicial Court and Appeals Court rules shall control. The Supreme Judicial Court, the Appeals Court, the Chief Justice for Administration and Management, and each Trial Court department may adopt additional rules or administrative procedures to supplement these rules, provided that they are consistent with these rules.

(b) Guiding Principles.

The interpretation of these rules shall be guided by the following principles:

(i) **Quality.** The judiciary, collaborating with others experienced in dispute resolution, is responsible for assuring the high quality of the dispute resolution services to which it refers the public.

(ii) **Integrity.** Dispute resolution services should be provided in accordance with ethical standards and with the best interest of the disputants as the paramount criterion.

(iii) **Accessibility.** Dispute resolution services should be available to all members of the public regardless of their ability to pay.

(iv) **Informed choice of process and provider.** Wherever appropriate, people should be given a choice of dispute resolution processes and providers and information upon which to base the choice.

(v) **Self-determination.** Wherever appropriate, people should be allowed to decide upon the issues to be discussed during a dispute resolution process, and to decide the terms of their agreements.

(vi) **Timely services.** Dispute resolution services, to be most effective, should be available early in the course of a dispute.

(vii) **Diversity.** The policies, procedures and providers of dispute resolution services should reflect the diverse needs and background of the public.

(viii) **Qualification of neutrals.** Dispute resolution services should be performed only by qualified neutrals. There are many ways in which a neutral may become competent, and there are many ways to determine qualifications of neutrals, such as assessing performance and considering a neutral's education, training, experience and subject matter expertise.

Rule History

Adopted May 1, 1998, effective June 1, 1998.

Rule 2: Definitions.

As used in these rules, the following terms shall have the following meanings:

"Arbitration" means a process in which a neutral renders a binding or non-binding decision after hearing arguments and reviewing evidence.

"Case evaluation" means a process in which the parties or their attorneys present a summary of their cases to a neutral who renders a non-binding opinion of the settlement value of the case and/or a non-binding prediction of the likely outcome if the case is adjudicated.

"Clerk" means the clerk, clerk-magistrate, recorder, or register of a court, or a designated assistant clerk-magistrate, assistant recorder or assistant register of probate.

"Community mediation program" means a non-profit, charitable program whose goals are to promote the use of mediation and related conflict resolution services by volunteers to resolve disputes including those that come to, or might otherwise come to, the courts.

"Conciliation" means a process in which a neutral assists parties to settle a case by clarifying the issues and assessing the strengths and weaknesses of each side of the case, and, if the case is not settled, explores the steps which remain to prepare the case for trial.

"Court" means the Land Court, the Boston Municipal Court, or a division of the District Court, the Superior Court, the Probate and Family Court, the Housing Court or the Juvenile Court. The provisions of these rules addressed to courts shall apply to judges, clerks, probation officers and other employees of these courts. For the purposes of Rule 9, "court" also includes the appellate courts.

"Court-connected dispute resolution services" means dispute resolution services provided as the result of a referral by a court. "To refer," for purposes of this definition, means to provide a party to a case with the name of one or more dispute resolution services providers or to direct a party to a particular dispute resolution service provider.

"Dispute intervention" means a process used in the Probate and Family Court and in the Housing Court in which a neutral identifies the areas of dispute between the parties, and assists in the resolution of differences.

"Dispute resolution service" means any process in which an impartial third party is engaged to assist in the process of settling a case or otherwise disposing of a case without a trial, including arbitration, mediation, case evaluation, conciliation, dispute intervention, early neutral evaluation, mini-trial, summary jury trial, any combination of these processes, and any comparable process determined by the Chief Justice for Administration and Management of the Trial Court or the Supreme Judicial Court to be subject to these rules. The term "dispute resolution service" does not include a pretrial conference, an early intervention event, a screening, a trial, or an investigation.

"Early intervention" means a compulsory, judicially supervised event, early in the life of a case, with multiple objectives relating to both scheduling of litigation and selection of dispute resolution services.

“Early neutral evaluation” means case evaluation which occurs early in the life of a dispute.

“Immediate family” means the individual’s spouse, domestic partner, guardian, ward, parents, children, and siblings.

“Mediation” means a voluntary, confidential process in which a neutral is invited or accepted by disputing parties to assist them in identifying and discussing issues of mutual concern, exploring various solutions, and developing a settlement mutually acceptable to the disputing parties.

“Mini-trial” means a two-step process to facilitate settlement in which (a) the parties’ attorneys present a summary of the evidence and arguments they expect to offer at trial to a neutral in the presence of individuals with decision-making authority for each party, and (b) the individuals with decision-making authority meet with or without the neutral to discuss settlement of the case.

“Neutral” means an individual engaged as an impartial third party to provide dispute resolution services and includes but is not limited to a mediator, an arbitrator, a case evaluator, and a conciliator. “Neutral” also includes a master, clerk, clerk-magistrate, register, recorder, family service officer, housing specialist, probation officer, and any other court employee when that individual is engaged as an impartial third party to provide dispute resolution services. For purposes of Rule 9, “neutral” also means an administrator of a program providing court-connected dispute resolution services.

“Program” means an organization with which neutrals are affiliated, through membership on a roster or a similar relationship, which administers, provides and monitors dispute resolution services. A program may be operated by a court employee or by an organization independent of the court, including a corporation or a governmental agency. A program operated by a court employee may include one or more court employees or non-employees or a combination of court employees and non-employees on its roster.

“Provider” or **“provider of dispute resolution services”** means a program which provides dispute resolution services or a neutral who provides dispute resolution services.

“Screening” means an orientation session in which parties to a case and/or their attorneys receive information about dispute resolution services. The case is reviewed to determine whether referral to a dispute resolution service is appropriate, and, if so, to which one. In a screening, there may also be discussion to narrow the issues in the case, to set discovery parameters, or to address other case management issues.

“Summary jury trial” means a non-binding determination administered by the court in which (a) the parties’ attorneys present a summary of the evidence and arguments they expect to offer at trial to a six-person jury chosen from the court’s jury pool, (b) the jury deliberates and returns a non-binding decision on the issues in dispute, (c) the attorneys may discuss with the jurors their reaction to the evidence and reasons for the verdict, and (d) the presiding neutral may be available to conduct a mediation with the parties.

Rule History

Adopted May 1, 1998, effective June 1, 1998.

Commentary

"Court-connected dispute resolution services." This definition does not alter the fact that parties are free on their own initiative to obtain dispute resolution services which are not court-connected.

"Neutral." Judges are not included under the term "neutral" in this section because there are other provisions and rules which apply to the functions of judges.

Rule 3: Administrative Structure for Court-Connected Dispute Resolution Services.

(a) Appointment of Standing Committee on Dispute Resolution.

There shall be a Standing Committee on Dispute Resolution consisting of up to twenty persons appointed by the Chief Justice for Administration and Management in consultation with the Chief Justices of the Trial Court departments. Each department of the Trial Court shall be represented on the Standing Committee. Members shall be appointed for three year terms and may be reappointed for additional terms when their terms expire. The Standing Committee shall be composed of: judges; other court personnel; attorneys; members of the public; academics; and providers of dispute resolution services. In order to achieve diversity in the membership of the Standing Committee, the Trial Court shall attempt to make funds available for expenses associated with participation in the Committee.

(b) Duties of Standing Committee on Dispute Resolution.

The Standing Committee shall advise the Chief Justice for Administration and Management of the Trial Court with respect to standards for court-connected dispute resolution services and the implementation and oversight of court-connected dispute resolution services throughout the Trial Court. The Standing Committee shall work to ensure access to court-connected dispute resolution services, to ensure the quality of the services, and to foster innovation in the delivery of the services.

(c) Trial Court Departments.

The Chief Justice of each Trial Court department may appoint an advisory committee on that department's court-connected dispute resolution services composed of judges, other court personnel, attorneys, academics, members of the public, and providers of dispute resolution services, including representatives of community mediation programs where they provide services to that court department. In order to achieve diversity in the membership of an advisory committee, the court shall attempt to make funds available for expenses associated with participation in the committee. An advisory committee shall function so as to avoid conflict of interest or the appearance of conflict of interest. Each such Chief Justice may designate an employee as the department coordinator of court-connected dispute resolution services. Every Trial Court chief justice who approves dispute resolution programs pursuant to Rule 4(a) shall develop written policies and procedures governing program operations and record-keeping that will enable evaluation of the program.

(d) Local Dispute Resolution Services Coordinator.

The First Justice or the justice with administrative supervision of each court or division within every Trial Court department shall designate one court staff member as the dispute resolution services coordinator for that court or division. By agreement of affected First Justices, one person may be designated as dispute resolution services coordinator for divisions or courts in more than one department which are located in the same or a nearby building. The dispute resolution services coordinator shall maintain information about court-connected dispute resolution services and assist the public in making informed choices about the use of those services. The coordinator, in collaboration with the program or programs to which the court division refers cases, shall develop a system to record and compile data as required by Rule 6(g).

(e) Technical Assistance for Implementation of Dispute Resolution Services.

The Chief Justice for Administration and Management shall, subject to appropriation, provide advice and consultation to Trial Court departments, courts, advisory committees and designated dispute resolution staff to assist in developing and operating court-connected dispute resolution services in accordance with the rules.

Rule History

Adopted May 1, 1998, effective June 1, 1998; amended July 21, 2004, effective January 1, 2005.

Rule 4: Implementation of Court-Connected Dispute Resolution.

(a) Development of List of Approved Programs.

(i)

The Chief Justice of each Trial Court department, subject to review for compliance by the Chief Justice for Administration and Management, shall approve programs to receive court referrals in accordance with these rules. In order to be approved, programs must: agree to meet the operations standards in Rule 7; agree to ensure that the neutrals on their roster who provide court-connected dispute resolution services meet the qualifications standards in Rule 8; and agree to ensure that the neutrals on their roster follow the ethical standards in Rule 9 when providing court-connected dispute resolution services. The list of approved programs shall be developed and maintained through an open process which includes at least the following: advertisement of the opportunity to apply to be on the list; fair assessment of programs; efforts to ensure diversity among neutrals as to race, gender, ethnicity, experience, and training; policies about the length and termination of participation on the list; and procedures for removing a program from the list for cause and/or as a result of a complaint filed pursuant to Rule 4(f).

(ii)

The Chief Justice for Administration and Management shall distribute a combined list of the programs approved pursuant to subparagraph (i). The list shall include information as to each

program regarding geographic region, fees, and dispute resolution processes; and information as to each program's expertise, including process and subject matter expertise;

(b) Trial Court Department Plans.

Each Trial Court department shall develop plans each fiscal year for the use of court-connected dispute resolution services by the courts in the department. The Chief Justice shall develop the plan in consultation with the department advisory committee, the department coordinator of court-connected dispute resolution services, and the courts in the department. Services may be provided only by programs on the list developed pursuant to paragraph (a) of Rule 4. The plan shall set forth information about court-connected dispute resolution services in the department, including at least the following: current status, goals and objectives, plans for the coming year, any plans for collaborating with other departments, a budget request, case selection and screening criteria, plans for early intervention, and needs for education programs. Where appropriate, each portion of the plan shall address: plans with respect to access to dispute resolution services, the quality of the services, and efforts to foster innovation in the delivery of services. Plans shall ensure that court-connected dispute resolution services are available to those who lack the financial resources to pay for the services and those who would not otherwise have access to the services. The plans shall be submitted by September 1 of each year to the Chief Justice for Administration and Management for review and approval.

(c) Pilot Programs for Mandatory Participation in Dispute Resolution Services.

Any Trial Court department may propose to the Chief Justice for Administration and Management for review and approval an experimental pilot program which requires parties in civil cases to participate in non-binding forms of dispute resolution services. No Trial Court department shall administer such a pilot program without the approval of the Chief Justice for Administration and Management. Case types not suitable for dispute resolution services should be identified. The pilot program may provide for the mandatory participation of the parties and shall be assessed regularly to control quality. The minimal requirements for mandatory participation shall be as follows:

(i) each party shall be provided with an opportunity to terminate the dispute resolution services, upon motion to the court for good cause shown, but unwillingness to participate shall not be considered good cause;

(ii) the court shall give preference to a dispute resolution process upon which the parties agree;

(iii) the court shall explicitly inform parties that, although they are required to participate, they are not required to settle the case while participating in dispute resolution services; and

(iv) no fees may be charged for mandatory participation in dispute resolution services, but the court may charge fees for elective dispute resolution services.

(d) Funding of Court-connected Dispute Resolution Services.

As part of the annual budget requests required by G.L. c. 211B, §10(viii) and (x), the Chief Justice of each Trial Court department shall include a request for funding for court-connected dispute

resolution services. The budget request shall provide for the funding of court-connected dispute resolution services for those parties who lack the financial resources to pay for the services or who would not otherwise have access to the services. Funds may be used for approved programs to provide screening and to provide and/or administer the services. Budget requests shall estimate funds needed to maintain previously funded services provided by approved programs. Additional amounts shall be used for the expansion or improvement of services or for innovative services. Expenditures shall be subject to the approval of the Chief Justice for Administration and Management after consultation with the Standing Committee.

(e) Contracts for Court-connected Dispute Resolution Services.

(i)

If public funds are appropriated or otherwise available and allocated by the Chief Justice for Administration and Management of the Trial Court for contracts with court connected dispute resolution programs, the Chief Justice for Administration and Management, in consultation with First Justices or other justices with administrative responsibility for courts and the Chief Justices of affected departments, shall issue one or more requests for proposals for dispute resolution services to be provided by contracts with approved programs, shall select programs through a competitive bidding process, and shall execute contracts for services on behalf of departments and courts which may extend for no more than three years. These contracts may provide for a program to receive payments approved under paragraph (d) and may provide that a court will refer all or most of its cases requiring dispute resolution services to one or more contracting programs.

(ii)

If public funds are not involved, but courts seek an exclusive arrangement with a program or programs for court-connected dispute resolution services, the Chief Justice of the affected department or his or her designee shall, in consultation with the Chief Justice for Administration and Management, issue one or more requests for proposals to be provided by contracts with approved programs, shall select programs through a competitive process, and, with the approval of the Chief Justice for Administration and Management, shall execute contracts for services on behalf of departments and courts which may extend for no more than three years. These contracts may provide that a court will refer all or most of its cases requiring dispute resolution services to one or more contracting programs.

(iii)

In selecting programs with which to contract, the Chief Justice for Administration and Management, or the Chief Justice of the department, as applicable, is encouraged to give preference to programs which demonstrate a record of and commitment to maintaining a diverse roster and operating in a manner which is accountable to the community.

(iv)

The competitive bidding requirements in this subsection shall not apply to programs in which dispute resolution services are provided exclusively by court employees.

(f) Complaint Mechanism.

The Chief Justice for Administration and Management, in consultation with the Chief Justices of the departments and with the advice of the Standing Committee, shall develop a uniform procedure for handling complaints regarding court-connected dispute resolution services.

Rule History

Adopted May 1, 1998, effective June 1, 1998. Amended July 21, 2004, effective January 1, 2005.

Commentary

(a) Development of List of Approved Programs.

Two Supreme Judicial Court Commissions have recommended measures like those contained in this paragraph and Rule 6(a) to ensure fair access to court appointments. See, Gender Bias Study of the Massachusetts Court System, Supreme Judicial Court, (1989), p.168 and Equal Justice, Commission to Study Racial and Ethnic Bias in the Courts, Supreme Judicial Court, (1994), p.128-129.

(b) Trial Court Department Plans.

The department plans are expected to be incremental, starting in the first year with a simple description of current and planned services and funding needs, and becoming gradually more extensive in future years. One desirable feature of department plans would be to aim for a consistent level in the quality and quantity of services in all courts across the state.

The criteria governing case selection should identify any categories of case which the department determines should be routinely excluded from dispute resolution as a matter of policy. For example, some commentators believe that courts should not, without a compelling countervailing reason, refer cases to dispute resolution services when there is a need for public sanctioning of conduct or a public declaration of rights, when repetitive violations of statutes or regulations need to be dealt with collectively and uniformly, or when a party or parties are not able to negotiate effectively themselves or with assistance of counsel.

Trial Court department chief justices should gather sufficient information from courts within the department to oversee the courts' use of dispute resolution services pursuant to the Uniform Rules on Dispute Resolution, and, in addition to or as part of the plans required by this section, should submit reports each year to the Chief Justice for Administration and Management about that department's use of court-connected dispute resolution services. The reports should contain information requested by the Chief Justice for Administration and Management, including (i) a narrative of significant program developments and activities; and (ii) case record information.

Program developments and activities should be described with reference to stated goals and objectives, including: accessibility, quality, collaborative activities, new initiatives, unexpected outcomes, and early intervention initiatives. The Chief Justice for Administration and Management should request case record information needed to plan and oversee court-connected dispute resolution services under these rules, including case record information by type of dispute resolution process, such as total numbers of: cases screened, pretrial referrals, types of cases, cases referred, cases which entered a dispute resolution process, cases in which agreement was

reached and not reached, cases in which resolution is pending, referrals made by each court to each approved program, referrals accepted by each program, and cases reviewed by early intervention processes. Each court and program would need to keep records on case record information in order to comply with any such request. See Rule 6(g).

(c) Pilot Programs for Mandatory Participation in Dispute Resolution Services.

In designing pilot programs, courts will comply with G.L. c. 209A, §3, which provides that in abuse prevention proceedings, "No court may compel parties to mediate any aspect of their case."

(e) Contracts for Court-connected Dispute Resolution Services.

Decisions in the awarding of contracts should not be based solely on cost, but should also reflect values and goals such as responsiveness to the community, the availability of a diverse pool of neutrals, outreach abilities, and the need for variety in referrals. See Rules 6(a) and 7(c) for referral rules affecting programs which are awarded contracts.

(f) Complaint Mechanism.

The complaint mechanism should be designed to be accessible and user-friendly. Information about the complaint mechanism should be posted in every courthouse and included in the written information prepared pursuant to Rule 5.

Rule 5: Early Notice of Court-Connected Dispute Resolution Services.

Clerks shall make information about court-connected dispute resolution services available to attorneys and unrepresented parties. This information should state that selection of court-connected dispute resolution services can occur at the early intervention event or sooner, and that no court may compel parties to mediate any aspect of an abuse prevention proceeding under G.L. c. 209A, §3. Insofar as possible, information should be available in the primary language of the parties. Attorneys shall: provide their clients with this information about court-connected dispute resolution services; discuss with their clients the advantages and disadvantages of the various methods of dispute resolution; and certify their compliance with this requirement on the civil cover sheet or its equivalent.

Rule History

Adopted May 1, 1998, effective October 1, 1998; effective date changed to February 1, 1999.

Commentary

Information about the availability of court-connected dispute resolution services should be added to the standard summons form.

Although the rule is limited to civil cases, courts are encouraged to distribute information about court-connected dispute resolution services in appropriate criminal matters, including delinquency cases and hearings on applications for criminal complaints pursuant to G.L. c. 218, §35A.

The information made available by clerks should include a general description of dispute resolution services, an explanation of reasons for choosing whether or not to use these services in different kinds of cases, an enumeration of the services available by referral from the court where the complaint is filed, information designed to ensure that pro se litigants make informed choices about the use of these services, information about the process for filing complaints regarding court-connected dispute resolution services, notice of the right to bring an adviser of one's own choice to a dispute resolution session pursuant to Rule 7(d),and information about the right to an interpreter's services throughout a legal proceeding pursuant to G.L. c. 221C. To the extent possible, courts should also provide pro se litigants with written information containing answers to frequently asked questions (regarding statutory rights, for example).

Rule 6: Duties of Courts with Respect to Court-Connected Dispute Resolution Services.

(a) Referral of Cases.

No court may refer cases to a provider of dispute resolution services unless the provider is an approved program included on the list developed pursuant to Rule 4(a). In all cases, courts shall inform parties that they are free to choose any approved program on the list, subject to such reasonable limitations as the court may impose, or any other provider of dispute resolution services. If the parties are unable or unwilling to choose a program from the list or another provider, a court may make a referral to a specific program on the list in which the court has confidence, whether or not the court has a contract for services with that program. The court shall make a reasonable effort to distribute such specific referrals fairly among programs on the list, taking into consideration geographic proximity, subject matter competence, special needs of the parties, and fee levels. In the alternative, a court may refer all or most of its cases requiring dispute resolution services to one or more approved programs in which the roster consists exclusively of one or more court employees or with which it has a contract for services pursuant to Rule 4(e). Notwithstanding the foregoing, a court may refer a case to a provider that is not on the list in exceptional circumstances, when special needs of the parties cannot be met by a program on the list. The judge shall report any such referral and the exceptional circumstances which required it to the Chief Justice of the department. In a criminal case, the court shall consult with the prosecuting attorney and obtain the approval of the defendant and, where applicable, the victim, before making a referral to a dispute resolution program.

(b) Screening.

In civil cases, courts may require parties and/or their attorneys to attend a screening session or an early intervention event regarding court-connected dispute resolution services except for good cause shown.

(c) Time for Dispute Resolution.

A court may establish a deadline for the completion of a court-connected dispute resolution process, which may be extended by the court upon a showing by the parties that continuation of the process is likely to assist in reaching resolution.

(d) Choice.

No court shall require parties to participate in dispute resolution services without meeting the minimal requirements set forth in Rule 4(c), except that Probate and Family Courts may require parties to participate in dispute intervention. Except in a case affected by a pilot program under Rule 4(c) or a case involving such a referral to dispute intervention, the court shall inform litigants, both at the time of referral and at the beginning of the dispute resolution process, that the decision to participate in a dispute resolution process is voluntary.

(e) Space for Dispute Resolution Sessions.

Courts may, subject to guidelines issued by the Chief Justice for Administration and Management of the Trial Court, provide available courthouse space or other resources for court-connected dispute resolution services provided by approved programs. The space provided shall be sufficiently private and readily accessible. Reasonable accommodation shall be made for disabled individuals.

(f) Communication with Program or Neutral.

(i)

The court shall give a program which is providing court-connected dispute resolution services sufficient information to process the case effectively.

(ii)

The program shall give the court's administrative staff sufficient case-specific and aggregate information to permit monitoring and evaluation of the services.

(iii)

Communication with the court during the dispute resolution process shall be conducted only by the parties or with their consent. The parties may agree, as part of the dispute resolution process, as to the scope of the information which they, the program, or the neutral will provide to the court. Absent an agreement of the parties and subject to the provisions of Rule 9 regarding confidentiality and subparagraph (iv) below, the program or neutral may provide only the following information to the court: a request by the parties for additional time to complete dispute resolution, the neutral's assessment that the case is inappropriate for dispute resolution, and the fact that the dispute resolution process has concluded without parties' having reached agreement.

(iv)

At the conclusion of conciliation or dispute intervention, the program or neutral may communicate to the court recommendations, a list of those issues which are and are not resolved, and the program's or neutral's assessment that the case will go to trial or settle, provided that the parties are informed at the initiation of the process that such communication may occur.

(g) Data Collection.

The court, in collaboration with the approved program or programs to which it refers cases, shall develop a system to record accurately and compile regularly data sufficient to track cases, monitor services, and provide any information required or requested by the applicable Trial Court department chief justice or the Chief Justice for Administration and Management.

(h) Intake and Selection.

Every court shall evaluate cases to ensure that they are appropriate for dispute resolution based on the case selection criteria of the applicable department developed pursuant to Rule 4(b).

(i) Inappropriate Pressure to Settle.

Courts shall inform parties that, unless otherwise required by law, they are not required to make offers and concessions or to settle in a court-connected dispute resolution process. Courts shall not impose sanctions for nonsettlement by the parties. The court shall give particular attention to the issues presented by unrepresented parties, such as the need for the neutral to memorialize the agreement and the danger of coerced settlement in cases involving an imbalance of power between the parties. In dispute intervention, in cases in which one or more of the parties is not represented by counsel, a neutral has a responsibility, while maintaining impartiality, to raise questions for the parties to consider as to whether they have the information needed to reach a fair and fully informed settlement of the case.

(j) Sanctions for Failure to Attend Sessions.

A court may impose sanctions for failure without good cause to attend a mandatory screening session, an early intervention event, or a scheduled dispute resolution session.

Rule History

Adopted May 1, 1998, effective October 1, 1998; effective date changed to February 1, 1999.

Commentary

(a) Referral of Cases.

Parties who are interested in dispute resolution services should be referred to the court's dispute resolution coordinator for assistance in those courts which neither offer a program operated by a court employee nor have a contract with any program, or which have contracts with more than one program.

This paragraph governs court referrals and does not alter the fact that parties may obtain dispute resolution services on their own initiative from a neutral or organization not on the list, consistent with the schedule established by the court.

Courts are encouraged to provide neutrals with information about counsel for indigent persons in civil cases, including information about legal services, lawyer referral services, or volunteer programs such as "lawyer of the day."

ADR has been used successfully by the courts in a wide range of both civil and criminal cases, and in matters that might otherwise become the subject of civil or criminal litigation. The courts should undertake further exploration of the use of ADR in both civil and criminal matters. There are, however, policy reasons which make the use of ADR inappropriate in some cases. See Commentary to Rule 4(b). This paragraph does not limit the discretion of the prosecuting attorney in a criminal case to commence or proceed with the prosecution of the case, nor does it enlarge the limited authority of the court to dismiss a criminal case.

(f) Communication with Program or Neutral.

This rule is not intended to remove the evidentiary bar against the admissibility of settlement discussions. In appropriate cases, the court should make the case file available to the neutral. Subparagraph (iv) applies only to the processes of conciliation and dispute intervention, and does not affect other dispute resolution processes.

(g) Data Collection.

The court shall make available to the neutral, upon request, information as to whether a case has been referred to the neutral by the court.

(i) Inappropriate Pressure to Settle.

Courts and programs should consider the use of checklists or other forms for the gathering of information by the neutral in dispute intervention, in order to aid the neutral in discussing with unrepresented parties relevant factual circumstances and issues which might go unaddressed without such tools. In addition, courts should make their facilities available to "lawyer of the day" programs, to which neutrals or the court can refer unrepresented parties for legal advice.

(j) Sanctions for Failure to Attend Sessions.

Sanctions should be imposed only by order of a judge and only in the case of willful failure to attend an event or session.

Rule 7: Duties of Approved Programs with Respect to Court-Connected Dispute Resolution Services.

(a) Program Administration.

Programs shall be monitored and evaluated on a regular basis. Settlement rates shall not be the sole criterion for evaluation. Every program shall evaluate its neutrals on a regular basis. Every program shall develop and comply with written policies and procedures governing program administration and operations, including policies regarding evaluation, facilities, communication with the court, data collection, pressure to settle, and intake and selection, which are consistent with policies developed by Trial Court departments pursuant to Rule 3(c) and with Rules 4(a) and 6(a), (e), (f), (g), (h) and (i). A program may refuse to accept a referral from a court if the case does not meet the program's intake and selection criteria.

(b) Diversity.

Programs shall be designed with knowledge of and sensitivity to the diversity of the communities served. The design shall take into consideration such factors as the languages, dispute resolution styles, and ethnic traditions of communities likely to use the services. Programs shall not discriminate against staff, neutrals, volunteers, or clients on the basis of race, color, sex, age, religion, national origin, disability, political beliefs or sexual orientation. Programs shall actively strive to achieve diversity among staff, neutrals, and volunteers.

(c) Rosters.

Programs shall (i) assemble, maintain and administer rosters of qualified neutrals in conformity with these rules; (ii) except in the case of programs in which the roster consists exclusively of court employees, make a reasonable effort to distribute referrals fairly among individuals on the list, taking into consideration geographic proximity, subject matter competence, special needs of the parties, scheduling, and fee levels; (iii) adopt a fair and reasonable method by which qualified individuals may join the roster at its inception, when vacancies occur, or when the caseload requires additional neutrals; and (iv) adopt a fair and reasonable method by which individuals may be removed from the roster, including a provision for a periodic review of the roster. The methods used by the program for adding and removing neutrals shall be set forth in writing and made available to individuals applying for affiliation.

(d) Presence of Advisers.

Parties, in consultation with their attorneys, if any, shall be permitted to decide whether their attorney, advocate or other adviser will be present at court-connected dispute resolution sessions.

(e) Fees.

Programs may charge fees for service. Parties shall not be charged a fee for attendance at a mandatory screening session or an early intervention event, or for dispute resolution services provided by court employees. Fees charged by a provider of court-connected dispute resolution services shall be approved by the Chief Justice of the applicable court department. The fee schedule shall provide for fee waived or reduced fee services to be made available to indigent and low income litigants. Fees may not be contingent upon the result of the dispute resolution process or the amount of the settlement. Neutrals may assist parties to negotiate an equitable allocation of fees.

(f) Dispute Resolution Sessions.

The program shall make reasonable efforts to schedule dispute resolution sessions at the convenience of the parties. The program shall allow adequate time in the dispute resolution session to discuss issues and reach settlement.

(g) Written Agreement.

If a settlement is reached, the agreement shall be prepared in writing and signed by the parties, who shall forward for docketing a notice of the disposition of the case to the clerk of the court in which the case is pending. The neutral may participate in the preparation of the written agreement. At the parties' request, the court may allow an oral agreement instead of a written one.

(h) Orientation and Supervision of Neutrals.

The program shall ensure that neutrals are familiar with the policies and operations of the court and the program. The program shall supervise its neutrals. During dispute resolution sessions, newly trained neutrals shall have immediate access to an experienced neutral.

(i) Enforcement of Qualifications Standards and Ethical Standards.

Each approved program shall be responsible for enforcing the qualifications standards in Rule 8 and the ethical standards in Rule 9, and for taking appropriate action if a neutral on its roster fails or ceases to meet the qualifications standards or violates the ethical standards. Appropriate actions include referral for further training, suspension from the roster, or removal from the roster. If the Chief Justice of a Trial Court Department directs a program to take such action as a result of a complaint about the neutral and the program refuses to act, the Chief Justice may revoke the program's status as a program approved to receive referrals from that department.

Rule History

Adopted May 1, 1998, effective October 1, 1998; effective date changed to February 1, 1999. Amended November 20, 2003, effective January 1, 2005.

Commentary

(a) Program Administration. Evaluation methods should be designed to incorporate the experiences of disputants.

Rule 8: Qualification Standards for Neutrals.

(a) Purpose and Applicability.

The purpose of setting qualifications standards for neutrals who receive court referrals is to foster high quality dispute resolution services. This rule shall apply to neutrals who provide mediation, arbitration, conciliation, case evaluation, dispute intervention, mini-trials or summary jury trials in court-connected programs.

(b) General Provisions.

(i) General Qualifications Requirements.

To be qualified to provide dispute resolution services for cases referred by a court to an approved program, a neutral shall satisfy the requirements specified in this rule for the particular process which he or she provides unless exempted pursuant to Rule 8(k). A neutral may meet one or all of these requirements using the alternative method, if any, specified for the particular process, pursuant to Rule 8(j). To remain qualified, neutrals shall satisfy the continuing education and continuing evaluation requirements, if any, specified in this rule for the particular process.

(ii) Additional Qualifications.

Trial Court Departments may establish additional qualifications for neutrals in approved programs in addition to those set forth in this rule provided they are consistent with these rules. In establishing such additional standards, court departments may provide for consideration of such factors as an individual's experience as a neutral, educational background, work experience, or subject matter expertise, and may also require such neutrals to complete specialized training or demonstrate subject matter expertise. Academic degrees and professional licensure may be among the factors considered but cannot be used as preclusive criteria by court departments in

establishing additional qualifications for mediators or arbitrators participating in approved programs.

(iii) Competence.

In qualifying mediators and arbitrators to handle court referrals, approved programs may consider such factors as an individual's experience as a mediator or arbitrator, educational background, work experience and subject matter expertise. Academic degrees and professional licensure may be among the factors considered but cannot be used as preclusive criteria by approved programs in qualifying mediators and arbitrators for inclusion in court panels. Academic degrees and professional licensure may be used as preclusive criteria for qualifying conciliators, case evaluators, mini-trial neutrals and summary jury trial neutrals.

(iv) Duties of the Chief Justice for Administration and Management.

The Chief Justice for Administration and Management (CJAM) shall oversee and monitor the implementation of this rule, and suggest changes as needed. The CJAM shall, in consultation with the Standing Committee, develop guidelines for implementing the provisions of this rule. The CJAM shall collect, publish and distribute to approved programs any changes in the guidelines, and shall maintain the annual certifications submitted by approved programs as to the training, evaluation, mentoring and continuing education of neutrals.

(v) Duties of Approved Programs.

Each approved program shall ensure that the neutrals on its roster meet the applicable training, mentoring, evaluation, continuing education, continuing evaluation, professional and experience requirements set forth in this rule and the guidelines adopted pursuant to Rule 8(b)(iv), and any additional qualification requirements adopted by a Trial Court Department. Each approved program shall ensure that the neutrals meet the standards set forth in the rule and guidelines, that any alternative method relied upon by a neutral to meet the standards is in compliance with Rule 8(j) and the guidelines, and that reliance upon the limited exemption is in compliance with Rule 8(k). To carry out these duties, each program shall take the following specific actions:

(a) Attest in its application for program approval that it will assign cases referred by a court only to neutrals who meet the qualifications standards;
(b) Maintain for the tenure of the neutral's association with the program, and for three years thereafter, documentation which demonstrates that the neutral meets the qualifications standards. Such documentation shall include, without limitation, the following:
    (i) Name of the neutral;
    (ii) Name of the training organization where the neutral satisfactorily completed any required training (or documentation of the neutral's compliance with the alternative method of meeting any training requirement pursuant to Rule 8(j));
    (iii) Outcome of any required mentoring and evaluation for each neutral (or documentation of the neutral's compliance with the alternative method of meeting any evaluation requirement pursuant to Rule 8(j));
    (iv) Documentation of the neutral's participation in any required continuing education and in any required continuing evaluation;

(v) Documentation demonstrating that the neutral meets any applicable requirements as to professional licensure, experience or subject matter expertise; and

(vi) Documentation demonstrating that the neutral qualifies for the limited exemption set forth in Rule 8(k).

(c) Certify annually to the AOTC that the neutrals on its roster meet the requirements for training, mentoring and evaluation, and continuing education set forth in this rule and the guidelines.

(d) Make the documentation demonstrating a neutral's qualification and the documentation demonstrating the program's compliance with the rules and the guidelines available to the AOTC and to the Chief Justices of the Trial Court Departments for inspection and copying upon request.

(c) Mediators.

(i) Training Requirement.

A mediator shall successfully complete a basic mediation training course of at least thirty hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A mediator shall also complete any additional, specialized training required by a Trial Court Department.

(ii) Mentoring and Evaluation Requirement.

A mediator shall complete the mentoring and evaluation requirements contained in the Guidelines adopted pursuant to Rule 8(b)(iv).

(iii) Continuing Education.

A mediator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iv) Continuing Evaluation.

A mediator shall participate in regular evaluation as required by Rule 7.

(d) Arbitrators.

(i) Training Requirement.

An arbitrator shall successfully complete a basic arbitration training course of at least eight hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8 (b)(iv). An arbitrator shall also complete any additional, specialized training required by a Trial Court Department.

(ii) Mentoring and Evaluation Requirement.

An arbitrator shall complete the mentoring and evaluation requirements contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iii) Continuing Education.

An arbitrator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iv) Continuing Evaluation.

An arbitrator shall participate in regular evaluation as required by Rule 7.

(e) Conciliators.

(i) Professional Qualifications.

A conciliator must be admitted to the bar of the Commonwealth of Massachusetts, be in good standing with the Board of Bar Overseers, and have engaged in the practice of law within the Commonwealth of Massachusetts for at least three years.

(ii) Training Requirement.

A conciliator shall successfully complete a conciliation training course of at least eight hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A conciliator shall also complete any additional, specialized training required by a trial court department.

(iii) Mentoring and Evaluation Requirement.

A conciliator shall, if required to do so at the discretion of the approved program with which he or she is affiliated, complete the mentoring and evaluation requirements of that program contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iv) Continuing Education.

A conciliator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(v) Continuing Evaluation.

A conciliator shall participate in regular evaluation as required by Rule 7.

(f) Case Evaluators.

(i) Professional Qualifications.

A case evaluator must be admitted to the bar of the Commonwealth of Massachusetts, be in good standing with the Board of Bar Overseers, and must have seven years of trial experience within the Commonwealth of Massachusetts as an attorney or judge.

(ii) Training Requirement.

A case evaluator shall successfully complete a basic case evaluation training of at least eight hours and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A case evaluator shall also complete any additional, specialized training required by a Trial Court Department for case evaluators.

(iii) Mentoring and Evaluation Requirement.

A case evaluator shall complete the mentoring and evaluation requirements contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iv) Continuing Education.

A case evaluator shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(v) Continuing Evaluation.

A case evaluator shall participate in regular evaluation as required by Rule 7.

(g) Mini-Trial Neutrals.

(i) Professional Qualifications.

A mini-trial neutral shall have at least ten years experience evaluating legal disputes as a judge, arbitrator, attorney, or executive level decision-maker.

(ii) Training Requirements.

A mini-trial neutral shall successfully complete the training required for mediators in Rule 8(c)(i), and the training required for case evaluators in Rule 8(f)(ii).

(iii) Mentoring and Evaluation Requirement.

A mini-trial neutral shall complete the mentoring and evaluation requirements contained in the guidelines adopted pursuant to Rule 8(b)(iv).

(iv) Continuing Education.

A mini-trial neutral shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(v) Continuing Evaluation.

A mini-trial neutral shall participate in regular evaluation as required by Rule 7.

(h) Summary Jury Trial Neutrals.

(i) Professional Qualifications.

A summary jury trial neutral shall be an arbitrator qualified under this rule, an attorney, or a former judge, with at least ten years of experience as an arbitrator, trial attorney, or judge. The summary jury trial neutral must be in good standing in any jurisdiction in which he or she is licensed to practice law.

(ii) Continuing Education.

A summary jury trial neutral shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iii) Continuing Evaluation.

A summary jury trial neutral shall participate in regular evaluation as required by Rule 7.

(i) Dispute Intervention Neutrals.

(i) Training Requirement.

A provider of dispute intervention services shall successfully complete a training course and a court orientation, both of which comply with the guidelines adopted pursuant to Rule 8(b)(iv). A provider of dispute resolution services shall also complete any additional specialized training required by the Trial Court Department in which he or she is providing dispute intervention services.

(ii) Mentoring and Evaluation Requirement.

A provider of dispute intervention services shall complete the mentoring and evaluation requirements set forth in the guidelines adopted pursuant to Rule 8(b)(iv).

(iii) Continuing Education.

A provider of dispute resolution services shall participate in any continuing education required by the approved program with which he or she is affiliated or by the court department in which he or she is providing services.

(iv) Continuing Evaluation.

A provider of dispute resolution services shall participate in regular evaluation as may be required by the relevant Trial Court Department.

(j) Alternative Methods of Satisfying Requirements.

A neutral may be qualified by a program to handle cases referred by a court by demonstrating that he or she meets the alternative methods set forth in the guidelines of satisfying the training, mentoring and evaluation requirements set forth in this rule and the guidelines. Programs that seek to qualify neutrals through the alternative methods provision are required to compile necessary documentation pursuant to Rule 8(b)(v) and applicable guidelines.

(k) Limited Exemption from Training, Mentoring and Evaluation Requirements.

As a general rule, all neutrals in approved programs shall satisfy the training, mentoring and evaluation requirements set forth in Rule 8. However, the Chief Justice of any Trial Court Department may elect, as a one-time exception to this rule, to exempt mediators, arbitrators, case evaluators, and conciliators from those requirements, subject to the provisions set forth below. The Chief Justice for Administration and Management shall establish a process for notification and a deadline for submission by departmental Chief Justices of their decision to utilize the exemption, and for programs to apply for the exemption.

(i) One-Time Exemption of Certain Neutrals.

This exemption will be a one-time option available only to those mediators, arbitrators, case evaluators and conciliators who meet the requirements set forth in Rule 8(k). No other neutral shall be exempted from the training, mentoring or evaluation requirements of Rule 8.

(ii) Designation of Neutrals.

Each program approved on or before July 1, 2002, by a Department in which this exemption is available pursuant to this Rule and which continues as an approved program on the date on which Rule 8 becomes effective shall submit to the Chief Justice of that Department pursuant to the process established by the Chief Justice for Administration and Management, a list of any mediators, arbitrators, case evaluators and conciliators who qualify for the exemption. The program shall include a complete and detailed description of the qualifications of each such mediator, arbitrator, case evaluator or conciliator as evidence of his or her eligibility.

(iii) Requirements for Exemption.

A program may consider a neutral eligible for this exemption only if he or she was serving as of July 1, 2002, on a panel of a program approved on or before that date which continues as an approved program on the date on which Rule 8 becomes effective. In addition, a program shall consider the neutral's overall experience and other factors under Rule 8 (e.g. prior training, mentoring, evaluation, the recency of his or her experience and the number and types of cases handled). An eligible individual must have served in the process for which he or she is seeking exemption for five years during the last six years prior to July 1, 2002, and meet the following additional requirement:

(a) **Mediators.** Must have provided at least 300 hours of mediation during that period.
(b) **Arbitrators.** Must have provided at least 150 hours of arbitration during that period.
(c) **Case Evaluators.** Must have provided at least 100 hours of case evaluation during that period.
(d) **Conciliators.** Must have provided at least 100 hours of conciliation during that period.

(iv) Transferability of Exemption.

A mediator, arbitrator, case evaluator or conciliator who qualifies for this exemption in a Trial Court Department shall be qualified to provide services in the process in which he or she is exempted in another approved program within that Department subject to the approval of the other program. A mediator, arbitrator, case evaluator or conciliator who seeks exemption in another Department must meet the exemption through a program approved in that other Department.

(v) Limitations on Exemption.

This provision does not exempt any mediator, arbitrator, case evaluator or conciliator from complying with the continuing education and continuing evaluation requirements of Rule 8.

(l) Effective Date.

The effective date of this rule shall be January 1, 2005, except that to be qualified to provide dispute intervention, individuals employed by the courts on the effective date of this rule shall have until January 1, 2007 to demonstrate compliance with the requirements set forth in this rule. Employees hired to provide dispute intervention after the effective date of this rule must satisfy all the requirements of this rule within thirty-six (36) months of the date of hire.

Rule History

Adopted November 20, 2003, effective January 5, 2005.

Rule 9: Ethical Standards.

(a) Introduction.

These Ethical Standards are designed to promote honesty, integrity and impartiality by all neutrals and other individuals involved in providing court-connected dispute resolution services. These standards seek to assure the courts and citizens of the Commonwealth that such services are of the highest quality, and to promote confidence in these dispute resolution services. In addition, these standards are intended as a foundation on which appellate courts and Trial Court departments can build their dispute resolution policies, programs and procedures to best serve the public. These Standards apply to all neutrals as defined in these Standards when they are providing court-connected dispute resolution services for the Trial Court and the appellate courts, including those who are state or other public employees. State and other public employees are subject to the Massachusetts Conflict of Interest Law, M.G.L. c. 268A, and therefore, to the extent that these standards are in any manner inconsistent with M.G.L. c. 268A, the statute shall govern. In addition, to the extent that these standards are in any manner inconsistent with the Standards and Forms For Probation Offices of the Probate and Family Court Department promulgated by the Office of the Commissioner of Probation effective July 1, 1994, the Probation Standards shall govern. All courts providing dispute resolution services and all court-connected dispute resolution programs shall provide the neutrals with a copy of these Ethical Standards. These Standards shall be made a part of all training and educational programs for approved programs, and shall be available to the public.

(b) Impartiality.

A neutral shall provide dispute resolution services in an impartial manner. Impartiality means freedom from favoritism and bias in conduct as well as appearance.

(i)

A neutral shall provide dispute resolution services only for those disputes where she or he can be impartial with respect to all of the parties and the subject matter of the dispute.

(ii)

If at any time prior to or during the dispute resolution process the neutral is unable to conduct the process in an impartial manner, the neutral shall so inform the parties and shall withdraw from providing services, even if the parties express no objection to the neutral continuing to provide services.

(iii)

No neutral or any member of the neutral's immediate family or his or her agent shall request, solicit, receive, or accept any in-kind gifts or any type of compensation other than the court-established fee in connection with any matter coming before the neutral.

(c) Informed Consent.

The neutral shall make every reasonable effort to ensure that each party to the dispute resolution process (a) understands the nature and character of the process, and (b) in consensual processes, understands and voluntarily consents to any agreement reached in the process.

(i)

A neutral shall make every reasonable effort to ensure at every stage of the proceedings that each party understands the dispute resolution process in which he or she is participating. The neutral shall explain (a) the respective responsibilities of the neutral and the parties, and (b) the policies, procedures and guidelines applicable to the process, including circumstances under which the neutral may engage in private communications with one or more of the parties.

(ii)

If at any time the neutral believes that any party to the dispute resolution process is unable to understand the process or participate fully in it — whether because of mental impairment, emotional disturbance, intoxication, language barriers, or other reasons — the neutral shall (a) limit the scope of the dispute resolution process in a manner consistent with the party's ability to participate, and/or recommend that the party obtain appropriate assistance in order to continue with the process, or (b) terminate the dispute resolution process.

(iii)

Where a party is unrepresented by counsel and where the neutral believes that independent legal counsel and/or independent expert information or advice is needed to reach an informed agreement or to protect the rights of one or more of the parties, the neutral shall so inform the party or parties.

(iv)

A neutral may use his or her knowledge to inform the parties' deliberations, but shall not provide legal advice, counseling, or other professional services in connection with the dispute resolution process.

(v)

The neutral shall inform the parties of their right to withdraw from the process at any time and for any reason, except as is provided by law or court rule.

(vi)

In mediation, case evaluation, and other processes whose outcome depends upon the agreement of the parties, the neutral shall not coerce the parties in any manner to reach agreement.

(vii)

In dispute intervention, in cases in which one or more of the parties is not represented by counsel, a neutral has a responsibility, while maintaining impartiality, to raise questions for the parties to consider as to whether they have the information needed to reach a fair and fully informed settlement of the case.

(d) Fees.

A neutral shall disclose to the parties the fees that will be charged, if any, for the dispute resolution services being provided.

(i)

A neutral shall inform each party in a court-connected dispute resolution process in writing, prior to the start of the process, of (a) the fees, if any, that will be charged for the process, (b) if there will be a fee, whether it will be paid to the neutral, court, and/or the program, and (c) whether the parties may apply for a fee-waiver or other reduction of fees.

(ii)

If a fee is charged for the dispute resolution process, the neutral shall enter into a written agreement with the parties, before the dispute resolution process begins, stating the fees and time and manner of payment.

(iii)

Fee agreements may not be contingent upon the result of the dispute resolution process or amount of the settlement.

(iv)

Neutrals shall not accept, provide, or promise a fee or other consideration for giving or receiving a referral of any matter.

(v)

If the court has established fees for its dispute resolution services, no neutral shall request, solicit, receive, or accept any payment in any amount greater than the court-established fees when providing court-connected dispute resolution services.

(e) Conflict of Interest.

A neutral shall disclose to all parties participating in the dispute resolution process all actual or potential conflicts of interest, including circumstances that could give rise to an appearance of conflict. A neutral shall not serve as a neutral in a dispute resolution process after he or she knows of such a conflict, unless the parties, after being informed of the actual or potential conflict, give their consent and the neutral has determined that the conflict is not so significant as to cast doubt on the integrity of the dispute resolution process and/or neutral.

(i)

As early as possible and throughout the dispute resolution process, the neutral shall disclose to all parties participating in the process, all actual or potential conflicts of interest, including but not limited to the following:

(aa) any known current or past personal or professional relationship with any of the parties or their attorneys;

(bb) any financial interest, direct or indirect in the subject matter of the dispute or a financial relationship (such as a business association or other financial relationship) with the parties,

their attorneys, or immediate family member of any party or their attorney, to the dispute resolution proceeding; and

(cc) any other circumstances that could create an appearance of conflict of interest.

(ii)

Where the neutral determines that the conflict is so significant as to cast doubt on the integrity of the dispute resolution process and/or neutral, the neutral shall withdraw from the process, even if the parties express no objection to the neutral continuing to provide services.

(iii)

Where the neutral determines that the conflict is not significant, the neutral shall ask the parties whether they wish the neutral to proceed. The neutral shall obtain consent from all parties before proceeding.

(iv)

A neutral must avoid even the appearance of a conflict of interest both during and after the provision of services.

(aa) A neutral shall not use the dispute resolution process to solicit, encourage or otherwise procure future service arrangements with any party.

(bb) A neutral may not subsequently act on behalf of any party to the dispute resolution process, nor represent one such party against the other, in any matter related to the subject of the dispute resolution process.

(cc) A neutral may not subsequently act on behalf of any party to the dispute resolution process, nor represent one such party against the other, in any matter unrelated to the subject of the dispute resolution process for a period of one year, unless the parties to the process consent to such action or representation.

(v)

A neutral shall avoid conflicts of interest in recommending the services of other professionals.

(f) Responsibility to Non-Participating Parties.

A neutral should consider, and where appropriate, encourage the parties to consider, the interests of persons affected by actual or potential agreements and not participating or represented in the process.

(i)

If a neutral believes that the interests of parties not participating or represented in the process will be affected by actual or potential agreements, the neutral should ask the parties to consider the effects of including or not including the absent parties and/or their representatives in the process. This obligation is particularly important when the interests of children or other individuals who are not able to protect their own interests are involved.

(g) Advertising, Soliciting, or Other Communications by Neutrals.

Neutrals shall be truthful in advertising, soliciting, or other communications regarding the provision of dispute resolution services.

(i)

A neutral shall not make untruthful or exaggerated claims about the dispute resolution process, its costs and benefits, its outcomes, or the neutral's qualifications and abilities.

(ii)

A neutral shall not make claims of specific results, benefits, outcomes, or promises which imply favor of one side over another.

(h) Confidentiality.

A neutral shall maintain the confidentiality of all information disclosed during the course of dispute resolution proceedings, subject only to the exceptions listed in this section.

(i)

The information disclosed in dispute resolution proceedings that shall be kept confidential by the neutral includes, but is not limited to: the identity of the parties; the nature and substance of the dispute; the neutral's impressions, opinions, and recommendations; notes made by the neutral; statements, documents or other physical evidence disclosed by any participant in the dispute resolution process; and the terms of any settlement, award, or other resolution of the dispute, unless disclosure is required by law or court rule.

(ii) Confidentiality vis-à-vis nonparties.

The neutral shall inform the participants in the dispute resolution process that he or she will not voluntarily disclose to any person not participating in the mediation any of the information obtained through the process, unless such disclosure is required by law.

(iii) Confidentiality within mediation.

A neutral shall respect the confidentiality of information received in a private session or discussion with one or more of the parties in a dispute resolution process, and shall not reveal this information to any other party in the mediation without prior permission from the party from whom the information was received.

(iv)

Neutrals who are part of a court-connected dispute resolution program may, for purposes of supervising the program, supervising neutrals and monitoring of agreements, discuss confidential information with other neutrals and administrative staff in the program. This permission to discuss confidential information does not extend to individuals outside their program.

(v)

Neutrals may, with prior permission from the parties, use information disclosed by the parties in dispute resolution proceedings for research, training, or statistical purposes, provided the materials are adapted so as to remove any identifying information.

(i) Withdrawing from the Dispute Resolution Process.

A neutral shall withdraw from the dispute resolution process if continuation of the process would violate any of the Ethical Standards, if the safety of any of the parties would be jeopardized, or if the neutral is unable to provide effective service.

(i)

Withdrawal must be accomplished in a manner which, to the extent possible, does not prejudice the rights or jeopardize the safety of the parties.

(ii)

A neutral may withdraw from the dispute resolution process if the neutral believes that (a) one or more of the parties is not acting in good faith; (b) the parties' agreement would be illegal or involve the commission of a crime; (c) continuing the dispute resolution process would give rise to an appearance of impropriety; (d) in a process whose outcome depends upon the agreement of the parties, continuing with the process would cause severe harm to a non-participating party, or the public; and (e) continuing discussions would not be in the best interest of the parties, their minor children, or the dispute resolution program.

Rule History

Adopted May 1, 1998, effective October 1, 1998; effective date changed to February 1, 1999.

Commentary

(b) Impartiality.

A neutral's obligation is to act on the basis of what he or she subjectively believes may be the appearance of favoritism or bias and also on the basis of what the neutral reasonably believes others would think.

(c) Informed Consent.

(i)

In arbitration, private communications involving the neutral and less than all of the parties and/or their attorneys concerning the substance of the dispute would be improper unless all parties agree otherwise in advance.

(ii)

In making a recommendation that a party obtain assistance, the neutral shall avoid making any disclosure to other parties in the dispute resolution process which would (a) compromise the confidentiality of communications between the neutral and the party in need of assistance, (b) detrimentally affect the interests of the party in need of assistance, or (c) impair the impartiality (or perceived impartiality) of the neutral. In seeking appropriate assistance, neutrals should be aware of parties' right, pursuant to G.L. c. 221C, to interpreter's services throughout a legal proceeding.

(iii)

This Standard is ordinarily not applicable in arbitration. See also commentary to previous section.

Courts are encouraged to develop and foster innovative approaches to serving unrepresented parties, such as "lawyers of the day," pro bono panels, lay advocates, information rooms inside the court, assignment of counsel, mediation assistants, substantive written information, the use of volunteer mediators to supplement court employees in busy sessions such as the Boston Housing Court, the use of a different ADR process, substantive checklists, and judicial participation in the review of agreements.

(iv)

The provision in this Standard permitting a neutral to use his or her knowledge to inform the parties' deliberations is ordinarily not applicable in arbitration.

(v)

In arbitration, the parties may not have the right to withdraw from the proceedings.

(d) Fees.

For purposes of this subsection, fees may include the neutral's fees, administrative fees, and related expenses.

(iv)

This provision is not intended to prohibit neutrals from paying an administrative or panel membership fee.

(e) Conflict of Interest.

(i)

Individuals are not prohibited from serving as neutrals for parties for whom they or members of their firm have provided services or are currently providing services as long as full disclosure of the relationship is made and (i) after disclosure (ii) the parties consent to the neutral's serving in the case and (iii) the neutral determines that the conflict is not significant enough to cast doubt on the integrity of the process and the neutral. However, neutrals should be particularly sensitive to the fact that circumstances may arise while serving as a neutral for a party who is currently a client of his or her firm which can give rise to a conflict requiring withdrawal, especially when it involves a matter related to the dispute to which the neutral has been assigned.

(iv)

The provisions in this subparagraph do not apply to other individuals with whom the neutral is in business, such as other lawyers in the neutral's firm, or other mental health professionals in a neutral's group practice, nor do they apply to situations where the neutral has served in the past as a neutral in a dispute resolution process involving any party to the current dispute resolution process. Consent is not waivable in advance of the dispute resolution process, but may be waived after the dispute resolution process. A dispute should be considered "related to" another matter if the facts involved in the dispute resolution process are so germane to the later matter that (a) a party in the earlier matter would be unfairly disadvantaged by the neutral's involvement in the later matter or (b) a party in the later matter would be unfairly disadvantaged by the neutral's involvement in the earlier matter.

(h) Confidentiality.

(i)

This rule is not applicable to arbitration, in which private communications involving the neutral and less than all of the parties and/or their attorneys would be improper unless all parties agree otherwise in advance.

(iv)

Individuals who administer court-connected dispute resolution programs are also bound by these standards. See definition of "neutral" in Rule 2.

(v)

Ethical vs. statutory obligations: The provisions in this section concerning confidentiality govern the ethical obligations of the neutral but may not bar compelled disclosure of confidential communications, by means of subpoena or other court process. G. L. c.233, §23C, which governs mediation, may prohibit disclosure of communications made in the course of a mediation (as defined in the statute) even if those communications relate to child abuse or neglect or life threatening situations. Other statutes, such as c.119, §51A (the mandated reporter statute) may also govern the obligation to disclose, or maintain confidentiality of, communications relating to child abuse and neglect.

Agreements: In some cases, the confidentiality protection afforded by G. L. c.233, §23C, requires an agreement to mediate. In other dispute resolution processes (such as arbitration, case evaluation, and conciliation), where there is no statutory protection for confidentiality, it may be desirable for the parties to execute an agreement which provides for confidentiality of the process.

1:19 Electronic Access to the Courts.

1. Covert photography, recording or transmission prohibited.

No person shall take any photographs, or make any recording or transmission by electronic means, in any courtroom, hearing room, office, chambers or lobby of a judge or magistrate without prior authorization from the judge or magistrate then having immediate supervision over such place.

2. Electronic access by the news media.

A judge shall permit photographing or electronic recording or transmitting of courtroom proceedings open to the public by the news media for news gathering purposes and dissemination of information to the public, subject to the limitations of this rule. Subject to the provisions of paragraph (d), the news media shall be permitted to possess and to operate in the courtroom all devices and equipment necessary to such activities. Such devices and equipment include, without limitation, still and video cameras, audio recording or transmitting devices, and portable computers or other electronic devices with communication capabilities. The "news media" shall include any authorized representative of a news organization that has registered with the Public Information Officer of the Supreme Judicial Court or any individual who is so registered.

Registration shall be afforded to organizations that regularly gather, prepare, photograph, record, write, edit, report or publish news or information about matters of public interest for dissemination to the public in any medium, whether print or electronic, and to individuals who regularly perform a similar function, upon certification by the organizations or individuals that they perform such a role and that they will familiarize themselves or their representatives, as the case may be, with the provisions of this rule and will comply with them.

In his or her discretion, a judge may entertain a request to permit electronic access as authorized by this rule to a particular matter over which the judge is presiding by news media that have not registered with the Public Information Officer.

(a) Substantial likelihood of harm.

A judge may limit or temporarily suspend such access by the news media if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence.

(b) Limitations.

A judge shall not permit:

(i) photography or electronic recording or transmission of voir dire hearings concerning jurors or prospective jurors.
(ii) electronic recording or transmission of bench and side-bar conferences, conferences between counsel, and conferences between counsel and client; or
(iii) frontal or close-up photography of jurors and prospective jurors.

A judge may impose other limitations necessary to protect the right of any party to a fair trial or the safety and well-being of any party, witness or juror, or to avoid unduly distracting participants or detracting from the dignity and decorum of the proceedings.

If the request is to record multiple cases in a session on the same day, a judge, in his or her discretion, may reasonably restrict the number of cases that are recorded to prevent undue administrative burdens on the court.

(c)

Minors and sexual assault victims may not be photographed without the consent of the judge.

(d) Positioning of equipment.

All equipment and devices shall be of a type and positioned and operated in a manner which does not detract from the dignity and decorum of the proceeding. Unless the judge permits otherwise for good reason, only one stationary, mechanically silent video camera shall be used in the courtroom for broadcast television, a second mechanically silent video camera shall be used for other media, and, in addition, one silent still camera shall be used in the courtroom at one time. Unless the judge otherwise permits, photographic equipment and its operator shall be in place in a fixed position within the area designated by the judge and remain there so long as the court is in session, and movement shall be kept to a minimum, particularly in jury trials. The operator shall not interrupt a court proceeding with a technical problem.

(e) Advance notice.

A judge may require reasonable advance notice from the news media of their request to be present to photograph or electronically record or transmit at a particular session. In the absence of such notice, the judge may refuse to admit them. A judge may defer acting on such a request until the requester has seasonably notified the parties and, during regular business hours, the Bureau Chief or News Editor of the Associated Press, Boston, using the email address of apboston@ap.org A judge hearing any motion under this rule may reasonably limit the number of counsel arguing on behalf of the several interested media.

(f) Non-exclusive access.

A judge shall not make an exclusive arrangement with any person or organization for news media coverage of proceedings in the courtroom. If there are multiple requests to photograph or electronically record the same proceeding, the persons making such requests must make arrangements among themselves for pooling or cooperative use and must do so outside of the courtroom and before the court session without judicial intervention.

(g) Objection by a party.

Any party seeking to prevent any of the coverage which is the subject of this rule may move the court for an appropriate order, but shall first deliver electronic notice of the motion during regular business hours to the Bureau Chief or News Editor of the Associated Press, Boston, using the email address of apboston@ap.org as seasonably as the matter permits. The judge shall not hear the motion unless the movant has certified compliance with this paragraph, but compliance shall relieve the movant and the court of any need to postpone hearing the motion and acting on it, unless the judge, as a matter of discretion, continues the hearing.

3. Other recordings.

A judge may permit the use of electronic or photographic means for the presentation of evidence or the perpetuation of a record when authorized by law, for other purposes of judicial administration, or for the preparation of materials for educational or ceremonial purposes.

4. Definitions.

For purposes of this rule, the term “judge” shall include a magistrate presiding over a proceeding open to the public. The term “minor” shall be defined as a person who has not attained the age of eighteen.

Rule History

Adopted October 1, 1998, effective November 2, 1998; amended December 15, 1999, effective January 3, 2000; amended February 28, 2012, effective September 17, 2012.

1:20 Address Confidentiality Program.

The purpose of this rule is to allow persons certified by the Secretary of the Commonwealth as program participants under the Address Confidentiality Program, G.L. c. 9A, §§ 1 et seq. to use "substitute addresses" provided in that program in certain court proceedings. The words "address," "program participant and "Secretary" as used in this rule shall have the same meaning as designated for said words in G.L. c 9A, § 1.

This rule shall supersede any court rule, standing order or administrative directive to the contrary.

Any address confidentiality program participant and minor child(ren) residing with the program participant who are listed with the Secretary of the Commonwealth as included within the program, shall be entitled to use the address designated for him or her by the Secretary of the Commonwealth pursuant to Chapter 9A of the General Laws as his or her address. This address may be used in connection with any civil proceeding that is open to the public, except youthful offender cases, and except as may be ordered by the court, provided that the program participant first submits to the court in which the particular action is pending or is to be filed, an affidavit for use of substitute address on a form provided in this rule. The actual address of the program participant may be used by court personnel in the furtherance of their official duties, but such address shall not be used for purposes of mailing any documents, notices or orders

Any person who submits such an affidavit in connection with a particular action shall have an affirmative duty to notify the court if his or her certification is canceled by the Secretary of the Commonwealth or expires during the pendency of the particular action. Such person shall also file a new affidavit whenever there is a change in the actual address as listed on the affidavit filed with the court. Said affidavit shall be impounded by operation of this rule without any further judicial action. The Clerk, Register, or Recorder shall segregate the impounded affidavit from the other papers and shall not make the information contained therein available to other parties.

Affidavit For Use of "Substitute Address"

RE: [*Plaintiff's name field*] v. [*Defendant's name field*]

Docket Number: [*Case docket number field*]

Name: [*Name field*]

Address Designated by Secretary of the Commonwealth as my substitute address: [*Substitute address field*]

I hereby swear or affirm that pursuant to Chapter 9A of the General Laws I was certified by the Secretary of the Commonwealth on [date field] to participate in the Address Confidentiality Program and that the certification remains in full force and effect.

My actual residential address is [*Actual residential address field*].

The minor children residing with me at that address who are also participants in the Address Confidentiality Program are: [*List of minor children's names field*]

Signed under the penalties of perjury this *[day field]* day of [*month field*] in the year [*year field*].

[*Signature of Certified Program Participant field*]

Certified Program Participant

Notice

As a Program Participant you may use the substitute address provided by the State Secretary of the Commonwealth and need not use your actual address in this court proceeding except as the court may otherwise order. However, you should be aware that other individuals who know your actual address might use that address in documents filed with the court or during the court proceedings not related to this case. Furthermore, your actual address may appear in case files in other court proceedings not related to this case. You should consider seeking a protective order and/or an order of impoundment of all court documents containing your actual address to protect your safety further.

Rule History

Adopted March 5, 2002, effective April 1, 2002.

1:21 Corporate Disclosure Statement on Possible Judicial Conflict of Interest.

(a) Who Must File.

In civil and criminal cases in the Trial Court and appellate courts, any nongovernmental corporate party to a proceeding must file a statement identifying all its parent corporations and listing any publicly held corporation that owns 10 percent or more of the party's stock or stating that there is no such corporation. In a criminal case, if an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim and if the victim is a corporation providing the information required by this paragraph.

(b) Time for Filing.

The manner of filing the corporate disclosure statement shall be as follows:

(i) Appellate Court.

In an appellate court, a party must file an original and nine copies of the statement required in paragraph (a) within 30 days of the entry of the appeal upon the docket. In the single justice session of the Supreme Judicial Court, a party must file in accordance with subparagraph (ii). Even if such statement has already been filed, the party's principal brief must include the statement before the table of contents.

(ii) Trial Court; Civil Case.

In a civil case in the Trial Court, a party must file an original and one copy of the statement required in paragraph (a) with its first appearance, pleading, petition, motion, response or other request. A copy of the statement must also be filed with each contested motion.

(iii) Trial Court; Criminal Case.

In a criminal case in the Trial Court, a party must file an original and one copy of the statement required in paragraph (a) upon the defendant's initial appearance pursuant to Mass. R. Crim. P. 7. A copy of the statement must also be filed with each contested motion.

(c) Supplemental Filing.

In any case, a party shall promptly file a supplemental statement upon any change in the information that the statement requires.

Rule History

Adopted June 26, 2002, effective September 3, 2002.

1:22 Motions to Recuse.

(a)

Any motion seeking to recuse a Justice of this court from a full court case shall be in writing, and shall comply in all respects with Mass.R.A.P. 15(a). The motion shall be filed at or before the time for filing the moving party's brief. The court may allow the filing of a motion to recuse after the filing of the brief if the motion is based on grounds not known, and that reasonably could not have been known, at the time the brief was filed, and provided that the motion is filed as soon as practicable after the alleged ground for recusal becomes known. Late filed motions are strongly discouraged.

(b)

If the motion is denied by the Justice whose recusal is sought, the moving party may request review of that ruling by the other Justices, by filing with the clerk, within seven days of the ruling, a written request for review. To facilitate this review, a Justice who denies a motion to recuse is encouraged to provide a brief statement of his or her reasons for the ruling.

The review shall be on the papers, and limited to the information that was before the Justice whose recusal was sought, unless the court requests further information. A party requesting review shall therefore file, along with the request for review, eight copies of the motion to recuse and all material related to the motion that was before the Justice initially, including any supporting or opposing memoranda and affidavits. The Justices reviewing the ruling will act as soon as practicable, and, time permitting, before oral argument or submission of the case on briefs.

(c)

This rule applies only to full court cases. Recusal rulings in single justice cases are, and will continue to be, reviewable in the regular course on appeal from any adverse final judgment in the single justice case.

(d)

Nothing in this rule is intended to change the substantive law governing recusals.

Rule History

Adopted September 20, 2010, effective November 1, 2010.

1:23 Attorney General Approved Modifications of Certain Gift Instruments Under G.L. C. 180A, Section 5(d).

1.0 Administrative Equitable Deviation.

If an institution determines that a restriction contained in a gift instrument on the management, investment or duration of an institutional fund has become impractical or wasteful, impairs the management or investment of the fund or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund, the institution, without application to the court, but with the consent of the Attorney General given in accordance with procedures adopted pursuant to Section 3.0, may modify the restriction. This Section 1.0 shall apply only if the fund subject to the restriction has a total value of seventy five thousand dollars ($75,000) or less, as determined as of the end of the institution's last fiscal year, and has been in existence for twenty (20) years or longer. To the extent practicable, the modification shall be made in accordance with the donor's probable intention.

2.0 Administrative Cy Pres.

If an institution determines that a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund has become unlawful, impracticable, impossible to achieve or wasteful, the institution, without application to the court, but with the consent of the Attorney General given in accordance with procedures adopted pursuant to Section 3.0, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. This Section 2.0 shall apply only if the fund subject to the restriction has a total value of seventy five thousand dollars ($75,000) or less, as determined as of the end of the institution's last fiscal year, and has been in existence for twenty (20) years or longer.

3.0 Attorney General Procedures.

The Attorney General may adopt such requirements, definitions, forms and procedures for granting or withholding consent as are not inconsistent with the forgoing and applicable laws governing charitable funds.

4.0 De Novo Proceedings.

Any institution aggrieved by the decision of the Attorney General may proceed, de novo, under G.L. c. 180A, §§ 5(b) or 5(c).

Rule History

Adopted November 22, 2010, effective January 1, 2011.

1:24 Protection of Personal Identifying Information in Publicly Accessible Court Documents.

Section 1. Purpose and Scope.

This rule is intended to prevent the unnecessary inclusion of certain personal identifying information in publicly accessible documents filed with or issued by the Courts, in order to reduce the possibility of using such documents for identity theft, the unwarranted invasion of privacy, or other improper purposes. The rule applies to publicly accessible documents filed in civil and criminal cases; documents offered in evidence at any trial or hearing; and any order, decision, or other document issued by a court that will be publicly accessible. The rule does not prevent a document's filer from requesting more or less protection of personal identifying information than this rule requires. The rule does not limit a court's authority to enter specific orders in particular cases, and it does not relieve a filer of any greater obligations imposed by the law or a court. Further, the rule does not prohibit any Department of the Trial Court, or any appellate court, from adopting a rule or standing order providing additional protections for personal identifying information covered by this rule, or protecting additional categories of personal identifying information. The rule applies only to filings made after its effective date.

Section 2. Definitions.

As used in this rule, the following terms shall have the following meanings:

"Clerk" shall mean a Clerk, Clerk-Magistrate, Register of Probate, the Recorder of the Land Court, and their assistants.

"Court" shall mean all Departments of the Trial Court; the Appeals Court; and the Supreme Judicial Court.

“Document” shall mean any material filed in a court, in paper or electronic form.

“Filer” shall mean any person or entity, including a corporation or government entity, that files documents in a court, and is not limited to parties.

“Personal identifying information” shall mean a social security number, taxpayer identification number, driver’s license number, state-issued identification card number, or passport number, a parent's birth surname if identified as such, a financial account number, or a credit or debit card number.

“Redacted” shall mean a filing that either does not include complete personal identifying information or has portions of such information whited or blacked out so they are not readable.

Section 3. Personal Identifying Information: Requirement of Limited Disclosure.

When filing a document in court that will be publicly accessible, a filer may not, unless otherwise allowed by this rule, include personal identifying information, except when the filer redacts it as follows:

(a) Government-Issued Identification Numbers.

If a social security number, taxpayer identification number, driver’s license number, state-issued identification card number, or passport number must be included, all but the last four digits of that number shall be redacted.

(b) Parent’s Birth Surname, if Identified as Such.

If the birth surname of a person’s parent, identified as such, must be included, all but the first initial of the birth surname shall be redacted.

(c) Financial Account Numbers and Credit Card Numbers.

If a financial account number or credit or debit card number must be included, all but the last four digits of the number shall be redacted.

Section 4. Methods of Redaction.

Documents shall be redacted as set forth below.

(a) Documents Drafted for Filing in Court.

In the case of a document drafted for filing in court, the omitted information shall be replaced by three “x” characters or, where appropriate, by the phrase “beginning with” or “ending in.”

(b) All Other Documents.

In all documents that were not drafted for filing in court, such as copies of pre-existing exhibits, the filer shall partially redact all personal identifying information as required by this rule. All redactions shall be made in a way that prevents the redacted information from being read or made visible. Any document redacted in this way shall be clearly marked to show the name of the filer making the

redaction and the date on which it was made. The location of each redaction in the document must be visible. The filer shall keep an unredacted copy of the document while the case is pending, including during any related appeal, and furnish it (i) to the court promptly upon request, and (ii) to any party promptly upon that party's request, or if such a request is refused, the court may order production upon the requesting party's motion showing good cause and affirming that the information will be secured in a manner sufficient to avoid misuse or disclosure to third parties.

Section 5. General Exceptions.

Unless the court orders otherwise, unredacted personal identifying information may be included in documents filed with the court if any of the following exceptions applies:

(a) A law, court rule, standing order, court-issued form, or an order issued in the proceeding specifically requires including the personal identifying information in the document.
(b) The document including the personal identifying information is a transcript of the court proceeding, filed directly by a court reporter or transcriber, or is the official record of another court proceeding, filed by that court.
(c) The document including the personal identifying information is a record of administrative adjudicatory or quasi-adjudicatory proceedings, filed by the administrative agency, and the applicable department of the Trial Court or other court has adopted its own rule or standing order governing redaction of personal identifying information in such records.
(d) The document including the personal identifying information is produced directly to or in the court by a nonparty in response to a subpoena, summons or other court order, and is not publicly accessible. Any party that intends to offer such a document in evidence shall make a copy of it, redact the copy as required by this rule, and offer the redacted copy.
(e) The document includes a financial account number that is necessary to identify an account that is the subject of a forfeiture proceeding, in which case the number need not be redacted.

Section 6. Exceptions in Criminal and Youthful Offender Cases.

In criminal and youthful offender cases, unless the court orders otherwise, the following documents need not be redacted when filed originally, but shall be redacted when attached by an attorney as exhibits unless the original filing is in the same court file:

(a) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of a criminal case or is not filed as part of any docketed criminal case;
(b) an arrest or search warrant; or
(c) a charging document, including an application for a criminal complaint, and supporting documents filed in support of any charging document.

Section 7. Responsibility for Redaction.

The filer is responsible for redacting personal identifying information. The clerk will not review each filed document for compliance.

Section 8. Noncompliance.

(a)

In the event of a filer's noncompliance with this rule, the court, on its own initiative or on motion of a party or the person whose personal identifying information is at issue, may require corrective action. Corrective action may include, but is not limited to: (i) striking and returning to the filer any noncompliant document, with or without an order that a properly-redacted copy be filed in its place; (ii) requiring the filer to file a redacted version of the document and move to impound the unredacted version; (iii) forfeiting any protection under this rule for the filer's own personal identifying information, if the information has become public or if other parties or persons would be unduly prejudiced by treating the information as protected, or if the filer's noncompliance is either willful or repeated; (iv) entering orders to ensure the filer's future compliance or to protect the interests under this rule of other parties and persons; and (v) imposing monetary sanctions, if the filer's noncompliance is either willful or repeated.

(b)

The filer shall have the burden to prove any claim that the noncompliance was inadvertent. The filing of a document that contains the filer's personal identifying information does not by itself make this rule inapplicable to that information. If a filer files a document that includes another person's personal identifying information, that person or any other interested person may still move for an order impounding the document or requiring that it be returned to the filer and that a properly-redacted copy be filed in its place. A filer may waive the applicability of this rule to the filer's own personal identifying information, but only by an express statement of waiver filed in writing or made in open court.

Section 9. Applicability to Court Orders and Other Court-Issued Documents.

In any order, decision, or other document issued by the court that will be publicly accessible, the court shall avoid including a complete version of any personal identifying information covered by this rule, unless including it (a) is specifically required by law, court rule, standing order, or court-issued form or (b) is necessary to serve the document's purpose.

Section 10. Appellate Court Filings.

In addition to the other requirements of this rule, filers in the Supreme Judicial Court, the Appeals Court, or the Appellate Divisions of the District and Boston Municipal Courts shall comply with the following requirements:

(a) Brief.

If a filer includes any complete personal identifying information in a publicly accessible brief, the filer shall at the same time file one additional, unbound copy of the brief, with that personal identifying information redacted according to this rule, clearly marked "Limited Personal Identifying Information" on the cover and without including any addendum or appendix.

(b) Record Appendix.

If a document to be included in the record appendix was redacted when filed in or issued by the trial court, the same version of the document shall be included in the record appendix. If a document to be included in the record appendix was not redacted when filed in or issued by the trial court, even where complete personal identifying information was included under an exception in Section 5 or 6, the party that wants to include the document in the record appendix shall redact it as required by Section 3, unless the party obtains leave of the appellate court to include the document in unredacted form.

Rule History

Adopted July 22, 2016, effective November 1, 2016.

Commentary of the Standing Advisory Committee on the Rules of Civil and Appellate Procedure on S.J.C. Rule 1:24

This Commentary was drafted by the Supreme Judicial Court's Standing Advisory Committee on the Rules of Civil and Appellate Procedure, which recommended the adoption of this Rule. The Court's Standing Advisory Committee on the Rules of Criminal Procedure furnished helpful input on Section 6 and the Commentary thereto. The Commentary does not constitute part of the Rule and has not been formally adopted by the Court but is provided as an aid to understanding and applying the Rule.

Section 1

This rule applies to paper documents, as well as to electronic documents that are now or may in the future be filed with or issued by all Departments of the Trial Court; the Appeals Court; and the Supreme Judicial Court. The rule does not govern the separate question whether various court documents should be made publicly available on the Internet.

The reference in Section 1 to "greater obligations imposed by the law or court" is intended to include statutes and rules that require, or authorize a court to require, impoundment or confidentiality, however labeled. See, e.g., G.L. c. 265, § 24C (requiring that court records containing rape victims' names be "withheld from the public"); G.L. c. 6, § 178M (on judicial review of Sex Offender Registry Board decisions, records to be kept "confidential and . . . impounded"); G.L. c. 209A, § 8 (requiring that certain personal information filed in connection with requests for abuse prevention orders be "withheld from public inspection except by order of the court"); Mass. R. App. P. 16(m) (governing "references to impounded material"). Litigants should also be aware that other court rules, such as the forthcoming Uniform Rules on Access to Court Records (Trial Court Rule XIV), may impose limits on whether or how certain personal information may be included in court filings.

Section 2

The term "filer" as used in Section 2 and throughout this rule includes any person or governmental or other entity making a filing (including, e.g., persons applying for criminal complaints, police

officers applying for search warrants, putative interveners, and amici curiae) regardless of their status as parties.

In the definition of "Personal identifying information," the term "financial account numbers" includes, but is not limited to, insurance policies, and account numbers and loan numbers assigned by financial service providers.

Section 3

Section 3 refers to "filing" documents in court. Exhibits offered at evidentiary hearings, although not "filed" as that term is used in Mass. R. Civ. P. 5 or Mass. R. Crim. P. 32, are subject to this rule. Prior to trial or other evidentiary hearing, the parties should discuss how to handle exhibits in compliance with this rule, as well as any issues of waiver of the rule's protection pursuant to Section 8.

Section 4

In the case of documents drafted for filing in court as described in Section 4(a) (e.g., motions, memoranda, and affidavits, as opposed to pre-existing exhibits), this rule does not require the filer to prepare a second version with complete personal identifiers. Nothing in this rule limits the court's power to order that such complete information be supplied to other parties or non-parties.

The provision in Section 4(b) requiring the filer to mark redactions creates a record that helps protect against claims of improper alteration of documents. Particularly in documents with multiple redactions, the required notation of each redaction need be no more than an asterisk or similar mark, together with a single statement, on or accompanying the document, explaining that redactions so marked were made by the filer on a specified date.

Section 5

The exception in Section 5(a) does not permit inclusion of complete personal identifying information in a filing merely because such information may be useful to include in an order to be issued in the proceeding as requested by the filing. Alternatives are often available.

Thus, a motion for an order to a third party to produce records, such as a person's hospital records under G.L. c. 233, § 79, or a person's criminal offender record information (CORI), shall not include the person's unredacted personal identifying information. The motion and any resulting order may instead include redacted information, and the moving party may then, at the time the order is served on the entity required to respond to it, provide any unredacted information the entity requires in order to respond.

Similarly, a filer shall not include bank or other asset account numbers in court filings in connection with court orders that serve to secure assets to satisfy a judgment. If complete account numbers are necessary, the filer (usually the plaintiff) may provide this information separately, along with any other unredacted personal identifying information necessary to identify an account holder, to those who may need it to carry out the order.

Likewise, a bank responding to a trustee summons shall not include the entire account number in the trustee's answer. Section 1 and Section 9 recognize that courts and filers retain flexibility to deal

with such situations without unnecessarily making personal identifying information publicly accessible.

The exception in Section 5(b) for transcripts is included to avoid undue burden on the court reporter or transcriber. Section 5(b) also creates an exception for the official record of another court proceeding, filed by that court, e.g., in a certiorari action under G.L. c. 249, § 4, for review of a District Court or Boston Municipal Court decision. Ordinarily the documents in that record will already have been redacted in accordance with this Rule, either by the parties at the time of filing or by the court at the time of issuance. This provision of Section 5(b) makes clear that the court need not independently review all of those documents to ensure that they were properly redacted.

The exception in Section 5(c) recognizes that departments of the Trial Court or the appellate courts may adopt their own rules or standing orders governing redaction of personal identifying information in the official record of an administrative adjudicatory proceeding filed by the administrative agency. This provision is included to afford flexibility to the courts in dealing with the particular redaction problems raised by the filing of these often voluminous records. The term "adjudicatory proceedings" refers to proceedings that are judicially reviewed primarily or exclusively on the agency record, under G.L. c. 30A or other law such as G.L. c. 249, § 4. The qualifier "adjudicatory" is used because the reasons for different treatment of the records of such proceedings are less likely to apply to documents concerning other, less formal administrative proceedings.

The exception in Section 5(d) is intended to cover documents produced by a non-party pursuant to Mass. R. Civ. P. 45(b), Mass. R. Crim. P. 17(a)(2), Superior Court Rule 13 and G.L. c. 233, § 79 (hospital records), and similar court rules or laws. It is intended to be consistent with the Dwyer protocol applicable to defendants' motions for Rule 17(a)(2) summonses. See Commonwealth v. Dwyer, 448 Mass. 122, 147-50 (2006). The exception recognizes that requiring the non-party to redact, particularly where some or all of the records may never become available to the public, would be unduly burdensome.

Section 6

This section is based, with some Massachusetts-specific alterations, on Fed. R. Crim. P. 49.1(b)(7)-(9). This section addresses special considerations related to charging documents and documents created by police or other investigative entities prior to the initiation of a criminal case. Requiring redaction of such documents would impose a substantial burden on these law enforcement agencies, which necessarily must document the personal identifying information relied upon for investigative purposes. Moreover, requiring redaction of these documents would deprive clerks initiating a new criminal case or issuing an arrest warrant of the information necessary to properly identify the defendant and enter the case or warrant into, and search for existing information about the defendant already contained in, databases such as MassCourts and the warrant management system. This is necessary to ensure, among other things, that information about prior cases or warrants involving that defendant is available to the court in the pending matter, and that information about the pending matter is available to the court in any future cases involving that defendant.

Unlike the federal rule, however, Section 6 does ordinarily require redaction when one of these documents is filed by an attorney as an exhibit in another case. Thus, an attorney might need to file a search warrant, District Court charging document, or police report attached to an application for a criminal complaint, as an attachment to a motion to dismiss or suppress, or an opposition thereto, in a related Superior Court case. In that circumstance, there would be no burden on the investigative agency or need for the Superior Court clerk to have access to that information. The attorney, therefore, would be required to redact the document of personal identifying information. If that document, however, already appeared in the same court file (for example, an application for complaint attached to a District Court motion to dismiss), there would be no point in redacting the document when filed as an exhibit, and an attorney would not need to do so.

In any event, the court may make other orders regarding the redaction of documents in a criminal case file, if a different practice is warranted in a particular case.

Section 7

This section makes clear that clerks are not responsible for reviewing every filed document for compliance, but it does not preclude clerks from reviewing selected documents for compliance—for example, at the time a member of the public asks to see a case file.

Section 8

In determining issues concerning corrective action, the court has the discretion to consider all relevant circumstances, including but not limited to whether the violation of this rule was willful or repeated, whether it has caused or is likely to cause harm to privacy interests or financial interests, and the nature and amount of information improperly filed in unredacted form.

Section 9

The exception in Section 9 for inclusion of complete personal identifying information where "necessary to serve the document's purpose" is included because some types of court documents, although directed to parties or non-parties that require specific identifying information, are included in the court file, where they are publicly accessible as a matter of law. Although the inclusion of personal identifying information should be minimized when drafting such documents, it must be recognized that sometimes, unredacted information will be necessary to serve the purpose of the document.

Section 10

Section 10(b)'s provision governing documents not redacted when filed in or issued by the trial court is included because the rationales underlying the exceptions in Sections 5 and 6 ordinarily would not apply, and would not serve any useful purpose if applied, to documents presented to the appellate court in the record appendix. If inclusion of an unredacted document is warranted, Section 10(b) allows the party to do so if leave of the appellate court is obtained.

1:25 Rules of Electronic Filing.

Rule 1: Scope.

(a) Scope.

These Rules of Electronic Filing (E-Filing Rules) shall govern the general procedures of electronic filing and service of documents in the participating Massachusetts trial and appellate courts, as supplemented by any procedures specified by a court or a court department relating to its particular case types and requirements. To the extent that any Massachusetts Court Rules and Orders concerning conventional filing methods are inconsistent with these rules, the E-Filing Rules shall govern.

(b) Court record.

The official court record in a case shall include electronic records or scanned records pertaining to that case, together with any documents and exhibits filed under the conventional method, which the clerk may convert into a designated electronic format.

(c) Use of these rules.

All filers shall become familiar with these E-Filing Rules and all training and documentation materials provided for use by the Provider or the court(s).

Rule History

Adopted June 7, 2018, effective September 1, 2018; amended May 22, 2020, effective June 1, 2020.

Rule 2: Definitions.

"Clerk" shall refer to the clerk, clerk magistrate, recorder, or register of any court, as well as his/her respective assistants or deputies.

"Conventional method" shall refer to court rules and procedures that would apply in the absence of electronic filing. Parties or counsel who are ordered or opt to proceed "conventionally," as provided in these E-Filing Rules, must follow the appropriate Massachusetts Court Rules and Orders.

"Electronic record" shall refer to the electronic record maintained on a court's case management and document management systems.

"Electronic filing," "e-filing," or **"electronically filed"** shall refer to the submission of documents through the e-filing system for purposes of filing in a case. E-mailing or sending a document by facsimile does not constitute "e-filing" a document.

"Electronic filing system" or **"e-filing system"** shall refer to the Provider's system of electronic filing and electronic service of documents via the internet.

"Electronic service" or **"e-service"** shall refer to the electronic transmission of a notice of filing to the electronic mail (e-mail) address of a party who has consented to electronic service through the

Provider. The notice will contain a hyperlink to access the document that was filed electronically for the purpose of accomplishing service. E-service according to these E-Filing Rules shall be deemed in compliance with the Massachusetts Court Rules and Orders that govern service and notice. Service of process or summons to gain jurisdiction over persons or property may not be made by e-service.

"Electronic signature" or **"electronically signed"** shall mean a signature from a User, judge, or clerk, that complies with the requirements set forth in Rule 13, below.

"Envelope" shall refer to a submission containing one or more filings to be filed in a single case by a filing User.

"Massachusetts Court Rules and Orders" shall mean the Rules of Civil, Criminal, and Appellate Procedure, the Rules of the Supreme Judicial Court, Appeals Court, and Trial Court, the Rules of the various Trial Court Departments, and the Rules Governing Time Standards and Case Management, together with all Standing Orders.

"Non-Registered Participant" shall mean a party to a case who has not registered with the Provider.

"PDF" shall mean "portable document format," the file format compatible with the latest version of Adobe Reader. Types of PDFs include electronically converted PDFs and scanned PDFs.

- ***Electronically converted PDFs*** are created from an electronic source (MS Word, WordPerfect, etc.) using Adobe Acrobat or similar software. They are text searchable, accessible, and their file size is small. Electronically converted PDFs are preferred.
- ***Scanned PDFs*** are created from documents run through an optical scanner. Scanned PDFs have a larger file size and lower quality image and should be avoided when possible. Pursuant to Rule 9(a), scanned PDFs must contain optical character recognition of text.

"Provider" shall refer to the Electronic Filing Service Provider designated by the courts.

"Provider Notification" shall mean a provider-generated notice acknowledging activity within the e-filing system.

"Public access terminal" shall mean a publicly accessible computer provided by a court for the purposes of allowing e-filing and viewing public electronic court records. The public access terminal shall be located at the courthouse and will be available during normal business hours.

"Service Contact" shall mean an individual to be served electronically by the electronic filing system.

"User" shall refer to a participant in a case who has properly registered with the e-filing system.

"User ID" shall refer to the e-mail address provided during registration that is used to login to the e-filing system.

"Waiver Account" shall refer to a method whereby court and provider fees may be waived. The acceptance of any document filed under a waiver account shall be subject to the court's determination that use of the account is appropriate, given the nature of the filing.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 3: Eligibility and conditions of registration.

(a) Eligibility.

Participation in the Electronic Filing Program shall be determined by order of the particular department or court. In general, registration for the Electronic Filing Program may include:

(1) Attorneys who are members of the Massachusetts Bar.
(2) Attorneys who are admitted to practice in a Massachusetts court pro hac vice.
(3) Self-represented parties.
(4) Any non-party who is seeking or has obtained permission of the court to participate in the case (e.g., a witness seeking a protective order, an intervenor, amicus curiae, or court investigator).

(b) Registration.

Registration is accomplished by completing the online e-filing system registration, a link to which is available on the Provider's website. An e-mail address will be required for registration.

(1) Attorneys who are members of the Massachusetts Bar shall register for a firm account and furnish their primary business e-mail address on file with the Board of Bar Overseers, and shall keep their account e-mail up to date.
(2) Non-attorneys who are representing themselves and attorneys who are not members of the Massachusetts Bar shall register for a self-represented account, unless otherwise ordered.
(3) An attorney representing him or herself shall register for a self-represented account with a unique e-mail address.

(c) Law firm or agency registration.

The Provider shall allow a firm or agency administrator to register a central account profile on behalf of a firm or agency's multiple Users. Once an administrator has completed this central registration, the administrator can add additional Users to that account.

(d) Conditions of registration.

By registering, the User acknowledges that:

(1) Registration shall constitute consent to receipt of Provider notifications, electronic court notifications, and e-service in all cases.
(2) It is the User's responsibility to ensure that the court and the Provider have the User's correct e-mail address at all times. Users shall update the Provider within 7 days of any change in the information provided at registration.

(e) User ID.

The e-mail address provided during registration will serve as a unique User ID.

(f) User password.

At registration the User must designate a unique password in accordance with the specifications given by the Provider. Users may reset their password for the e-filing system at any time.

(g) Confidentiality of user ID and password.

The combination of the User ID and password shall be used only by the User and any other person that the User authorizes. Use of the User ID and password shall be deemed authorized by the User. Users should contact the court if they believe a filing was submitted falsely under their User ID.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 4: Electronic filing procedures.

(a) E-filing through the provider.

E-filing shall be performed only through the Provider's e-filing system. The Provider shall receive electronic filings 24 hours per day except when undergoing maintenance or repair.

(b) Receipt of provider notifications.

Whenever a User submits a document to the court through the e-filing system, a Provider Notification will automatically generate and transmit to the User, acknowledging the submission. Provider notifications shall also be sent at the time the court accepts or rejects any submitted document.

(c) Determination of date of filing and commencement of civil action.

(1) Date of Filing.

Any document submitted through the e-filing system by 11:59 P.M. on a business day shall be deemed filed on that date, unless it is rejected by the court. See Rule 4(d). A document submitted on a Saturday, Sunday, or legal holiday shall be considered filed the next business day, unless it is subsequently rejected by the court.

(2) Commencement of Civil Action.

The date of filing provided in Rule 4(c)(1) shall constitute the date of filing of any case initiating document or entry fee when determining the commencement of an action under Mass. R. Civ. P. 3.

(d) Clerk's review of electronically filed documents.

Prior to entry upon the docket, the clerk shall review each document submitted through the e-filing system for compliance with these E-filing Rules, the court's Electronic Filing Program, and the Massachusetts Court Rules and Orders. Upon the clerk's acceptance, the document shall be considered "filed" with the court at the time the original submission to the e-filing system was complete, as stated on the Provider Notification transmitted pursuant to Rule 4(b), subject to Rule

4(c), and a Provider Notification of the acceptance will be transmitted. If a filing is rejected, the filing User will receive notice from the Provider, which shall note the rejection and the court's reason(s) therefore.

(e) Correction of errors.

Upon the discovery of any error made during the e-filing process, the User may cancel the transaction while the cancel option is available in the e-filing system. The cancel option is not available once the court begins the review process pursuant to Rule 4(d). After this period, the User should abide by the Massachusetts Court Rules and Orders for correcting filings containing errors.

(f) Exchange of discovery and other materials.

The e-filing system may be used for the electronic exchange of discovery materials and other communications between the parties that are not intended to be filed with the court. Use of the e-filing system for these purposes should be decided by the parties.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 5: Rejection of electronic documents for technical nonconformance with the rules of court.

The clerk may reject any document filed electronically for any technical nonconformance with the Rules of Court and may identify the error to be corrected and may state a deadline for the party to resubmit the document in a conforming format. This rule shall not, however, extend the mandatory or statutory time, including any statute of limitations, for the filing of such document.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 6: Electronic filing and service of civil case initiating documents.

(a) Filing of case initiating documents.

Where permitted by a court, case initiating documents, such as a complaint or petition, may be submitted for filing through the e-filing system, accompanied by electronic payment of the required filing fee. Motions to waive fees may be submitted through the e-filing system in accordance with Rule 8(d).

(b) Court action upon acceptance of case initiating document.

Upon acceptance of a case initiating document for filing, a case number will be assigned and the document will be processed. If the case initiating document is rejected, the User will be informed as provided in Rule 4(d).

(c) Service of case initiating documents shall be by conventional methods.

Unless otherwise determined by the court, or unless the responding party has consented in writing to accept electronic service or service by some other method, case initiating documents shall be served by conventional methods, together with a notice to the responding party stating that the case has been electronically commenced.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 7: Service of electronically filed documents.

(a) All documents e-filed must be served.

Except as otherwise provided in the Massachusetts Court Rules and Orders, or as otherwise ordered by the court, all electronically filed documents must be served on all other parties. Any document filed through the e-filing system must include a certificate of service. Subject to a court's specific requirement, the certificate of service may appear as a part of the document being filed or may be filed as a separate document.

(b) Electronic service accomplished through the electronic filing service provider; conventional service required for non-registered participants.

All Users in a case may be served electronically through the e-filing system, even when the parties to a case comprise both Users and Non-Registered Participants. When the parties to a case comprise both Users and Non-Registered Participants, the User submitting the document for filing through the e-filing system is responsible for serving a copy of the document to all parties who are Non-Registered Participants in accordance with other Massachusetts Court Rules and Orders.

(c) Conventional service required if electronic service notification is undeliverable.

If a filing User receives notice that electronic service on any party was undeliverable, the filing User shall then serve the document on that party by conventional methods.

(d) Electronic notification shall signal completion of electronic service.

Electronic service shall be deemed complete at the time of transmission to the e-mail account of the Service Contact.

(e) Calculation of time to respond.

For the purpose of computing time to respond to documents electronically filed, whenever a User has the right or is required to do some act within a prescribed period after the completion of

electronic service of a notice or other documents upon him/her and the notice or document is either served upon him/her by electronic means, or the document was filed electronically and served by conventional methods, three days shall be added to the prescribed period.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 8: Payment of fees.

(a) Provider may charge fee for civil filings.

The e-filing Provider may charge a fee per case for its services related to filings in civil cases, in an amount approved by the Supreme Judicial Court. The Provider fee shall be paid by the plaintiff, appellant or petitioner when a case is initiated by e-filing, unless the filing fee has been waived by the court. Regardless of whether a case is initiated by e-filing or by conventional methods, no Provider fee will be charged for any subsequent e-filing made by any party to the case. The Provider will provide for one or more methods of payment.

(b) Provider may charge fee for non-indigent criminal defendant filings.

The e-filing Provider may charge a fee for its services related to filings in criminal cases only when counsel is not appointed pursuant to S.J.C. Rule 3:10 and the defendant is not indigent.

(c) Payments shall be made at time of filing.

All applicable fees are due and payable at the time of e-filing unless waived by the court. Failure to timely pay a required fee may cause the document submitted to be refused by the clerk under Rule 4(d) or stricken by the court. The payment will be debited when the clerk accepts the document.

(d) Payments shall be transmitted through the e-filing system.

Users shall make any payment due to the clerk through the e-filing system unless otherwise ordered by the court.

(e) Request to waive court fees.

Where permitted by the court, Users may submit a motion for waiver of court fees accompanied by a separate affidavit of indigency through the e-filing system. If the court allows a waiver of a court fee, any related Provider fee shall also be waived.

(f) Request to waive provider fees.

Upon request, the court shall waive a Provider fee upon a showing the filing party is indigent or is represented by court-appointed counsel.

(g) Recoverable costs.

The cost of any convenience fees and other administrative fees levied for the ability to pay fees or costs by credit card or other means, including, but not limited to, Provider fees for electronic filing

of documents or pleadings with the court, may be recovered pursuant to any applicable Massachusetts Court Rules and Orders.

Rule History

Adopted June 7, 2018, effective September 1, 2018; amended May 22, 2020, effective June 1, 2020.

Rule 9: Format and content of documents.

(a) Documents shall be filed in searchable PDF.

Except where specifically provided, all documents submitted for e-filing must be in searchable Portable Document Format (PDF). Documents should be submitted as electronically converted PDFs rather than scanned PDFs whenever possible. Scanned PDFs shall be made searchable using optical-character-recognition software, such as Adobe Acrobat. Documents shall not be locked or otherwise password protected.

(b) Documents shall be formatted in compliance with Massachusetts court rules and orders.

Users shall format all documents in accordance with the Massachusetts Court Rules and Orders governing formatting of paper documents, including page limits and font style and size, unless a deviation has been allowed by court order.

(c) Internal links are allowed.

Each document submitted for e-filing may contain electronic links, but only to navigate within the same document.

(d) Paper filing required.

Each court may identify documents that must be filed by conventional methods in paper form only.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 10: File size limitations and legibility.

(a) File size limitations.

The Provider has set a maximum megabyte size for each document, and a maximum envelope size for all documents contained in one envelope. A User must limit the size of each electronically filed document, and the total size of all the documents filed within one envelope, to comply with the maximum file size and envelope size permitted by the Provider. Documents exceeding those limits cannot be transmitted by the Provider.

(b) Submission of oversized documents.

Documents or envelopes larger than the maximum allowed file size may be submitted for e-filing if they are broken up into separate segments, each of which complies with the Provider's size

restrictions. The User shall indicate in the document "Description" field that a filing is part of multiple parts (for example, "Volume 1 of 2").

(c) Scan settings for text documents.

To minimize file size, Users must configure their scanners to scan text documents at 200 dpi and in black and white rather than in color.

(d) Color and high resolution images.

For documents that consist of images beyond text, such documents shall be scanned at sufficient resolution to ensure a legible and accurate representation of the image. Black and white images should be scanned in grayscale. Images should only be scanned in color if color is relevant, such as color photographs used as an exhibit.

(e) Users must verify document legibility and orientation.

A PDF produced under these rules must be of high quality sufficient to ensure a legible and accurate reading of the entire document. A User must verify the legibility and orientation of scanned documents before submitting them for e-filing.

Rule History

Adopted June 7, 2018, effective September 1, 2018; amended May 22, 2020, effective June 1, 2020.

Rule 11: Filing of impounded information.

(a) Filing of impounded documents.

Except as otherwise provided, impounded documents should be filed in hard copy with the clerk's office. Such documents must be clearly labeled as impounded, with the appropriate accompanying notice of impoundment or motion to impound pursuant to the Uniform Rules of Impoundment Procedure, and any other applicable Massachusetts Court Rules and Orders.

(b) Electronic filing of impounded documents.

When permitted by a court, impounded documents may be e-filed through the e-filing system. The User shall identify the document as impounded at the time of filing.

(c) Identification of impounded documents by user.

Where an impounded document is submitted through the e-filing system, the User shall mark the cover or first page of the document as impounded.

(d) Motions to impound.

A User may submit for e-filing a motion to file an impounded document. If the motion is granted, the User shall then submit by conventional methods the impounded document to the clerk's office for filing. A paper copy of the order granting the motion must be attached to documents so filed and delivered to the clerk.

(e) Confidentiality.

The confidentiality of an electronic record or an electronic or paper copy thereof is equivalent to that of a paper record. Where an impounded document is scanned or otherwise placed in the e-filing system, access may be permitted only to the extent provided by law.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 12: Protection of personal identifying information.

Publicly accessible documents filed with the court shall conform to Supreme Judicial Court Rule 1:24, Protection of Personal Identifying Information in Publicly Accessible Court Documents. A User is responsible for redacting personal identifying information. The clerk will not review filed documents for compliance. See S.J.C. Rule 1:24, § 7.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 13: Electronic signature.

(a) Attorneys.

An attorney's use of the e-filing system to file documents shall serve as the attorney's signature for purposes of Mass. R. Civ. P. 11 and for all other purposes under the Massachusetts Court Rules and Orders. In addition, all documents submitted for e-filing must include either a scan of the individual's handwritten signature, an electronically inserted image intended to substitute for a signature, or a "/s/ name of signatory" block, which shall have the same validity and effect as a handwritten signature, and must set forth the attorney's name, Board of Bar Overseers number, address, telephone number, and e-mail address.

When using the "s" option, the name of the User must be preceded by an "/s/" and typed in the space where the signature would otherwise appear. For example:

/s/ John A. Smith

John A. Smith

BBO#123456

123 Main Street

Boston, MA 02210

617-123-4567

jasmith@internetprovider.com

(b) Self-represented litigants.

All documents submitted for e-filing must include either a scan of the individual's handwritten signature, an electronically inserted image intended to substitute for a signature, or a "/s/ name of signatory" block, which shall have the same validity and effect as a handwritten signature, and must set forth the individual's name, address, telephone number and e-mail address. When using the "s" option, the "/s/" must be typed in the space where the signature would otherwise appear. For example:

/s/ John B. Doe

John B. Doe

123 Main Street

Boston, MA 02210

617-123-4567

johnbdoe@isp.com

(c) Multiple signatories.

A User who submits a document for e-filing that bears more than one signature (e.g., stipulations, joint motions, joint status reports, etc.) must ensure that all signatures comply with Rule 13(a) and (b).

(d) Signature of notary; retention of original.

Notarized documents containing a handwritten signature and physical seal may be submitted for e-filing. The User shall submit a scanned copy of the notarized document through the e-filing system, and the court shall maintain the scanned document as the official court record. The court may require the User to produce the original paper document. The User shall retain the original for future production, if necessary, until two years after the conclusion of the case, including any appeal.

(e) Summons and complaint.

A summons and complaint, petition, or other case initiating document that is signed in compliance with this Rule bears a sufficient signature under any applicable Massachusetts Court Rules and Orders.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 14: Orders and judgments.

(a) Orders and judgments may be electronically signed.

The assigned judge or clerk may electronically sign all orders, judgments, and notifications.

(b) Electronic signatures shall have the force of conventional signatures.

Any order signed electronically has the same force and effect as if the judge or clerk had affixed his/her signature to a paper copy of the order and it had been entered on the docket in the conventional method.

(c) Clerk may enter orders by text-only entry.

A clerk may enter orders, issued by a judge or clerk as the case may be, by a text-only entry upon the docket. The text-only entry shall constitute the court's only order on the matter.

(d) Notification.

All Users and Non-Registered Participants of record in the case will receive notification either electronically or by conventional methods.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 15: Technological failures and timeliness of filing.

(a) Technological failure of the provider may excuse untimely filing.

A User whose filing is made untimely as a result of a technological failure of the Provider may seek appropriate relief from the court. The court may enter an order permitting the document to be deemed filed or served as of the date it was first attempted to be transmitted electronically. If appropriate, the court may adjust the schedule for responding to these documents or for the court's hearing, or provide other relief.

(b) Scheduled maintenance will not excuse untimely filing.

Notice of known system outages or maintenance will be posted by the Provider in advance on the User login screen. The notice will be posted as soon as the scheduled date and time is confirmed. Users will also receive e-mail notification of the upcoming downtime. Scheduled maintenance will not constitute a technological failure under these E-Filing Rules nor excuse an untimely filing.

(c) User error will not excuse untimely filing.

Problems on the User's end, e.g., problems with the User's Internet Service Provider (ISP), hardware, or software problems, will not constitute a technological failure under these E-Filing Rules nor excuse an untimely filing.

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Rule 16: Title.

These rules may be known and cited as the Massachusetts Rules of Electronic Filing (Mass. R. E. F.).

Rule History

Adopted June 7, 2018, effective September 1, 2018.

Chapter One A: General Rules' Partially Superseded by the Massachusetts Rules of Civil Procedure or the Massachusetts Rules of Criminal Procedure

1:01A Assignment of Counsel in Noncapital Cases. [Repealed]

Repealed May 29, 1986, effective July 1, 1986.

1:02A Depositions and Discovery.

(Applicable to certain civil cases.)

Section 1. Depositions Pending Action.

(a) When Depositions May Be Taken.

Any party to an original civil proceeding pending in the Supreme Judicial Court, other than such a proceeding governed by the Massachusetts Rules of Civil Procedure, or to a civil proceeding pending in the Land Court Department, other than such a proceeding governed by the Massachusetts Rules of Civil Procedure, may take the testimony of any person, including a party, by deposition upon oral examination for the purpose of discovery or for use as evidence or for both purposes. After service of process the deposition may be taken without leave of court except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff prior to the time allowed the defendant for appearance; or where in an action at law there is no reasonable likelihood that recovery will exceed five thousand dollars if the plaintiff prevails; or in an action at law there has been a hearing before an auditor. The attendance of witnesses may be compelled by the use of summons or subpoena as provided by Section 4(a). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of Examination.

Unless otherwise ordered by the court as provided by Section 4(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending proceeding, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. The party taking the deposition shall not require the production or submission for inspection of any writing, plan, recording, model, photograph, or other thing prepared by or for the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the court otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship; nor shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Section 7(b) the conclusions of an expert. The deponent may not be examined on or be required to produce for inspection any liability insurance policy or indemnity agreement unless such policy or agreement would be admissible in evidence at the trial of the action.

(c) Examination and Cross-Examination.

Examination and cross-examination of deponents may proceed as permitted at trial in the court where the proceeding is pending.

(d) Use of Depositions.

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1)

Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2)

The deposition of a party or of any one who at the time of taking the deposition was an officer, director or managing agent of a public or private corporation which is a party may be used by an adverse party for any purpose.

(3)

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is dead; or (ii) that the witness is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) that the party offering the deposition has been unable to procure the attendance of the witness by

subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4)

If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts. Substitution of parties does not affect the right to use depositions previously taken; and, when a proceeding in any court of the United States or of any state has been dismissed and another proceeding involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former proceeding may be used in the latter as if originally taken therefore.

(e) Objections to Admissibility.

Subject to the provisions of Sections 2(b) and 5(c), objections may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) Effect of Taking or Using Depositions.

A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subsection (d) of this section. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

Section 2. Persons Before Whom Depositions May Be Taken.

(a) Within the Commonwealth.

Within the Commonwealth depositions shall be taken before an officer authorized to administer oaths by the laws of the Commonwealth or the United States, or before a person appointed by the court, in which the proceeding is pending. A person so appointed has the power to administer oaths and take testimony.

(b) Outside the Commonwealth.

Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, whether by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in

any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the state, territory, or country]." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

(c) Disqualification for Interest.

No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee or partner or associate of such attorney or counsel, or is financially interested in the proceeding.

Section 3. Stipulations Regarding the Taking of Depositions.

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like any other depositions.

Section 4. Procedures for Depositions Upon Oral Examination.

(a) Notice of Examination: Time and Place.

A party desiring to take the deposition of any person upon oral examination, at least seven days before the time of the taking of the deposition, shall give notice in writing to every other party to the proceeding and file a copy of the notice in court in the proceeding. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party to the proceeding, the court may for cause shown enlarge or shorten the time. A resident of the Commonwealth shall not be required by subpoena to travel a distance of more than fifty miles from his place of residence or from his place of business or employment, unless the court otherwise orders. A nonresident of the Commonwealth may be required by subpoena to attend only within fifty miles from the place within the Commonwealth wherein he is served with a subpoena, or at such other convenient place as is fixed by an order of court. The court may regulate at its discretion the time, place and order of taking depositions as shall best serve the convenience of the parties and witnesses and the interests of justice.

(b) Orders for the Protection of Parties and Deponents.

After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the proceeding is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the

scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the proceeding and their officers or counsel, or that the deposition be sealed and opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, undue expense, embarrassment, or oppression. The court may in its discretion where notice is given of the taking of depositions outside the state and at great distances from the place where the case is to be tried, require the party taking the deposition to pay the traveling expenses of the opposite party and of his attorney where their attendance is reasonably necessary at the taking of said deposition; and where it appears that the witness whose deposition is sought is under the control of the party taking the deposition, the court may require such witness to be brought within the state and his deposition taken there. The power of the court under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.

(c) Record of Examination; Oath; Objections.

The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. The cost thereof shall be borne by the party taking the deposition, except that the court may for cause shown order the cost of stenographer or transcription equitably apportioned among the parties. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination.

At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, any justice of the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the proceeding is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

(e) Submission to Witness; Changes; Signing.

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Section 5(d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer; Copies; Notice of Filing.

(1)

The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the proceeding and marked "Deposition of [here insert name of witness]" and shall promptly deliver or mail it to the clerk of the court in which the proceeding is pending. The parties by stipulation may waive transcription and filing of the deposition.

(2)

Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3)

The party taking the deposition shall give prompt notice of its filing to all other parties.

(4)

Upon being filed, the deposition shall be open to inspection unless otherwise ordered by the court.

(g) Failure to Attend or to Serve Summons or Subpoena; Expenses.

(1)

If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2)

If the party giving the notice of the taking of a deposition of a witness fails to serve a summons or subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the

court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(h) Engagements of Counsel.

The engagement of counsel at the taking of a deposition shall be recognized to the extent that the court in which the proceeding is pending shall order upon application in writing to the court not less than three days prior to the time for the taking of a deposition.

Section 5. Effect of Errors and Irregularities in Depositions.

(a) As to Notice.

All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to Disqualification of Officer.

Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known as could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1)

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2)

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(d) As to Completion and Return of Deposition.

Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Section 4 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Section 6. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Section 4(b), the court may (1) order any party to produce and permit

the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of examination permitted by Section 1(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, testing, or photographing the property or any designated object or operation thereon within the scope of examination permitted by Section 1(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Section 7. Physical and Mental Examination of Persons.

(a) Order for Examination.

In a proceeding in which the mental or physical condition of a party is in controversy, or may affect the conduct of the proceedings, the court in which the proceeding is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) Report of Findings.

(1)

If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2)

By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that proceeding or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

Section 8. Refusal to Make Discovery; Consequences.

(a) Refusal to Answer.

If a party or other deponent refuses to answer any questions propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court for an order compelling an answer. If the motion is granted and if the court finds that

the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) Failure to Comply with Order.

(1) Contempt.

If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court, the refusal may be considered a contempt of court.

(2) Other Consequences.

If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this section requiring him to answer designated questions, or an order made under Section 6 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order under Section 7 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the proceeding in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) Failure of a Party to Attend or Serve Answers.

If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the proceeding or any part thereof, or enter a judgment by default against that party.

(d) Expenses Against the Commonwealth.

Expenses and attorney's fees are not to be imposed upon the Commonwealth under this section.

Section 9. Costs on Depositions.

The taxing of costs in the taking of depositions shall be subject to the discretion of the court. No costs shall be allowed unless the court finds that the taking of the deposition was reasonably necessary, whether or not the deposition was actually used at trial. Taxable costs may include the costs of service of summons or subpoena upon the deponent, the reasonable fee of the officer before whom the deposition is taken, the stenographer's reasonable fee for attendance, and the costs of transcription or such part thereof as the court may fix.

Rule History

Amended October 27, 1999, effective January 1, 2000.

1:03A Trustee Process.

(Applicable to certain civil cases.)

(1) Availability of Trustee Process.

In connection with any personal action or proceeding not governed by the Massachusetts Rules of Civil Procedure, the Massachusetts Rules of Domestic Relations Procedure (adopted by the judges of the Probate and Family Court Department), or the District/Municipal Courts Rules of Civil Procedure, trustee process may be used in the manner and to the extent provided by law, but subject to the requirements of this rule, to secure satisfaction of a judgment which the plaintiff may recover, provided, however, that no person shall be adjudged trustee for any amount due from him to the defendant for wages or salary for personal labor or services of the defendant except on a claim that has first been reduced to judgment or otherwise authorized by law; and in no event shall the attachment exceed the limitations prescribed by law.

(2) Necessity of Prior Hearing.

No trustee process may be served unless attachment on trustee process for a specified amount has been approved by order of the court. Except as provided in paragraph (8) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the trustee process over and above any liability insurance shown by the defendant to be available to satisfy the judgment.

(3) Procedure.

A plaintiff who desires to trustee goods, effects, or credits of the defendant shall file in the court to which the action is returnable the writ, properly completed, the declaration, and a motion for approval of attachment on trustee process. The motion shall be supported by affidavit or affidavits meeting the requirements set forth in paragraph (10) of this rule. Except as provided in paragraph (8) of this rule, a copy of the writ, declaration, motion and supporting affidavit or affidavits, together with notice of hearing thereon, shall be mailed to the defendant by certified mail, return receipt

requested, at his last known place of residence, or delivered to him, seven days (or if the credits to be attached include wages, ten days) at least before the date set for the hearing. Except as provided in paragraph (7) of this rule, any trustee process shall be served within thirty days after the date of the order approving the attachment. Promptly after the service of the trustee process upon the trustee or trustees, a copy of the trustee process with the officer's endorsement thereon of the date or dates of service shall be mailed to the defendant in the manner provided in paragraph (3).

(4) Appearance of Defendant.

Inclusion of a copy of the writ in the notice of hearing shall not constitute personal service of the writ upon the defendant. The notice shall inform the defendant that by appearing to be heard on the motion for approval of an attachment he will not thereby submit himself to the jurisdiction of the court nor waive service of the writ and summons or citation upon him in the manner provided by law.

(5) Answer by Trustee; Subsequent Proceedings.

A trustee shall file, but need not serve, his answer, under oath, or signed under the penalties of perjury, within the time prescribed in G.L. c. 246, § 10, unless the court otherwise directs. The answer shall disclose plainly, fully, and particularly what goods, effects or credits, if any, of the defendant were in the hands or possession of the trustee when the trustee process was served upon him. The proceedings after filing of the trustee's answer shall be as provided by law. A trustee's failure to file an answer within the time allowed by this rule shall subject him to default in accordance with law.

(6) Trustee Process in Third-Party Action.

Trustee process may be used by a party bringing a third-party action in the same manner as upon an original action.

(7) Subsequent Trustee Process.

Either before or after expiration of the applicable period prescribed in paragraph (3) of this rule for serving trustee process, the court may, subject to the provisions of paragraph (8) of this rule, order another or an additional service of the trustee process upon the original trustee. A trustee not named in the original writ may be served subject to the provisions of all paragraphs of this rule, except that if the defendant has previously been served with process the plaintiff need not mail him a copy of the writ; and if the plaintiff has previously filed any motion pursuant to paragraph (3) of this rule, or paragraph (3) of Rule 1:04A, he need not mail the defendant a copy of either the writ or the declaration.

(8) Ex Parte Hearings on Trustee Process.

An order approving trustee process for a specific amount may be entered ex parte upon findings by the court that there is a reasonable likelihood that the plaintiff will recover judgment in an amount equal to or greater than the amount of the trustee process over and above any liability insurance known or reasonably believed to be available, and that either (a) the person of the defendant is not subject to the jurisdiction of the court in the action, or (b) there is a clear danger that the defendant

if notified in advance of the attachment on trustee process will withdraw the goods, effects or credits from the hands and possession of the trustee and remove them from the Commonwealth or will conceal them, or (c) there is immediate danger that the defendant will dissipate the credits, or damage or destroy the goods or effects to be attached on trustee process. The motion for an ex parte order shall be accompanied by a certificate by the plaintiff or his attorney of the amount of any liability insurance which he knows or has reason to believe will be available to satisfy any judgment against the defendant in the action, and shall be supported by affidavit or affidavits meeting the requirements set forth in paragraph (10) of this rule.

(9) Dissolution or Modification of Ex Parte Trustee Process.

On two days' notice to the plaintiff, or on such shorter notice as the court may prescribe, a defendant whose goods, effects or credits have been attached on trustee process pursuant to an ex parte order entered under paragraph (8) of this rule may appear, without thereby submitting his person to the jurisdiction of the court, file a motion, supported by affidavit, for the dissolution or modification of the trustee process, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. One day at least before such hearing the plaintiff shall furnish the defendant with a copy of the writ, declaration, motion for the ex parte order, and supporting affidavits. At the hearing the plaintiff shall have the burden of justifying any finding in the ex parte order which the defendant has challenged by affidavit. Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of an attachment that is otherwise available by law.

(10) Requirements for Affidavits.

Affidavits required by this rule shall set forth specific facts sufficient to warrant the required findings and shall be upon the affiant's own knowledge, information or belief, and, so far as upon information and belief, shall state that he believes this information to be true.

(11) Form of Hearing.

At any hearing held under this rule, either party may adduce testimony and may call witnesses (including any opposing party).

(12) Definitions.

The term "plaintiff" shall include a petitioner; "defendant" shall include a respondent; "writ" shall include a summons or an order of notice in the action or proceeding; "declaration" shall include any initial pleading; and "judgment" shall include an order or decree.

1:04A Attachment.

(Applicable to certain civil cases.)

(1) Availability of Attachment.

Real estate, goods, chattels and other property may be attached in any personal action or proceeding, not governed by the Massachusetts Rules of Civil Procedure, the Massachusetts Rules of Domestic Relations Procedure (adopted by the judges of the Probate and Family Court Department), or the District/Municipal Courts Rules of Civil Procedure, in the manner and to the extent provided by law but subject to the requirements of this rule.

(2) Necessity of Prior Hearing.

No attachment upon an original writ may be made unless such attachment for a specified amount has been approved by a justice of the court to which the writ is returnable. The approval of such justice shall be endorsed upon the writ. Except as provided in paragraph (5) of this rule, such approval may be endorsed only after notice to the defendant and hearing and upon a finding by the court that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance shown by the defendant to be available to satisfy the judgment.

(3) Procedure.

A plaintiff who desires to attach real estate, goods, chattels or other property of the defendant shall file in the court to which the writ is returnable the writ in the action, properly completed, the declaration, and a motion for approval of the attachment. The motion shall be supported by affidavit or affidavits meeting the requirements of paragraph (7) of this rule. The motion shall be marked for hearing and, except as provided in paragraph (5) of this rule, a copy of the writ, declaration, motion, supporting affidavit or affidavits, and a notice of hearing shall be mailed to the defendant by certified mail, return receipt requested, at his last known place of residence, or delivered to him, seven days at least before the date set for hearing. Except as provided in paragraph (9) of this rule, any attachment shall be made within thirty days after the date of the order approving the attachment. Promptly after the attachment is made, a copy of the writ with the officer's endorsement thereon of the date of any attachment shall be mailed to the defendant in the manner provided in paragraph (3).

(4) Appearance of Defendant.

Inclusion of a copy of the writ in the notice of hearing shall not constitute personal service of the writ upon the defendant. The notice shall inform the defendant that by appearing to be heard on the motion for approval of an attachment he will not thereby submit himself to the jurisdiction of the court nor waive service of the writ and summons or citation upon him in the manner provided by law.

(5) Ex Parte Approval.

Approval of an attachment and endorsement thereof upon the writ may be granted ex parte upon findings by the court that there is a reasonable likelihood that the plaintiff will recover judgment in an amount equal to or greater than the amount of the attachment over and above any liability insurance known or reasonably believed to be available, and that either (a) the person of the

defendant is not subject to the jurisdiction of the court in the action, or (b) there is a clear danger that the defendant if notified in advance of attachment of his property will remove it from the Commonwealth or conceal or convey it, or (c) there is immediate danger that the defendant will damage, destroy or waste the property to be attached. The motion for such ex parte approval of attachment shall be accompanied by a certificate by the plaintiff or his attorney of the amount of any liability insurance which he knows or has reason to believe will be available to satisfy any judgment, and shall be supported by affidavit or affidavits meeting the requirements of paragraph (7) of this rule.

(6) Dissolution or Modification of Ex Parte Attachments.

On two days' notice to the plaintiff, or on such shorter notice as the court may prescribe, a defendant whose real estate, goods, chattels or other property has been attached upon a writ approved ex parte as provided in paragraph (5) of this rule may appear, without thereby submitting his person to the jurisdiction of the court, and move the dissolution or modification of the attachment. Such motion shall be heard and determined as expeditiously as the ends of justice require. At such hearing the plaintiff shall have the burden of justifying any finding made in the ex parte order which the defendant has challenged by affidavit. Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of an attachment that is otherwise available by law.

(7) Requirements for Affidavits.

Affidavits required by this rule shall set forth specific facts sufficient to warrant the required findings, and shall be upon the affiant's own knowledge, information or belief and, so far as upon information and belief, shall state that he believes this information to be true.

(8) Form of Hearing.

At any hearing held under this rule, either party may adduce testimony and may call witnesses (including any opposing party).

(9) Subsequent Attachment.

Property subject to attachment may, during the pendency of the action or proceeding, be attached subject to the provisions of this rule, except that if the defendant has previously been served with process the plaintiff need not mail the defendant a copy of the writ; and if the plaintiff has previously filed any motion pursuant to paragraph (3) of this rule, or paragraph (3) of Rule 1:03A, he need not mail the defendant a copy of either the writ or the declaration or similar pleading.

(10) Definitions.

The term "plaintiff" shall include a petitioner; "defendant" shall include a respondent; "writ" shall include a summons or an order of notice in the action or proceeding; "declaration" shall include any initial pleading; and "judgment" shall include an order or decree.

Chapter Two: Rules for the Regulation of Practice Before the Single Justice of the Supreme Judicial Court

2:01 Fixing Time for Pleadings and Proceedings.

(Applicable to all cases.)

The court in its discretion may order or permit pleadings to be filed, or any act to be done, at other times than are provided in these rules.

Whenever in the progress of any case it becomes necessary that a pleading be filed or other step taken so that the case may proceed, and the matter is not covered by any provision of statute or rule, the court may fix the time for the filing of such pleading or make any other appropriate order.

2:02 Form and Indorsement of Papers.

(Applicable to all cases. See S.J.C. Rule 1:08.)

All papers filed in the county court shall be legibly typed with double spacing. The page shall be eight and three-eighths or eight and one-half inches in width and ten and three-fourths or eleven inches in height. The left hand margin shall be not less than one and three-fourths inches. The right hand margin shall be not less than one inch. Documents shall be bound at the left side only. They shall be filed unfolded except applications for admission to the bar.

All information required by S.J.C. Rule 1:08 shall be indorsed on the paper before filing in the clerk's office.

In case of failure to comply with this rule, the court may entertain a motion to strike such paper from the files, and may allow such motion to strike or deny it upon terms against the party at fault.

2:03 Appearances.

(Applicable to criminal cases.)

The name, address, and business telephone number of the attorney for every party, or of the party if no attorney appears for him, shall be entered upon the docket as they appear upon the paper or papers constituting the appearance, or some paper transmitted to the clerk therewith. Where no address of the attorney or party, as the case may be, appears upon the docket, notice to such party

may be given by posting the same publicly in the clerk's office or in a room, hall or passage adjacent thereto. The clerk upon request shall post the same.

A substitution of attorneys or change of address or telephone number shall be entered by the clerk upon the docket on written request filed in the particular case. The court and parties, until such substitution or change is entered, and thereafter until the parties have notice thereof, may rely on action by, and notice to, any attorney previously appearing, and on notice at an address previously entered.

Any appearance shall constitute a general appearance unless the purposes thereof are specified in writing.

2:04 Giving Notice.

(Applicable to criminal cases.)

A notice to a party required by or given in pursuance of these rules, or any statute relative to procedure not requiring a different notice, shall be in writing, and, except as otherwise permitted by Rule 2:03, shall be given to such party or his attorney or any of his attorneys by delivering the same personally to him or by mailing the same, postage prepaid, to him at his business address or the address entered under Rule 2:03.

An affidavit of the person giving the notice shall be evidence thereof.

This rule shall not apply to original process or notice to bring a party before the court. The words "registered mail" in these rules shall include "certified mail."

2:05 Time for Pleadings and Proceedings When Last Day for Performance Falls on Saturday, Sunday or Legal Holiday.

(Applicable to criminal cases.)

When the day or the last day for the performance of any act authorized or required by these rules or by any order of the court falls on Saturday, Sunday, or a legal holiday, the act may be performed on the next succeeding business day, unless a contrary intent appears.

2:06 Eliminating Requirements of Verification by Oath or Affirmation.

(Applicable to criminal cases.)

No written statement in any proceeding in this court required to be verified by affidavit shall be required to be verified by oath or affirmation if it contains or is verified by a written declaration that it is made under the penalties of perjury.

2:07 Hearings Before Single Justice. Notice.

(Applicable to civil cases.)

When any party desires a hearing before a single justice, except at a sitting of the court held in Suffolk County, he may apply to a justice to appoint a time and place for the hearing; and when such time and place have been appointed, notice shall be given in accordance with the Massachusetts Rules of Civil Procedure (see, e.g., Rule 5 of Mass.R.Civ.P.) or the Massachusetts Rules of Appellate Procedure, where applicable (see, e.g., Rules 1 [b], 13, and 15[c] of Mass.R.A.P., and S.J.C. Rule 2:20). But this rule shall not prevent a party from obtaining a temporary restraining order, or a dissolution of the same or of an injunction, or other order, upon a shorter notice, or without notice, if the court shall think the same reasonable. And cases may be heard by consent of parties, and the permission of the court, without such notice.

2:08 Jury Issues.

(Applicable to criminal cases.)

Whenever it is necessary or proper to have any fact tried and determined by a jury, the court will direct an issue for that purpose, to be framed by the parties, containing a distinct affirmation and denial of the points in question, or in such form as the court shall order; and the issue thus framed and joined shall be submitted to a jury together with such part of the answers, depositions, and other proceedings in the cause as the court shall direct.

2:09 Copies to Adverse Parties.

(Applicable to criminal cases.)

When any pleading or motion is filed after the bill, complaint, or petition, or when any bill of particulars or specifications or answers to interrogatories are filed, a copy thereof shall be given not later than the day of filing to each of the adverse parties in the manner provided for notices by Rule 2:04.

In case of failure to comply with this rule, the court may entertain a motion to strike such paper from the files, and may allow such motion to strike or deny it upon terms against the party at fault.

2:10 Money Paid into Court.

(Applicable to civil cases.)

Money paid into court shall be in the custody of the clerk, whose duty it shall be to receive it when paid under the authority of law or rule or order of the court. He shall pay it as directed by the court; but money paid into court upon tender, or otherwise for the present and unconditional use of a party, shall be paid, on request, without special order, with any interest which has accrued thereon, to such party, at whose risk it shall be from the time when it is paid into court. Money payable to a party may be paid to his attorney of record.

No interest shall be deemed to accrue on any sum less in amount than the minimum on which interest is payable in the depositary in which the money is deposited.

2:11 Hearings Upon Motions Grounded on Facts.

(Applicable to criminal cases.)

The court need not hear any motion, or opposition thereto, grounded on facts, unless the facts are verified by affidavit, or apparent upon the record and files, or are agreed and stated in writing signed by the attorneys for the parties interested.

2:12 Postponement for Want of Evidence.

(Applicable to criminal cases.)

The court need not entertain any motion for postponement, grounded on the want of material testimony, unless supported by an affidavit, which shall state (1) the name, and, if known, the residence, of the witness whose testimony is wanted, (2) the particular testimony which he is expected to give, with the grounds of such expectation, and (3) the endeavors and means that have been used to procure his attendance or deposition; to the end that the court may judge whether due diligence has been used for that purpose. The party objecting to the postponement shall not be allowed to contradict the statement of what the absent witness is expected to testify, but may disprove any other fact stated in such affidavit. Such motion will not ordinarily be granted if the adverse party will admit that the absent witness would, if present, testify as stated in the affidavit, and will agree that the same shall be received and considered as evidence at the trial or hearing, as though the witness were present and so testified; and such agreement shall be in writing, upon the affidavit, and signed by such adverse party or his attorney. The same rule shall apply, mutatis mutandis, when the motion is grounded on the want of any material document, thing, or other

evidence. In all cases the granting or denial of a motion for postponement shall be discretionary, whether the foregoing provisions have been complied with or not.

2:13 Special Masters and Commissioners.

(Applicable to all cases.)

The full court may designate special masters and commissioners to deal with specified cases or with such matters as may be referred to them by a written order of a single justice or of the full court. The acts of any such special master and commissioner, when confirmed or approved, by a single justice or by the full court, as the case may be, shall have all the force and effect of a decision by a single justice or by the full court.

2:14 Writ of Protection.

(Applicable to all cases.)

A writ of protection shall issue only upon the application of the person for whom the writ of protection is to be issued, or some person in his behalf, and upon order of the court, and then only in case it is made to appear to the court, by affidavit and any other evidence that the court may require, (1) that the application is made in good faith and for the purpose of enabling such person to attend this court as a party or witness in some specified case pending, (2) if such person is a party, that such case has not been brought collusively to enable him to obtain a writ of protection, and (3) if such person is a witness, that he has not been required to attend as a witness by his own request or procurement to enable him to obtain a writ of protection.

2:15 Objections.

(See Mass. R. Civ. P. 46.)

(1) Civil Cases.

Objections to evidence in civil cases shall be decided without argument, unless the presiding judge calls upon the parties to state the grounds upon which the evidence is offered or objected to.

(2) Criminal Cases.

Exceptions to rulings or orders of the court in criminal cases are unnecessary and for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

If a party objects to a ruling or order of the court, he may state the precise legal grounds of his objection, but he shall not argue or further discuss such grounds unless the court calls upon him for such argument or discussion.

Objections to any opinion, ruling, direction or judgment made in the absence of counsel shall be taken by a writing filed with the clerk within three days after receipt from the clerk of notice thereof.

2:16 Requests for Rulings.

(Applicable to all cases.)

Requests for rulings, when appropriate, shall be made in writing before the closing arguments unless special leave is given to present further requests later.

2:17 Time for Arguments.

(Applicable to criminal cases.)

All arguments shall be limited to one-half hour on each side, unless for good cause shown, the court shall allow further time; and, when more than one counsel are to be heard on the same side, the time may be divided between them as they may elect.

2:18 Order of Business. Single Justice Sittings.

The justice designated to hear matters within the jurisdiction of a single justice at Boston will hear such matters once each week, except in the weeks in which his or her attendance with the full court is required during consultation or argument, and except as the number of cases to be heard does not require sitting. The sitting shall be on Wednesday, unless the single justice otherwise directs. A weekly list for hearing in Boston will be made up on which cases from any county may be set down, either by order of the court or by joint request of counsel, the hearing of which cases shall be subject to the discretion of the court. Matters to be heard before a single justice will be heard in Boston unless the full court or the single justice shall otherwise order. The single justice in his or her discretion may set any matter down for hearing in any place within the Commonwealth.

Rule History

Amended effective October 2, 1995; amended effective January 1, 1997; amended May 7, 2002, effective July 1, 2002.

2:19 Reviews of Orders of Department of Public Utilities.

(Applicable to proceedings to review orders, etc., of the department of public utilities.)

So far as the Massachusetts Rules of Civil Procedure are applicable, they shall govern proceedings brought under the provisions of G.L. c. 25, § 5, or acts in amendment thereof.

Unless the interests of justice plainly require, no stay of an order of the department of public utilities shall be ordered except after notice to the Attorney General or the commissioners of the department.

An order of the department fixing the rates, fares, charges, or prices for service furnished by a person or corporation under its jurisdiction shall not be stayed unless provision be made by the party applying for such stay by bond or other security for the repayment, in the event the order is finally sustained, of so much of rates, fares, charges, or prices collected, while such stay is in effect, as is in excess of those fixed in the order.

2:20 Appeals from Decisions of Appellate Tax Board.

Interlocutory matters arising in appeals from the decisions of the Appellate Tax Board and questions of final disposition thereof when further proceedings appear unnecessary may be presented to a single justice, who may after notice hear and determine the same both as to questions of law and of fact or reserve and report the case.

2:21 Appeal from Single Justice Denial of Relief on Interlocutory Ruling.

(Applicable to civil and criminal cases.)

(1)

When a single justice denies relief from a challenged interlocutory ruling in the trial court and does not report the denial of relief to the full court, the party denied relief may appeal the single justice's ruling to the full court. Unless the court otherwise orders, the notice of appeal shall be filed with the Clerk of the Supreme Judicial Court for Suffolk County within seven days of the entry of the judgment appealed from. Unless the single justice or the full court orders otherwise, neither the trial nor the interlocutory ruling in the trial court shall be stayed.

(2)

The appeal shall be presented to the full court on the papers filed in the single justice session, including any memorandum of decision. Nine copies of the record appendix must be filed in the Office of the Clerk of the Supreme Judicial Court for the Commonwealth within fourteen days after the date on which the appeal is docketed in the full Supreme Judicial Court. The record appendix shall be accompanied by eight copies of a memorandum of not more than ten pages, double-spaced, in which the appellant must set forth the reasons why review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment in the trial court or by other available means. No response from the prevailing party shall be filed, unless requested by the court.

(3)

This rule shall not apply to interlocutory appeals governed by Rule 15 of the Massachusetts Rules of Criminal Procedure.

(4)

The full court will consider the appeal on the papers submitted pursuant to this rule, unless it otherwise orders.

Rule History

Adopted effective November 15, 1995; amended May 2, 2001, effective June 1, 2001.

2:22 Petitions Under G. L. c. 211, § 3.

(Applicable to civil and criminal cases.)

Any petition seeking to invoke the general superintendency power of the court pursuant to G. L. c. 211, § 3, shall name as respondents and make service upon all parties to the proceeding before the lower court, including in criminal cases the Commonwealth through the District Attorney or Attorney General as appropriate. When the lower court is named as a respondent, service upon the lower court shall be made in accordance with Rule 4(d)(3) of the Rules of Civil Procedure by delivering a copy to the clerk of the lower court and to the Boston office of the Attorney General. Unless otherwise ordered by the single justice, the lower court shall thereafter be treated as a nominal party which may, but need not, appear and be heard.

Rule History

Adopted effective May 13, 1996.

2:23 Appeals in Bar Discipline Cases.

(Applicable to all bar discipline cases entered in the Supreme Judicial Court for Suffolk County after April 1, 2009)

(a)

A party aggrieved by a final order or judgment of the single justice in a bar discipline case may appeal to the full court for review of the order or judgment. A notice of appeal must be filed with the clerk of the Supreme Judicial Court for Suffolk County within ten days of entry of the final order or judgment for which review is sought. An appeal shall not stay any order or judgment of suspension or disbarment unless the single justice or this court so orders.

(b)

The appeal shall initially be presented to the full court on the record that was before the single justice, together with a preliminary memorandum from the appellant and, if requested, from the appellee. The appellant shall be responsible for preparing and filing a record appendix containing copies of all the relevant papers from the single justice proceeding, including but not limited to the hearing committee report, appeal panel report, if any, board of bar overseers memorandum, the order or judgment of the single justice, and any memorandum of decision of the single justice. The appellant's preliminary memorandum, which shall not exceed twenty pages, double spaced, shall set forth the relevant background and summarize the appellant's arguments on appeal, with citations to applicable authority. It is incumbent on the appellant to demonstrate in this memorandum that there has been an error of law or abuse of discretion by the single justice; that the decision is not supported by substantial evidence; that the sanction is markedly disparate from the sanctions imposed in other cases involving similar circumstances; or that for other reasons the decision will result in a substantial injustice.

Nine copies of the record appendix and preliminary memorandum shall be filed with the clerk of the Supreme Judicial Court for the Commonwealth within thirty days after the appeal has been docketed in the full court; one copy of the record appendix and memorandum shall be served on each other party. In the case of multiple appellants or cross-appellants, each appellant shall be permitted to file a preliminary memorandum within this time frame, but in such a case, the appellants shall submit, and share the cost of, a single record appendix. If requested by the court, the appellee may file a responsive memorandum, not to exceed twenty pages, double spaced, within twenty days of the court's request. Extensions of time for filing memoranda will rarely be granted and should not be anticipated.

(c)

Based on its review of the parties' memoranda and the record appendix, the full court may affirm, reverse, or modify the order or judgment of the single justice without oral argument; alternatively, the court may direct the appeal to proceed in the regular course, in which case the parties will be permitted to file full briefs conformably with the Rules of Appellate Procedure and the case will be scheduled for oral argument.

(d)

The Rules of Appellate Procedure shall apply to appeals covered by this rule to the extent they are not inconsistent with this rule.

Rule History

Adopted March 19, 2015, effective April 1, 2015.

Chapter Three: Ethical Requirements and Rules Concerning the Practice of Law

3:01 Attorneys.

Preamble

Persons desiring admission to the Massachusetts bar may petition to: (1) sit for the Uniform Bar Examination as provided in Section 1.1; (2) transfer a Uniform Bar Examination score earned in another jurisdiction as provided in Section 1.2; or (3) be admitted by motion as provided by Section 6.1 or 6.2.

Rule History

Adopted November 7, 2017, effective March 1, 2018.

Section 1. Filing requirements for admission.

1.1 Admission by Written Uniform Bar Examination

Persons desiring admission to the bar of the Commonwealth by written examination in Massachusetts or a concurrent written exam in another Uniform Bar Examination jurisdiction shall petition by filing with the Clerk of the Supreme Judicial Court for the county of Suffolk:

1.1.1 Petition for Admission accompanied by the recommendation of a member of the bar of this Commonwealth or of any state, district or territory of the United States;
1.1.2 Petitioner's Statement;
1.1.3 Authorization Form;
1.1.4 Law School Certificate;
1.1.5 Multistate Professional Responsibility Examination Score Report that sets forth a passing scaled score that meets or exceeds the Massachusetts required score;
1.1.6 Two (2) Letters of Recommendation for Admission; and
1.1.7 Current Certificate(s) of Admission and Good Standing from the highest judicial court of each state, district, territory or foreign country to which the petitioner is admitted, if applicable.

1.2 Admission by Transfer of Uniform Bar Examination Score Previously Earned in Another Jurisdiction

Persons desiring admission to the bar of the Commonwealth by transfer of a Uniform Bar Examination score previously earned in another jurisdiction shall petition by filing with the Clerk of the Supreme Judicial Court for the County of Suffolk;

1.2.1 Petition for Admission accompanied by the recommendation of a member of the bar of this Commonwealth or of any other state, district, or territory of the United States;
1.2.2 Petitioner's Statement;
1.2.3 Authorization Form;
1.2.4 Law School Certificate;
1.2.5 Multistate Professional Responsibility Examination Score Report that meets or exceeds the Massachusetts required score;
1.2.6 Written confirmation, issued by the National Conference of Bar Examiners, that the petitioner has submitted a request to transfer a Uniform Bar Examination transcript that sets forth a passing scaled score for Massachusetts that was achieved by an administration of the Uniform Bar Examination not more than 36 months prior to the date of filing;
1.2.7 Two Letters of Recommendation for Admission; and
1.2.8 Current Certificate(s) of Admission and Good Standing from the highest judicial court of each state, district, territory or foreign country to which the petitioner is admitted, if applicable.

1.3 Admission by Motion

Persons desiring admission to the bar of the Commonwealth by motion, pursuant to Rule 3:01, Section 6.1 or 6.2, shall petition by filing with the Clerk of the Supreme Judicial Court for the county of Suffolk:

1.3.1 Petition for Admission accompanied by the recommendation of a member of the bar of this Commonwealth or of any state, district or territory of the United States;
1.3.2 Petitioner's Statement;
1.3.3 Multistate Professional Responsibility Examination Score Report that meets or exceeds the Massachusetts required score;
1.3.4 (section deleted)
1.3.5 For admission by motion pursuant to Section 6.1, three (3) letters of Recommendation for Admission from members of the bar of the Commonwealth or of the bar of the state, district or territory of the United States where the petitioner is admitted or last practiced. At least one letter must be from a member of the bar of the state, district or territory of the United States where the petitioner is admitted;
1.3.6 For admission by motion pursuant to Section 6.2, three (3) letters of Recommendation for Admission from members of the bar of the Commonwealth or of the bar of the province or territory of Canada where the petitioner is admitted or last practiced. At least one letter must be from a member of the bar of the province or territory of Canada where the petitioner is admitted;

1.3.7 Current Certificate(s) of Admission and Good Standing from the highest judicial court of each state, district, territory, province or foreign country to which the petitioner is admitted;

1.3.8 Letter from the grievance or disciplinary entity of each state, district, territory, province or foreign country to which the petitioner is admitted indicating that there are no charges pending against the petitioner;

1.3.9 For admission by motion pursuant to Section 6.1, proof of active practice or teaching of law in a state, district or territory of the United States for five out of the past seven years immediately preceding the filing of petition for admission by motion.

1.3.10 For admission by motion pursuant to Section 6.2, proof of active practice or teaching of law in a province or territory of Canada for five out of the past seven years immediately preceding the filing of petition for admission by motion.

1.4 Referral to Board of Bar Examiners.

All petitions for admission shall be referred to the Board of Bar Examiners for a report as to the character, acquirements and qualifications of the petitioner. See Rules V and VI of the Rules of the Board of Bar Examiners.

Rule History

Amended effective October 2, 1995; amended April 1, 2009, effective July 1, 2009; amended June 10, 2010, effective July 1, 2010; amended October 7, effective November 1, 2016; amended November 7, 2017, effective March 1, 2018.

Section 2. Bar examination.

2.1 Time and Place.

Law examinations shall be held at least twice a year in Massachusetts. The Board of Bar Examiners shall fix the times and places of the examinations and shall give due notice thereof.

Rule History

Amended April 1, 2009, effective July 1, 2009; amended November 7, 2017, effective March 1, 2018.

Section 3. Qualifications.

3.1 Graduates of law schools in a state, district or territory of the United States.

3.1.1 (section deleted)

3.1.2 College. Each petitioner shall have completed the work acceptable for a bachelor's degree in a college or university, or have received an equivalent education in the opinion of the Board of Bar Examiners.

3.1.3 Law School. Each petitioner shall have graduated with a degree of bachelor of laws or juris doctor from a law school which, at the time of graduation, is approved by the American

Bar Association or is authorized by statute of the Commonwealth to grant the degree of bachelor of laws or juris doctor.

3.2 Graduates of Foreign Law Schools.

Graduates of law schools in foreign countries must have a college and legal education that is, in the opinion of the Board of Bar Examiners, similar in nature and quality to that of graduates of law schools approved by the American Bar Association. Before permitting such a petitioner to petition for admission by sitting for the written law examination in Massachusetts or a concurrent written exam in another Uniform Bar Examination jurisdiction, or to petition for admission based on transfer of a Uniform Bar Examination score earned previously in another jurisdiction, the Board of Bar Examiners in its discretion may, as a condition to such permission, require such petitioners to take such further legal studies as the Board of Bar Examiners may designate at a law school approved by the American Bar Association.

3.3 Massachusetts Law Component Requirement.

Each petitioner shall have successfully completed the Massachusetts Law Component Examination.

Rule History

Amended September 17, 1981; amended December 21, 1982, effective January 1, 1983; amended effective March 18, 1987; amended December 20, 2000, effective March 1, 2001; amended effective May 7, 2002; amended February 9, 2006, effective March 1, 2006; amended April 1, 2009, effective July 1, 2009; amended June 10, 2010, effective July 1, 2010; amended November 7, 2017, effective March 1, 2018.

Section 4. Public notice.

4.1 Notice and Publication.

Before the Board of Bar Examiners reports to the Court on the character, acquirements, and qualifications of a petitioner for admission, the Board of Bar Examiners shall publish the names of those petitioners who passed the written law examination in Massachusetts or a concurrent written exam in another Uniform Bar Examination jurisdiction, or transferred a qualifying Uniform Bar Examination score earned previously in another jurisdiction (under Rule 3:01, § 3) and who, if no objection is made, may be recommended to the Supreme Judicial Court for admission.

The Board of Bar Examiners shall publish the names on the websites of the Massachusetts Judicial Branch and the Board of Bar Examiners. The names shall remain published for no fewer than seven business days from a date fixed by the Board of Bar Examiners, in consultation with the Office of the Clerk of the Supreme Judicial Court for the County of Suffolk.

4.2 Report to the Court.

Not sooner than ten days after the date fixed for publication by the Board of Bar Examiners, the Board of Bar Examiners may report to the Supreme Judicial Court the names of those petitioners then found qualified for admission under § 3.

Rule History

Amended April 1, 1986, effective May 1, 1986; amended November 7, 2017, effective March 1, 2018.

Section 5. Disposition of petitions for admission.

5.1 Qualified Petitioners.

The petitions for admission of those who pass the written law examination in Massachusetts or a concurrent written exam in another Uniform Bar Examination jurisdiction, or transfer a passing Uniform Bar Examination score earned previously in another jurisdiction and who are found by the Board of Bar Examiners to be of good moral character and of sufficient acquirements and qualifications may be allowed and the petitioners may be admitted either (a) in open court upon subscription to the attorney's oaths, at such times and places as the Supreme Judicial Court shall appoint, or (b) by mail in accordance with procedures established by the Supreme Judicial Court and administered by the Clerk of the Supreme Judicial Court for the County of Suffolk.

5.2 Admissions of Qualified Petitioners within a Limited Time.

Except as otherwise ordered by a Justice of the Supreme Judicial Court, a qualified petitioner for admission may be sworn and enrolled as an attorney within one year of the report to the Court (Rule 3:01, subsection 4.2) concerning the petitioner, and, if not so sworn and enrolled, the petitioner may thereafter be sworn and enrolled only if he or she satisfies the Board of Bar Examiners as to his or her current legal knowledge, qualifications, and good moral character.

5.3 Non-Qualified Petitioners.

The petitions of those found not qualified shall be dismissed at the expiration of sixty days from the Board of Bar Examiners' report of nonqualification, unless within that period the Chief Justice of the Supreme Judicial Court, on application of the petitioner, shall order a hearing on the matter.

Rule History

Amended effective February 11, 1992; amended November 7, 2017, effective March 1, 2018.

Section 6. Admission by motion.

6.1 Persons admitted to practice in the United States.

A person who has been admitted as an attorney of the highest judicial court of any state, district or territory of the United States may petition to the Supreme Judicial Court for admission by motion as an attorney in this Commonwealth. The Board of Bar Examiners may, in its discretion, excuse the petitioner from taking the written law examination or transferring a qualifying Uniform Bar Examination score earned previously in another jurisdiction on the petitioner's compliance with the following conditions:

6.1.1 The petitioner shall have been admitted in another state, district or territory of the United States for at least five years prior to petitioning for admission in the Commonwealth, and shall have engaged in the active practice or teaching of law in a state, district or territory of

the United States for five out of the past seven years immediately preceding the filing of the petition for admission by motion.

6.1.2 The petitioner shall have so engaged in the practice or teaching of law since the prior admission as to satisfy the Board of Bar Examiners of his or her good moral character and professional qualifications.

6.1.3 (section deleted)

6.1.4 Graduates of law schools in a state, district or territory of the United States. The petitioner shall have completed work for a bachelor's degree at a college or university, or its equivalent, and graduated from a law school which at the time of graduation was approved by the American Bar Association or was authorized by a state statute to grant the degree of bachelor of laws or juris doctor.

Graduates of Foreign Law Schools. Graduates of law schools in foreign countries must have a college and legal education that is, in the opinion of the Board of Bar Examiners, similar in nature and quality to that of graduates of law schools approved by the American Bar Association.

6.1.5 The petitioner shall pass the Multistate Professional Responsibility Examination if he or she has not previously passed that examination in another jurisdiction.

6.1.6 Massachusetts Law Component Requirement. Each petitioner shall have successfully completed the Massachusetts Law Component Examination.

6.2 Graduates of Canadian law schools who are admitted to practice in Canada.

A person who has graduated from a law school in Canada, and who has been admitted as an attorney in the Law Society of any Canadian province or territory, may petition to the Supreme Judicial Court to be admitted by motion as an attorney in this Commonwealth. The Board of Bar Examiners may, in its discretion, excuse the petitioner from taking the written law examination or transferring a qualifying Uniform Bar Examination score earned previously in another jurisdiction on the petitioner's compliance with the following conditions:

6.2.1 The petitioner shall have completed a college and legal education that is, in the opinion of the Board of Bar Examiners, similar in nature and quality to that of graduates of law schools approved by the American Bar Association.

6.2.2 The petitioner shall have been admitted in a Canadian province or territory for at least five years prior to petitioning for admission in the Commonwealth, and shall have engaged in the active practice or teaching of law in such province or territory for five out of the seven years immediately preceding the filing of the petition for admission by motion.

6.2.3 The petitioner shall have so engaged in the practice or teaching of law since the prior admission as to satisfy the Board of Bar Examiners of his or her good moral character and professional qualifications.

6.2.4 The petitioner shall pass the Multistate Professional Responsibility Examination if he or she has not previously passed the examination in another jurisdiction.

6.2.5 The petitioner shall have successfully completed the Massachusetts Law Component Examination.

6.3 Massachusetts Law Component Requirement.

All persons desiring admission to the bar are required to certify their successful completion of the Massachusetts Law Component Examination to the Board of Bar Examiners.

6.4 Notice and Publication for Admission under Section 6.

Before the Board of Bar Examiners reports to the Court on the character, acquirements, and qualifications of petitioners for admission, the Board of Bar Examiners shall publish the names of petitioners who, if no objection is made, may be recommended to the Supreme Judicial Court for admission.

The list of names shall be published on the web sites of the Massachusetts Judicial Branch and the Board of Bar Examiners and shall remain posted for at least seven business days from a date fixed by the Board of Bar Examiners.

6.5 Report to the Court.

Not sooner than ten days after the date fixed for publication by the Board of Bar Examiners, the Board of Bar Examiners may report to the Supreme Judicial Court the names of those petitioners then found qualified for admission under § 6.

6.6 Time Limitation for Enrollment.

Except as otherwise ordered by a Justice of the Supreme Judicial Court, a qualified petitioner may be sworn and enrolled as an attorney within one year of the report to the Court. Failure to be so sworn and enrolled will result in dismissal of the petition.

Rule History

Amended effective February 21, 1984; amended August 23, 1984, effective January 1, 1985; amended April 1, 1986, effective May 1, 1986; amended March 26, 1997, effective July 1, 1997; amended May 6, 1997, effective June 2, 1997; amended December 20, 2000, effective March 1, 2001; amended April 1, 2009, effective July 1, 2009; amended June 10, 2010, effective July 1, 2010; amended November 7, 2017, effective March 1, 2018.

Section 7. Bar Examiners' rules.

7.1

The Board of Bar Examiners may, subject to the approval of the Supreme Judicial Court, make rules consistent with these rules.

Rule History

Amended November 7, 2017, effective March 1, 2018.

Section 8. Subpoenas.

8.1

Any member of the Board of Bar Examiners may summon witnesses to appear before the Board of Bar Examiners.

Rule History

Amended November 7, 2017, effective March 1, 2018.

Section 9. Immunity.

9.1

The Board of Bar Examiners, and its members, employees, and agents are immune from all civil liability for conduct and communications occurring in the performance of their official duties relating to the examination, character and fitness qualification, and licensing of persons seeking to be admitted to the practice of law.

9.2

Records, statements of opinion and other information regarding a petitioner for admission to the bar communicated by any entity, including any person, firm, or institution, without malice, to the Board of Bar Examiners, or to its members, employees or agents are privileged, and civil suits predicated thereon may not be instituted.

Rule History

Amended November 7, 2017, effective March 1, 2018.

3:02 Administration of Justice.

(1)

A corporation or association shall not be represented under G.L. c. 221, § 46, by a disbarred attorney.

(2)

All clerks of court, registers of probate, the recorder of the Land Court and their assistants and employees in their offices are prohibited from engaging in the practice of law during the time they hold such office or employment.

3:03 Legal Assistance to the Commonwealth and to Indigent Criminal Defendants, and to Indigent Parties in Civil Proceedings.

(1)

A senior law student in an accredited law school, or a law school authorized by statute of the Commonwealth to grant the degree of bachelor of laws or juris doctor, who has successfully completed or is enrolled in a course for credit in evidence or trial practice, with the written approval by the dean of such school of his character, legal ability, and training, may appear without compensation (a) on behalf of the Commonwealth (including a subdivision of the Commonwealth or an agency of the Commonwealth or of a subdivision) in proceedings in any division of the District Court, Juvenile Court, Probate and Family Court or Housing Court Departments or in the Boston Municipal Court Department, provided that the conduct of the case is under the general supervision of a member of the bar of the Commonwealth who is a regular or special assistant district attorney, a regular or special assistant attorney general, an agency counsel or assistant agency counsel, or a corporation counsel, city solicitor, town counsel, assistant municipal counsel or assistant solicitor; (b) on behalf of indigent defendants in criminal proceedings in any division of the District Court, Juvenile Court or Housing Court Departments or in the Boston Municipal Court Department, or in the Supreme Judicial Court or the Appeals Court, provided that the conduct of the case is under the general supervision of a member of the bar of the Commonwealth assigned to the case by the Committee for Public Counsel Services or employed by a non-profit program of legal aid, legal assistance or defense or a law school clinical instruction program; and (c) on behalf of indigent parties in civil proceedings in any division of the District Court, Juvenile Court, Probate and Family Court, or Housing Court Departments or in the Boston Municipal Court Department, provided that the conduct of the case is under the general supervision of a member of the bar of the Commonwealth assigned by the Committee for Public Counsel Services or employed by a non-profit program of legal aid, legal assistance or defense or a law school clinical instruction program.

(2)

The expression “general supervision” shall not be construed to require the attendance in court of the supervising member of the bar. The term “senior student” or “senior law student” shall mean students who have completed successfully their next to the last year of law school study.

(3)

The written approval described in paragraph (1), for a student or group of students, shall be filed with the clerk of the Supreme Judicial Court for the county of Suffolk and shall be in effect, unless withdrawn earlier, until the date of the first bar examination following the student’s graduation, and as to a student taking that examination, until the announcement of the results thereof. For any student who passes that examination, the approval shall continue in effect for six months after the date of examination or until the date of his or her admission to the bar, whichever is sooner, unless otherwise ordered by the Supreme Judicial Court.

(4)

A justice of the Superior Court Department may, in his discretion, permit a senior law student, qualified and supervised as provided in paragraphs (1) through (3) above, to appear without compensation on behalf of the Commonwealth or on behalf of an indigent defendant in a criminal proceeding:

(a) on a motion for a new trial in that court seeking post-conviction relief after the time for direct appeal has expired, or (if such an appeal has been taken) after the appeal has been decided by the Supreme Judicial Court, or
(b) on an appeal for review of sentence in the Appellate Division of that court under G.L. c. 278, §§ 28A-28D, or
(c) on a petition heard in that court, under G.L. c. 276, § 58, as amended, for review of District Court refusal to authorize pre-trial release of defendant on personal recognizance.

(5)

A justice of the Superior Court or the Land Court Department may, in his discretion, permit a senior law student, qualified and supervised as provided in paragraphs (1) through (3) above, to appear without compensation on behalf of the Commonwealth or indigent parties in civil proceedings.

(6)

If an appearance by a senior law student is not permitted as of right by this rule, a justice of the Supreme Judicial Court or of the Appeals Court may, in his discretion, permit a senior law student, qualified and supervised as provided in paragraphs (1) through (3) above, to appear in those courts without compensation on behalf of the Commonwealth or indigent persons. Successful completion of or enrollment in a course for credit in appellate practice in an accredited law school, or a law school authorized by statute of the Commonwealth to grant the degree of bachelor of laws or juris doctor, may, in the discretion of an appellate justice, be deemed a substitute for the course requirement provision of paragraph (1) of this rule.

(7)

A senior law student, qualified and supervised as provided in paragraphs (1) through (3) above, may appear without compensation on behalf of the Commonwealth or indigent parties before any administrative agency, provided such appearance is not inconsistent with its rules.

(8)

A student who has begun his next to the last year of law study in an accredited law school, or a law school authorized by statute of the Commonwealth to grant the degree of bachelor of laws or juris doctor, qualified and supervised as provided in paragraphs (1) through (3) above, may appear in civil proceedings under the same conditions as a senior law student, provided that the written approval referred to in paragraphs (1) and (3) states that he is currently participating in a law school clinical instruction program.

(9)

Rule 3:03 applies only to a student whose right to appear commenced at least three months prior to graduation from law school. Subject to the time limitations expressed in paragraph (3) of this rule, such a student may make appearances after graduation under the same or any other non-profit program of legal aid, legal assistance, prosecution or defense, or law school clinical instruction.

Rule History

Amended May 29, 1986, effective July 1, 1986; amended October 24, 1989, effective January 1, 1990; amended November 21, 1989, effective December 1, 1989; amended January 6, 1993, effective February 1, 1993; amended September 29, 1993, effective November 1, 1993; amended effective October 7, 1994; amended April 16, 2008, effective June 1, 2008; amended November 30, 2009, effective January 1, 2010; amended September 7, 2012, effective October 15, 2012.

3:04 Limited Practice by Attorneys from Other Jurisdictions who are Engaged in Certain Graduate Law Studies or Programs of Legal Assistance.

(1)

A person (a) who is enrolled in a graduate criminal law or poverty law and litigation program in an approved Massachusetts law school or who, after graduation from an approved law school, is employed by or associated with an organized nonprofit legal services program providing legal assistance to indigents in civil or criminal matters, and (b) who is a member of the bar of the highest judicial court of any state, district, or territory of the United States (or in the case of the District of Columbia, of the District Court of the United States for the District of Columbia), may engage in practice before the courts of the Commonwealth in all causes in which he is associated with such graduate program or with an organized nonprofit defender association or an organized nonprofit legal services program. Practice under this rule shall be limited to the above causes. The permission granted by this rule shall become effective upon filing with the clerk of this court for Suffolk County a certificate of any such court of another jurisdiction certifying that the attorney is a member in good standing at the bar of that court, and also (a) a statement signed by a representative of the law school that the attorney is enrolled in the specified graduate program or (b) a statement signed by a representative of the organized legal services program that the attorney is currently associated with such program. An attorney engaging in practice under this rule shall be subject to the provisions of Chapter Four of these rules, and the permission granted by this rule shall be conditioned on compliance by the attorney with the requirements of Rules 4:02 and 4:03.

(2)

Practice under this rule shall cease whenever that attorney ceases to be enrolled in or associated with such a program. When an attorney ceases to be so enrolled or associated, a statement to that effect shall be filed with the clerk of this court for Suffolk County by a representative of the law school or legal services program. In no event shall an attorney engage in practice under this rule for more than two years.

3:05 Licensing of Foreign Legal Consultants.

Section 1. General Regulation as to Licensing.

1.1 Petitions.

A person desiring to be licensed to practice in this Commonwealth as a foreign legal consultant shall apply by filing an application for such license with the Clerk of the Supreme Judicial Court for the County of Suffolk on such form as the Clerk may prescribe for this purpose. Upon the recommendation of the Board of Bar Examiners, the Supreme Judicial Court may, in its discretion, grant such application.

1.2 General Qualifications.

A person will be considered eligible for licensing as a foreign legal consultant only if such person:

(a) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

(b) for at least five years immediately preceding his or her application has been a member in good standing of such legal profession and has been engaged in the practice of law in such foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;

(c) possesses the good moral character and general fitness requisite for a member of the bar of this Commonwealth; and

(d) intends to practice as a foreign legal consultant in this Commonwealth and to maintain an office in this Commonwealth for that purpose.

Rule History

Adopted July 28, 1999, effective January 1, 2000.

Section 2. Proof Required.

Every applicant for a license as a foreign legal consultant shall file with the application to the Clerk:

(a) a certificate from the professional body or public authority in such foreign country having final jurisdiction over profession discipline, certifying as to the applicant's admission to

practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent;

(b) a letter of recommendation from one of the members of the executive body of such professional body or public authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;

(c) a duly authenticated English translation of such certificate and such letter if, in either case, it is not in English;

(d) affidavits as to the applicant's good moral character and fitness from three reputable persons residing in this Commonwealth and not related to the applicant, one of whom shall be a member of the bar of the Commonwealth; and

(e) such other evidence as to the nature and extent of the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Section 1 of this Rule as the Board of Bar Examiners may require.

Rule History

Adopted July 28, 1999, effective January 1, 2000; amended December 2, 1999, effective January 1, 2000.

Section 3. Reciprocal Treatment of Members of the Board of the Commonwealth.

In considering whether to recommend an applicant to practice as a foreign legal consultant, the Board of Bar Examiners may in its discretion take into account whether a member of the bar of this Commonwealth would have a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission. Any member of the bar who is seeking or has sought to establish an office in that country may request the Board of Bar Examiners to consider the matter, or the Board may do so sua sponte.

Rule History

Adopted July 28, 1999, effective January 1, 2000.

Section 4. Disposition of Applications.

4.1 Qualified Applicants.

The applications of those who are found by the Board of Bar Examiners to have satisfied the requirements for licensing as foreign legal consultants may be allowed by the Supreme Judicial Court and the applicants may be licensed upon (i) the taking of such oaths as the Supreme Judicial Court shall prescribe, (ii) paying the prescribed registration fee, and (iii) fulfilling all other requirements set forth in this Rule or otherwise promulgated by the Supreme Judicial Court.

4.2 Non-Qualified Applicants.

The applications of those who are not recommended by the Board of Bar Examiners for licensing as foreign legal consultants shall be denied, subject to the right of the applicant to request a hearing on the matter before the Supreme Judicial Court.

Rule History

Adopted July 28, 1999, effective January 1, 2000.

Section 5. Scope of Practice.

5.1 Limitations.

A person licensed to practice as a foreign legal consultant under this Rule may render legal services in this Commonwealth subject, however, to the limitations that he or she shall not:

(a) appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this Commonwealth (other than upon admission pro hac vice pursuant to G.L.c. 221, § 39);

(b) prepare any instrument effecting the transfer or registration of title to real estate located in the United States of America;

(c) prepare:
  (i) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or
  (ii) any instrument relating to the administration of a decedent's estate in the United States of America;

(d) prepare any instrument in respect of the marital or parental relations, rights or duties of a resident of the United States of America, or the custody or care of the children of such a resident;

(e) render professional legal advice on the law of this Commonwealth or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise);

(f) be, or in any way hold himself or herself out as, a member of the bar of this Commonwealth unless duly admitted as such; or

(g) carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:
  (i) his or her own name;
  (ii) the name of the law firm with which he or she is affiliated;
  (iii) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and
  (iv) the title "foreign legal consultant," which may be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]."

5.2 Not Unauthorized Practice of Law.

A duly licensed foreign legal consultant acting in accordance with the foregoing limitations shall not be considered engaged in the unauthorized practice of law for purposes of G.L. c. 221, § 46A (or any successor provision).

Rule History

Adopted July 28, 1999, effective January 1, 2000.

Section 6. Rights and Obligations.

6.1 Rules of Professional Conduct.

Subject to the limitations set forth in Section 5 of this Rule, a person licensed to practice as a foreign legal consultant under this Rule shall be entitled and subject to the rights and obligations set forth in Rule 3:07 (Massachusetts Rules of Professional Conduct) or arising from the other conditions and requirements that apply to a member of the bar of this Commonwealth under the rules of the Supreme Judicial Court.

6.2 Affiliation.

A person licensed to practice as a foreign legal consultant under this Rule may affiliate with one or more members of the bar of this Commonwealth, including by:

(a) employing one or more members of the bar of this Commonwealth;
(b) being employed by one or more members of the bar of this Commonwealth or by any partnership or professional corporation which includes members of the bar of this Commonwealth or which maintains an office in this Commonwealth; or
(c) being a partner in any partnership or shareholder in any professional corporation which includes members of the bar of this Commonwealth or which maintains an office in this Commonwealth.

6.3 Privilege.

A person licensed to practice as a foreign legal consultant under this Rule shall enjoy the same attorney-client privilege, work-product privilege and similar professional privileges as members of the bar of this Commonwealth.

Rule History

Adopted July 28, 1999, effective January 1, 2000.

Section 7. Service of Process.

7.1 Appointment of Clerk as Agent for Service of Process.

Every person licensed to practice as a foreign legal consultant under these Rules shall execute and file with the Supreme Judicial Court, in such form and manner as such court may prescribe, an instrument, in writing, setting forth his or her address in this Commonwealth and designating the

Clerk of the Supreme Judicial Court for Suffolk County as his or her agent upon whom process may be served, with like effect as if served personally upon him or her, in any action or proceeding thereafter brought against him or her and arising out of or based upon any legal services rendered or offered to be rendered by him or her within the Commonwealth or to residents of this Commonwealth, whenever after due diligence service cannot be made upon him or her at such address or at such new address in this Commonwealth as he or she shall have filed in the office of such Clerk by means of a supplemental instrument in writing.

7.2 Effect of Service on Clerk.

Service of process on such Clerk, pursuant to the designation filed as aforesaid, shall be made by personally delivering to and leaving with such Clerk, or with a deputy or assistant authorized by him or her to receive such service, at his or her office, duplicate copies of such process together with a fee of $10. Service of process shall be complete when such Clerk has been so served. Such Clerk shall promptly send one of such copies to the foreign legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to such foreign legal consultant at the address specified by him or her as aforesaid.

Rule History

Adopted July 28, 1999, effective January 1, 2000.

Section 8. Revocation of License.

In the event that the Supreme Judicial Court determines that a person licensed as a foreign legal consultant under this Rule no longer meets the requirements for licensure set forth in Section 1 of this Rule, it shall revoke the license granted to such person hereunder.

Rule History

Adopted July 28, 1999, effective January 1, 2000.

Section 9. Admission to the Bar.

In the event that a person licensed as a foreign legal consultant under this Rule is subsequently admitted as a member of the bar of this Commonwealth under the provisions of the Rules governing such admission, the license granted to such person hereunder shall be deemed superseded by the license granted to such person to practice law as a member of the bar of this Commonwealth.

Rule History

Adopted July 28, 1999, effective January 1, 2000.

Section 10. Application for Waiver of Provisions.

The Supreme Judicial Court, upon application, may in its discretion vary the application of or waive any provision of this Rule where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age and residence address, the facts relied upon and a prayer for relief.

Rule History

Adopted July 28, 1999, effective January 1, 2000.

3:06 Use of Limited Liability Entities.

(1)

As used in this rule, the term "entity" shall mean a professional corporation, a limited liability company, or a limited liability partnership organized to practice law pursuant to the laws of any state or other jurisdiction of the United States and which practices law in the Commonwealth. The provisions of such laws shall be applicable to attorneys practicing law in the Commonwealth subject to the terms and conditions of this rule. Such terms and conditions are necessary and appropriate for the purpose of making the provisions of those laws applicable to attorneys. As used in this rule, the term "owner" shall mean a shareholder of a professional corporation, a member of a limited liability company, or a partner of a limited liability partnership.

(2)

In addition to other provisions required by law, the articles of organization or similar organizational document ("Charter") of each entity shall contain provisions to assure compliance with the following requirements:

(a)

All owners shall be persons who are duly licensed by this court to practice law in the Commonwealth, if they are actively engaged in the practice of law in the Commonwealth, or duly licensed by the licensing authority of the jurisdiction in which they are actively engaged in the practice of law. All owners shall be in good standing before this court or before the licensing authority of the jurisdiction in which they are actively engaged in the practice of law, and all owners of the entity shall own their shares or other ownership interests in their own right. All owners shall be individuals who, except for temporary absence due to illness or accident, time spent in the Armed Services of the United States, vacations, and leaves of absence not to exceed two years, are actively engaged in the practice of law as employees or owners of the entity. Notwithstanding the foregoing, an owner may be an entity rather than an individual, provided that the owners of such entity are individuals who satisfy all of the other conditions of this rule.

(b)

Any owner who ceases to be eligible to be an owner and the executor, administrator, or other legal representative of a deceased owner shall be required to dispose of his or her shares or other ownership interests as soon as reasonably possible either to the entity or to an individual or entity duly qualified to be an owner of the entity.

(c)

The name of the entity shall contain words or abbreviations that indicate that it is a limited liability entity and shall also conform to the requirements of Mass.R.Prof.C. 7.5.

(d)

All owners of the entity shall, by becoming owners, agree to the provisions of this rule, including without limitation paragraph (3) of this rule.

(e)

All directors of a professional corporation and managers of a limited liability company, as the case may be, shall be owners.

(3)

The following provisions are established with respect to the liability of the owners of an entity with respect to damages which arise out of the performance of legal services by the entity, such provisions to be in addition to any statutory or common law rules of general application which deal with the liability of entities and their owners:

(a)

Each owner of the entity shall be personally liable for damages which arise out of the performance of legal services on behalf of the entity and which are caused by his or her own negligent or wrongful act, error, or omission. Owners of the entity whose acts, errors, or omissions did not cause the damages shall not be personally liable therefor, whether or not they have agreed with any owners or employees or other persons to contribute to the payment of the liability, except to the extent provided in subparagraphs (b), (c), and (d).

(b)

All the owners of an entity which is a professional corporation at the time of any negligent or wrongful act, error, or omission of any owner or employee of said entity which occurs in the performance of legal services by said entity and which results in damages to the person or persons for whom the services were being performed shall be jointly and severally liable for such damages, but only to the extent of the excess, if any, of (1) the sum of $50,000 plus the product of $15,000 multiplied by the number of owners and employees of said entity at the time of such act, error, or omission who are duly licensed by this court to practice law in the Commonwealth, or duly licensed to practice law by the licensing authority in the jurisdiction in which they practice, and who are owners of or employed by said entity as lawyers, but not in excess of $500,000 in the aggregate, over (2) the sum of the assets of said entity and the proceeds of any insurance policy issued to it which are applied to the payment of such damages.

(c)

Each entity which is not a professional corporation shall maintain at all times either (a) professional liability insurance covering negligence, wrongful acts, errors, and omissions of said entity and its owners and employees in connection with their performance of legal services in an amount per

claim and in an annual aggregate limit, exclusive of any deductible or retention, not less than the Designated Amount, or (b) a specifically designated and segregated fund for the satisfaction of judgments against said entity or its owners or employees based on their professional negligence, wrongful acts, errors, or omissions in connection with their performance of legal services in not less than the Designated Amount, maintained as (i) a deposit in trust or a bank escrow of cash, bank certificates of deposit, or United States Treasury obligations, or (ii) a bank letter of credit or an insurance company bond. As used herein the term "Designated Amount" shall mean $50,000 plus the product of $15,000 multiplied by the number of owners and employees of said entity who are licensed to practice law in the Commonwealth or another jurisdiction, but not in excess of $500,000 in the aggregate. If such an entity fails to maintain insurance or a fund in the Designated Amount in compliance with this rule, its owners at the time when a professional liability claim is asserted shall be jointly and severally liable to the claimant for an amount not to exceed the Designated Amount applicable at that time, less the sum of the assets of said entity and the proceeds of any professional liability insurance policy issued to it which are applied to the payment of said liability.

(d)

If an entity is an owner (an "ownership entity") or a partner in a general partnership, the provisions of subparagraphs (a), (b), and (c) shall apply to each of the individual owners of such ownership entity or such partners, and the formulas in subparagraphs (b) and (c) shall be based on all of the individual owners, partners, and employees of the entity or general partnership and of each ownership entity and partner thereof who is licensed to practice law.

(4)

The entity shall at all times comply with all applicable standards of professional conduct which may be established by this court or by the licensing authority of any jurisdiction in which the entity practices law. Any violation of such standards shall be grounds for this court, after hearing and if it deems the circumstances appropriate, to terminate or suspend the right of the entity to practice law in the Commonwealth.

(5)

Nothing in this rule shall be deemed to diminish or change the obligation of each attorney who is an owner of or who is employed by the entity or an ownership entity to conduct the practice of law in accordance with generally recognized standards of professional conduct and in accordance with any specific standards which may be promulgated by this court or the licensing authority of the jurisdiction in which the attorney practices. Any attorney who by act or omission causes the entity to act or fail to act in a way which violates any applicable standard of professional conduct, including any provision of this rule, shall be personally responsible for such act or omission and shall be subject to discipline therefor.

(6)

Nothing in this rule shall be deemed to modify, abrogate, or reduce the attorney-client privilege or any comparable privilege or relationship whether statutory or deriving from the common law.

(7)

Nothing in this rule shall prohibit the use of a voting trust to hold stock of a professional corporation. For all purposes under this rule, a person who holds a beneficial interest in such a voting trust shall be treated as a shareholder of the corporation, and, additionally, shall be deemed to own in his or her own right a percentage of shares in the corporation equal to his or her percentage of beneficial interest in the shares held by the voting trust.

(8)

An entity which is a limited liability partnership or a limited liability company shall not be deemed to be an "association" pursuant to G.L. c. 221, § 46.

Rule History

Amended effective January 29, 1987; amended effective July 1, 1994; amended effective November 1, 1994; amended effective January 1, 1996; amended effective July 1, 1996; amended effective July 11, 1996; amended August 31, 1999, effective October 1, 1999.

3:07 Massachusetts Rules of Professional Conduct.

Preamble, Scope & Terminology

Preamble: A Lawyer's Responsibilities

[1]

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2]

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3]

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a

lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See Rule 8.4.

[4]

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5]

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6]

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7]

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8]

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when

they know their communications will be private. The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[9]

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

[10]

Although other professions have been granted powers of self-government, the legal profession is unique because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11]

To the extent that lawyers meet the obligations of their professional calling, the occasion for further government regulation is obviated. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12]

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

[13]

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

[14]

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.

[15]

The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16]

Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17]

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18]

Under various legal provisions, including constitutional, statutory, and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the Attorney General, and Federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent

several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules are not meant to address the substantive statutory and constitutional authority of the Attorney General when appearing for the Commonwealth to assume primary control over the litigation and to decide matters of legal policy on behalf of the Commonwealth, or any other substantive statutory authority of government lawyers.

[19]

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20]

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. "A violation of a canon of ethics or a disciplinary rule . . . is not itself an actionable breach of duty to a client." Fishman v. Brooks, 396 Mass. 643, 649 (1986). In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. The Rules are not designed to be a basis for civil liability, but they may embody a substantive principle of law that furnishes the basis for disqualification or a non-disciplinary liability. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. "As with statutes and regulations, however, if a plaintiff can demonstrate that a disciplinary Rule was intended to protect one in his position, a violation of that Rule may be some evidence of the attorney's negligence." Id. at 649.

[21]

The Rules are authoritative. The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments to each Rule are intended as guides to interpretation. They are meant to assist lawyers in applying the Rules, and disciplinary authorities and courts may rely on the Comments in determining whether a lawyer has violated the Rules.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended July 13, 2022, effective October 1, 2022.

Rule 1.0: Terminology.

The following definitions are applicable to the Rules of Professional Conduct:

(a) **"Bar association"** includes an association of specialists in particular services, fields, and areas of law.

(b) **"Belief"** or **"believes"** denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(c) **"Confidential information"** is defined in Rule 1.6(a).

(d) **"Confirmed in writing,"** when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (f) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(e) **"Firm"** or **"law firm"** denotes a lawyer or lawyers in a law partnership, professional corporation, limited liability entity, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation, government entity, or other organization.

(f) **"Fraud"** or **"fraudulent"** denotes conduct that is fraudulent under substantive or procedural law and has a purpose to deceive.

(g) **"Informed consent"** denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(h) **"Knowingly," "known,"** or **"knows"** denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(i) **"Partner"** denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(j) **"Person"** includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.

(k) **"Qualified legal assistance organization"** means a legal aid, public defender, or military assistance office; or a bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries, provided the office, service, or organization receives no profit from the rendition of legal services, is not designed to procure financial benefit or legal work for a lawyer as a private practitioner, does not infringe the individual member's freedom as a client to challenge the approved counsel or to select outside counsel at the client's expense, and is not in violation of any applicable law.

(l) **"Reasonable"** or **"reasonably"** when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(m) **"Reasonable belief"** or **"reasonably believes"** when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(n) **"Reasonably should know"** when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(o) **"Sexual relations"** denotes sexual intercourse or the intentional touching of an intimate part of the lawyer or another person for the purpose of sexual arousal or sexual gratification.

(p) **"State"** includes the District of Columbia, Puerto Rico, and federal territories or possessions.

(q) **"Substantial"** when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(r) **"Tribunal"** denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(s) **"Writing"** or **"written"** denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(t) These Rules shall be known and cited as the Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.).

Rule History

Adopted March 26, 2015, effective July 1, 2015; amended July 13, 2022, effective October 1, 2022.

Comment

Confirmed in Writing

[1]

If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2]

Whether two or more lawyers constitute a firm within paragraph (d) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3]
With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4]
Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5]
When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6]
Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7]
Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence.

Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (q) and (c). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (q).

[8]
The final category of qualified legal assistance organization requires that the organization "receives no profit from the rendition of legal services." That condition refers to the entire legal services operation of the organization; it does not prohibit the receipt of a court-awarded fee that would result in a "profit" from that particular lawsuit. An award of attorney's fees that leads to an operating gain in a fiscal year does not create a "profit" for purposes of this subparagraph.

Client-Lawyer Relationship

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.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended March 26, 2015, effective July 1, 2015; amended July 13, 2022, effective October 1, 2022.

Comment

Legal Knowledge and Skill

[1]
In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. See Rule 7.2.

[2]
A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most

fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3]
In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4]
A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5]
Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[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 lawyer's 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.

[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, such as in the context of discovery.

Maintaining Competence

[8]

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

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer.

(a)

A lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these Rules. A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b)

A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c)

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

(d)

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended March 26, 2015, effective July 1, 2015; amended July 13, 2022, effective October 1, 2022.

Comment

Allocation of Authority between Client and Lawyer

[1]
Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[1A]
In consulting with a client about the means to accomplish a client's objectives, a lawyer must take into consideration the lawyer's own professional obligations in dealing with third parties, see Rules 4.1-4.4, and the lawyer's duties as an advocate, see Rules 3.1-3.9. A lawyer should not permit a client's personal prejudices or animosities to dictate the lawyer's treatment of the opposing party or counsel or others involved in the legal process and should reject client requests to engage in abusive tactics.

[2]
On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3]
At the outset of a representation and subject to Rule 1.4, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4]
In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5]

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6]

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7]

Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8]

All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.5, 1.8 and 5.6. Although paragraph (c) does not require that the client's informed consent to a limited representation be in writing, the specification of the scope of representation as well as the rate or basis of the lawyer's fee is generally required to be communicated to the client in writing by Rule 1.5(b).

Criminal, Fraudulent and Prohibited Transactions

[9]

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10]
When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). But see Rule 3.3(e). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11]
Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12]
Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13]
If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Rule 1.3: Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client. The lawyer should represent a client zealously within the bounds of the law.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended March 26, 2015, effective July 1, 2015.

Comment

[1]
A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may

have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2]
A lawyer's work load must be controlled so that each matter can be handled competently.

[3]
Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude a lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4]
Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client may depend on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5]
To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. See S.J.C. Rule 4:01, § 14.

Rule 1.4: Communication.

(a)
A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(g), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b)

A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended March 26, 2015, effective July 1, 2015; amended July 13, 2022, effective October 1, 2022.

Comment

[1]

Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2]

If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or reject the offer. See Rule 1.2(a) and Comment 3 thereto.

[3]

Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4]
A lawyer's regular communication with clients will minimize the number of occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5]
The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[6]
Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7]
In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. Ordinarily, a lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

[8]
There will be circumstances in which a lawyer should advise a client concerning the advantages and disadvantages of available dispute resolution options in order to permit the client to make informed decisions concerning the representation.

Rule 1.5: Fees.

(a)

A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) whether the fee is fixed or contingent.

(b)

(1)

Except as provided in paragraph (b)(2), the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.

(2)

The requirement of a writing shall not apply to a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than $500. Where an indigent representation fee is imposed by a court, no fee agreement has been entered into between the lawyer and client, and a writing is not required.

(c)

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Except for contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims, a contingent fee agreement shall be in writing and signed in duplicate by both the lawyer and the client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the lawyer for a period of six years after the conclusion of the contingent fee matter. The writing shall state the following:

(1) the name and address of each client;

(2) the name and address of the lawyer or lawyers to be retained;
(3) the nature of the claim, controversy, and other matters with reference to which the services are to be performed;
(4) the contingency upon which compensation will be paid, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer, and if the lawyer is to be paid any fee for the representation that will not be determined on a contingency, the method by which this fee will be determined;
(5) the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer out of amounts collected, and unless the parties otherwise agree in writing, that the lawyer shall be entitled to the greater of (i) the amount of any attorney's fees awarded by the court or included in the settlement or (ii) the amount determined by application of the percentage or other formula to the recovery amount not including such attorney's fees;
(6) the method by which litigation and other expenses are to be calculated and paid or reimbursed, whether expenses are to be paid or reimbursed only from the recovery, and whether such expenses are to be deducted from the recovery before or after the contingent fee is calculated;
(7) if the lawyer intends to pursue such a claim, the client's potential liability for expenses and reasonable attorney's fees if the attorney-client relationship is terminated before the conclusion of the case for any reason, including a statement of the basis on which such expenses and fees will be claimed, and, if applicable, the method by which such expenses and fees will be calculated; and
(8) if the lawyer is the successor to a lawyer whose representation has terminated before the conclusion of the case, whether the client or the successor lawyer is to be responsible for payment of former counsel's attorney's fees and expenses, if any such payment is due.

Upon conclusion of a contingent fee matter for which a writing is required under this paragraph, the lawyer shall provide the client with a written statement explaining the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. At any time prior to the occurrence of the contingency, the lawyer shall, within twenty days after either 1) the termination of the attorney-client relationship or 2) receipt of a written request from the client when the relationship has not terminated, provide the client with a written itemized statement of services rendered and expenses incurred; except, however, that the lawyer shall not be required to provide the statement if the lawyer informs the client in writing that he or she does not intend to claim entitlement to a fee or expenses in the event the relationship is terminated before the conclusion of the contingent fee matter.

(d)

A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e)

A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made only if the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

(f)

(1)

The following forms of contingent fee agreement may be used to satisfy the requirements of paragraphs (c) and (e) if they accurately and fully reflect the terms of the engagement.

(2)

A lawyer who uses Form A does not need to provide any additional explanation to a client beyond that otherwise required by this rule. The form contingent fee agreement identified as Form B includes two alternative provisions in paragraphs (3) and (7). A lawyer who uses Form B shall show and explain these options to the client, and obtain the client's informed consent confirmed in writing to each selected option. A client's initialing next to the selected option meets the "confirmed in writing" requirement.

(3)

The authorization of Forms A and B shall not prevent the use of other forms consistent with this rule. A lawyer who uses a form of contingent fee agreement that contains provisions that materially differ from or add to those contained in Forms A or B shall explain those different or added provisions or options to the client and obtain the client's informed consent confirmed in writing. For purposes of this rule, a fee agreement that omits option (i) in paragraph (3), and, where applicable, option (i) in paragraph (7) of Form B is an agreement that materially differs from the model forms. A fee agreement containing a statement in which the client specifically confirms with his or her signature that the lawyer has explained that there are provisions of the fee agreement, clearly identified by the lawyer, that materially differ from, or add to, those contained in Forms A or B meets the "confirmed in writing" requirement.

(4)

The requirements of paragraphs (f)(1)-(3) shall not apply when the client is an organization, including a non-profit or governmental entity.

Contingent Fee Agreement, Form A

To be Executed in Duplicate

Date: [*Month and day field*], 20[*YY*]

The Client [*(Name) (Street & Number) (City or Town)*]

retains the Lawyer [*(Name) (Street & Number) (City or Town)*]

to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is recovery of damages, whether by settlement, judgment or otherwise.

(3) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer.

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage calculation described above, whichever is greater.

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] The lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures

(To client)

(To lawyer)

Signatures of client and lawyer

(Signature of client)

(Signature of lawyer)

Contingent Fee Agreement, Form B

To be Executed in Duplicate

Date: [*Month and day field*], 20[*YY*]

The Client [*(Name) (Street & Number) (City or Town)*]

retains the Lawyer [*(Name) (Street & Number) (City or Town)*]

to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is:

(3) Costs and Expenses. The client should initial next to the option selected.

  (i) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer; or

  (ii) The client is not to be liable to pay compensation or court costs and expenses of litigation otherwise than from amounts collected for the client by the lawyer, except as follows:

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage calculation described above, whichever is greater. [Modify the last two sentences as appropriate if the parties agree on some other basis for calculation.]

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will be entitled to receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or

(ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] Payment of any fees owed to former counsel. The client should initial next to the option selected.

(i) The lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses; or

(ii) The client is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures

(To client)

(To lawyer)

Signatures of client and lawyer

(Signature of client)

(Signature of lawyer)

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended November 2, 2000, effective January 2, 2001; amended December 22, 2010, effective March 15, 2011; amended October 24, 2012, effective January 1, 2013; comment amended March 26, 2015, effective July 1, 2015; comment amended March 10, 2016, effective May 1, 2016; amended June 7, 2018, effective September 1, 2018.

Comment

Basis or Rate of Fee

[1]

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client.

[1A]
Rule 1.5(a) departs from Model Rule 1.5(a) by retaining the standard of former DR 2-106(A) that a fee must be illegal or clearly excessive to constitute a violation of paragraph (a) of the rule. However, it does not affect the substantive law that fees must be reasonable to be enforceable against the client.

[1B]
Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. As such, the standard differs from that for fees, as described in Comment 1A. A lawyer may seek reimbursement for the cost of services performed in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2]
A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the scope of the representation and the basis or rate of the fee is set forth. Ordinarily, the lawyer should send the written fee statement to the client before any substantial services are rendered. Where the client retains a lawyer for a single session consultation or where the total fee to the client is reasonably expected to be less than $500, a writing is not required, although the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client.

[3]
Contingent fees, like any other fees, are subject to the not-clearly-excessive standard of paragraph (a) of this rule. In determining whether a particular contingent fee is clearly excessive, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain matters. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should inform the client of alternative bases for the fee and explain their implications.

[3A]
A lawyer must inform the client at the time representation is undertaken if there is a possibility that a legal fee or other payments will be owed under other circumstances. A lawyer may pursue a quantum meruit recovery or payment for expenses advanced only if the contingent fee agreement so provides.

[3B]
The "fair value" of the legal services rendered by the attorney before the occurrence of a contingency in a contingent fee case is an equitable determination designed to prevent a client from being unjustly enriched if no fee is paid to the attorney. Because a contingent fee case does not require any certain amount of labor or hours worked to achieve its desired goal, a lodestar method of fee calculation is of limited use in assessing a quantum meruit fee. A quantum meruit award should take into account the benefit actually conferred on the client.

Other factors relevant to determining "fair value" in any particular situation may include those set forth in Rule 1.5(a), as well as the circumstances of the discharge or withdrawal, the amount of legal work required to bring the case to conclusion after the discharge or withdrawal, and the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. Unless otherwise agreed in writing, the lawyer will ordinarily not be entitled to receive a fee unless the contingency has occurred. Nothing in this Rule is intended to create a presumption that a lawyer is entitled to a quantum meruit award when the representation is terminated before the contingency occurs.

[3C]
When the attorney-client relationship in a contingent fee case terminates before completion, and the lawyer makes a claim for fees or expenses, the lawyer is required to state in writing the fee claimed and to enumerate the expenses incurred, providing supporting justification if requested. In circumstances where the lawyer is unable to identify the precise amount of the fee claimed because the matter has not been resolved, the lawyer is required to identify the amount of work performed and the basis employed for calculating the fee due.

This statement of claim will help the client and any successor attorney to assess the financial consequences of a change in representation.

[3D]
A lawyer who does not intend to make a claim for fees in the event the representation is terminated before the occurrence of the contingency entitling the lawyer to a fee under the terms of a contingent fee agreement would not be required to use paragraph (6) of the model forms of contingent fee agreement specified in Rule 1.5(f)(1) and (2). However, if a lawyer expects to make a claim for fees if the representation is terminated before the occurrence of the contingency, the lawyer must advise the client of his or her intention to retain the option to make a claim by including the substance of paragraph (6) of the model form of contingent fee agreement in the engagement agreement and would be expected to be able to provide records of work performed sufficient to support such a claim.

Terms of Payment

[4]
A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5]
An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further

assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6]

Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7]

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee if the client has been informed that a division of fees will be made and consents in writing. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[7A]

Paragraph (e), Unlike ABA Model Rule 1.5(e), Paragraph (e) does not require that the division of fees be in proportion to the services performed by each lawyer or require the lawyer to assume joint responsibility for the representation in order to be entitled to a share of the fee. The Massachusetts rule does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.

[8]

Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9]

In the event of a fee dispute not otherwise subject to arbitration, the lawyer should conscientiously consider submitting to mediation or an established fee arbitration service. If such procedure is required by law or agreement, the lawyer shall comply with such requirement. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. For purposes of paragraph 1.5(f)(3), a provision requiring that fee disputes be resolved by arbitration is a provision that differs materially from the

forms of contingent fee agreement set forth in this rule and is subject to the prerequisite that the lawyer explain the provision and obtain the client's consent, confirmed in Writing.

Form of Fee Agreement

[10]
Paragraph (f) provides model forms of contingent fee agreements and identifies explanations that a lawyer must provide to a client, except where the client is an organization, including a non-profit or governmental entity.

[11]
Paragraphs (f)(1) and (f)(2) provide two forms of contingent fee agreement that may be used. Because paragraphs (3) and (7) of Form A do not contain alternative provisions, a lawyer who uses Form A does not need to provide any special explanation to the client. Paragraphs (2), (3), and (7) of Form B differ from Form A. While in most contingency cases, the contingency upon which compensation will be paid is recovery of damages, paragraph (2) of Form B permits lawyers and clients to agree to other lawful contingencies. A lawyer is not required to provide any special explanation when using paragraph (2). Paragraphs (3) and (7) of Form B allow options for the payment of costs and expenses and the payment of reasonable attorney's fees and expenses to former counsel. To ensure that a client gives informed consent to the agreed-upon option, a lawyer who uses Form B must retain in the form both options contained in paragraphs (3) and, where applicable, paragraph (7); show and explain these options to the client; and obtain the client's informed consent confirmed in writing to the selected option.

[12]
Paragraph (f)(3) permits the lawyer and client to agree to modifications to Forms A and B, including modifications which are more favorable to the lawyer, to the extent permitted by this rule. However, a lawyer using a modified form of fee agreement must explain to the client any provisions that materially differ from or add to those contained in Forms A and B, and obtain the client's informed written consent. For purposes of this rule, an agreement that does not contain option (i) in paragraph (3) and, where applicable, option (i) in paragraph (7) of Form B is materially different, and a lawyer must explain those different or added provisions to the client, and obtain the client's informed written consent.

[13]
When attorney's fees are awarded by a court or included in a settlement, a question arises as to the proper method of calculating a contingent fee. Rule 1.5(c)(5) and paragraph (4) of the form agreements contained in Rule 1.5(f) state the default rule, but the parties may agree on a different basis for such calculation, such as applying the percentage to the total recovery, including attorney's fees.

Rule 1.6: Confidentiality of Information.

(a)

A lawyer shall not reveal confidential information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the

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

(b)

A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1 or 8.3 must reveal, such information:

(1) to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another;
(2) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another;
(3) to prevent, mitigate or rectify substantial injury to property, financial, or other significant interests 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.

(d)

A lawyer participating in a lawyer assistance program, as hereinafter defined, shall treat the person so assisted as a client for the purposes of this Rule. Lawyer assistance means assistance provided to a lawyer, judge, other legal professional, or law student by a lawyer participating in an organized nonprofit effort to provide assistance in the form of (a) counseling as to practice matters (which shall not include counseling a law student in a law school clinical program) or (b) education as to personal health matters, such as the treatment and rehabilitation from a mental, emotional, or

psychological disorder, alcoholism, substance abuse, or other addiction, or both. A lawyer named in an order of the Supreme Judicial Court or the Board of Bar Overseers concerning the monitoring or terms of probation of another attorney shall treat that other attorney as a client for the purposes of this Rule. Any lawyer participating in a lawyer assistance program may require a person acting under the lawyer's supervision or control to sign a nondisclosure form approved by the Supreme Judicial Court. Nothing in this paragraph (d) shall require a bar association-sponsored ethics advisory committee, the Office of Bar Counsel, or any other governmental agency advising on questions of professional responsibility to treat persons so assisted as clients for the purpose of this Rule.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended December 30, 1997, effective March 1, 1998; amended March 26, 2015, effective July 1, 2015; amended March 10, 2016, effective May 1, 2016; amended July 13, 2022, effective October 1, 2022; amended March 12, 2024, effective April 1, 2024.

Comment

[1]

This Rule governs the disclosure by a lawyer of confidential information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to confidential information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal confidential information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2]

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent or as otherwise permitted by these Rules, the lawyer must not reveal confidential information relating to the representation. See Rule 1.0(g) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.

[3]

The principle of client-lawyer confidentiality established by this Rule is broader than the attorney-client privilege and the work-product doctrine. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. Under applicable law, the attorney-client privilege belongs to the client, not the lawyer. The rule of client-lawyer confidentiality also applies in situations other than those where evidence is sought from the lawyer through compulsion of law. Although these Rules provide lawyers with a limited discretion to disclose client confidences in exceptional circumstances, as a general matter clients reasonably expect that their

confidences will not be voluntarily disclosed and that disclosure will be judicially compelled only in accordance with recognized exceptions to the attorney-client privilege and work-product doctrine.

[3A]

A lawyer may not disclose confidential information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope. Information that is "generally known in the local community or in the trade, field or profession to which the information relates" includes information that is widely known. Information about a client contained in a public record that has received widespread publicity would fall within this category. On the other hand, a client's disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not "generally known in the local community." As another example, a client's disclosure of the fact of infidelity to a spouse is protected information, although it normally would not be after the client publicly discloses such information on television and in newspaper interviews. The accumulation of legal knowledge that a lawyer gains through practice ordinarily is not client information protected by this Rule. In addition, the factual information acquired about the structure and operation of an entire industry during the representation of one entity within the industry would not ordinarily prevent an attorney from undertaking a successive representation of another entity in a matter when the attorney had no other relevant confidential information from the earlier representation and there was no other conflict of interest at issue.

[3B]

All these examples explain the addition of the word "confidential" before the word "information" in Rule 1.6(a) as compared to the comparable ABA Model Rule. It also explains the elimination of the words "or is generally known" in Rule 1.9(c)(1) as compared to the comparable ABA Model Rule. The elimination of such information from the concept of protected information in Rule 1.9(c)(1) has been achieved more generally throughout the Rules by the addition of the word "confidential" in this Rule.

[4]

Paragraph (a) prohibits a lawyer from revealing confidential information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5]

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other confidential information relating to a client of the firm, unless the client has instructed that particular confidential information be confined to specified lawyers. Before accepting or continuing

representation on such a basis, the lawyers to whom such restricted confidential information will be communicated must assure themselves that the restriction will not contravene firm governance rules or prevent them from discovering disqualifying conflicts of interests.

Disclosure Adverse to Client

[6]

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities, even if the information is confidential information, if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[6A]

The use of the term "substantial" harm or injury in paragraphs (b)(1), (b)(2) and (b)(3) of this Rule restricts permitted revelation by limiting the permission granted to instances when the harm or injury is likely to be more than trivial or small. The reference to bodily harm in paragraph (b)(1) is not meant to require physical injury as a prerequisite. Acts of statutory rape, for example, fall within the concept of bodily harm. Rule 1.6(b)(1) also permits a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution. This language has been included to permit disclosure of confidential information in these circumstances where the failure to disclose may not involve the commission of a crime.

[7]

Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal confidential information to the extent necessary to enable affected persons or appropriate authorities to prevent the commission of a crime or fraud that the lawyer reasonably believes is likely both to occur and to result in substantial injury to the interests or property of another. The lawyer should not ignore facts that would lead a reasonable person to conclude that disclosure is permissible. Although paragraph (b)(2) does not require the lawyer to reveal the misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal confidential information relating to the representation in limited circumstances.

[8]

Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of

preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose confidential information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter consults or employs a lawyer for the purpose of representation concerning that offense.

[8A]
Paragraphs (b)(2) and (b)(3) each permit a lawyer to disclose client confidential information under certain circumstances to prevent or ameliorate harm caused by the commission of a crime or fraud. Disclosure is permitted only when the harm constitutes substantial injury to property, financial, or other significant interests of another. The modifier "significant" is added to emphasize that a substantial injury to an insignificant interest is not an adequate basis for disclosure. Unlike the corresponding ABA Model Rule, this rule permits disclosure to prevent or ameliorate harm to non-financial interests as well as to property or financial interests. For example, the kidnapping of a child by a non-custodial parent may result in substantial injury to the vital interest of the other parent in maintaining custody of or even contact with his or her child. A criminal trespasser might invade a significant privacy interest of another. A person by crime or fraud might deprive someone of the right to vote or some other significant right of participation in the political process. These interests are not financial interests, but are sufficiently important that lawyers should have the discretion to disclose client confidential information to prevent or ameliorate crimes and frauds that substantially injure those interests.

[9]
A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing confidential information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10]
Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11]
A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12]
Other law may require that a lawyer disclose confidential information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of confidential information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13]
Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited confidential information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment 7. Under these circumstances, lawyers and law firms are permitted to disclose limited confidential information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, the general extent of the lawyer's involvement in the matter, and information about whether the matter has terminated. Even this limited confidential information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any such information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14]
Any information received pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment 5, such as when a lawyer in a firm discloses confidential information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation. See also Rule 1.16.

[15]
A lawyer may be ordered to reveal confidential information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the confidential information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16]
Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the confidential information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable. See also Rule 1.16, Comment 3.

[17]
Paragraph (b) permits but does not require the disclosure of confidential information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(7). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as: (1) the seriousness of the potential harm to others; (2) the degree of certainty that the harm will occur, including the attorney's assessment of the accuracy of the information; (3) the imminence of the harm; (4) the apparent absence of any other feasible way to prevent the potential harm; (5) the extent to which the client may be using or has used the lawyer's services to bring about the harm, or the lawyer's own involvement in the transaction; (6) the circumstances under which the lawyer acquired the confidential information, including if the information is protected by the attorney-client privilege; and (7) the nature of the lawyer's relationship with the client and with those who might be injured by the client. Some of these factors may also be relevant to the exercise of discretion under paragraphs (b)(4) through (b)(7). In any instance, disclosure should be no greater than the lawyer reasonably believes necessary to prevent the harm. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. The reference to Rules 3.3, 4.1(b), 8.1 and 8.3 in the opening phrase of Rule 1.6(b) has been added to emphasize that Rule 1.6(b) is not the only provision of these Rules that deals with the disclosure of confidential information. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Notice of Disclosure to Client

[17A]

Whenever these Rules permit or require the lawyer to disclose a client's confidential information, the issue arises whether the lawyer should, as a part of the confidentiality and loyalty obligation and as a matter of competent practice, advise the client beforehand of the plan to disclose. It is not possible to state an absolute rule to govern a lawyer's conduct in such situations. In some cases, it may be impractical or even dangerous for the lawyer to advise the client of the intent to reveal confidential information either before or even after the fact. Indeed, such revelation might thwart the reason for creation of the exception. It might hasten the commission of a dangerous act by a client or it might enable clients to prevent lawyers from defending themselves against accusations of lawyer misconduct. But there will be instances, such as the intended delivery of whole files to prosecutors to convince them not to indict the lawyer, where the failure to give notice would prevent the client from making timely objection to the revelation of too much confidential information. Lawyers will have to weigh the various factors and make reasonable judgments about the demands of loyalty, the requirements of competent practice, and the policy reasons for creating the exception to confidentiality in order to decide whether they should give advance notice to clients of the intended disclosure.

Acting Competently to Preserve Confidentiality

[18]

Paragraph (c) requires a lawyer to act competently to safeguard confidential information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments 3 and 4.

[19]

When transmitting a communication that includes confidential information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the confidential information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a

reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20]

The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

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 lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(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.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended March 26, 2015, effective July 1, 2015; comment amended July 13, 2022, effective October 1, 2022.

Comment

General Principles

[1]
Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For the lawyer's duties with respect to information provided to the lawyer by a prospective client, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(g) and (d).

[2]
Resolution of a conflict of interest problem under this Rule requires the lawyer to (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and (4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3]
A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4]
If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments 5 and 29.

[5]
Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to

the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6]

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Paragraph (a) expresses that general rule. Thus, absent consent, a lawyer ordinarily may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7]

Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8]

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9]

In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's

responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10]
The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11]
When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12]
Combining an attorney-client relationship with an intimate personal relationship raises concerns about conflicts between the attorney's personal interests and the best interests of the client, impairment of the judgment of both lawyer and client, and preservation of the attorney-client privilege. These concerns are particularly acute when a lawyer has a sexual relationship with a client. In some cases, sexual relationships between lawyer and client are prohibited by Rule 1.8(j). Even if the sexual relationship does not violate Rule 1.8(j), the lawyer must consider whether the lawyer's ability to represent the client effectively will be affected by the sexual relationship. Unless it would be clear to a reasonable person that a sexual relationship with the client would not materially affect the representation, the lawyer should either avoid the sexual relationship or withdraw from the representation.

[12A]
Sexual relations with a representative of an organizational client who supervises, directs, or regularly consults with the outside lawyer concerning the organization's legal matters can also raise the risk that the lawyer's independent professional judgment will be impaired and the attorney-client privilege compromised. A client representative in an intimate personal relationship with outside counsel may not be able to assess and waive any conflict of interest for the organization

because of the representative's personal involvement, and another representative of the organization may be required to determine whether to give informed consent to a waiver.

Interest of Person Paying for a Lawyer's Service

[13]

A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14]

Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15]

Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16]

Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, Chapter 268A of the General Laws may limit the ability of a lawyer to represent both a state, county or municipal government or governmental agency and a private party having a matter that is either pending before that government or agency or in which the government or agency has an interest, even when the interests of the government or agency and the private party appear to be similar.

[17]

Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of

adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(r)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18]

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(g) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments 30 and 31 (effect of common representation on confidentiality).

[19]

Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20]

Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(d). See also Rule 1.0(s) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(d). The requirement of a 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, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21]

A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of

a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients would result.

Consent to Future Conflict

[22]

Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23]

Paragraph (b)(3) prohibits representation of opposing parties in litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant, or more than one person under investigation by law enforcement authorities for the same transaction or series of transactions, including any grand jury proceeding. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24]

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of

the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25]
When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26]
Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment 7. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment 8.

[27]
Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the lawyer should make clear his or her relationship to the parties involved.

[28]
Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29]
In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30]
A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31]
As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client confidential information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that confidential information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32]
When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and thus that the clients may be required to assume greater responsibility for decisions than when each client is independently represented. Any limitations on the scope of the representation made

necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33]
Subject to the above limitations, each client in the joint representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34]
A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client. As to lawyers representing governmental entities, see Scope [18].

[35]
A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules.

(a)

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(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 gives informed consent, except as permitted or required by these Rules.

(c)

A lawyer shall not, for his own personal benefit or the benefit of any person closely related to the lawyer, solicit any substantial gift from a client, including a testamentary gift, or prepare for a client an instrument giving the lawyer or a person closely related to the lawyer any substantial gift, including a testamentary gift, unless the lawyer or other recipient of the gift is closely related to the client. For purposes of this Rule, a person is "closely related" to another person if related to such other person as sibling, spouse, child, grandchild, parent, or grandparent, or as the spouse of any such person.

(d)

Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e)

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono publico may provide modest gifts to the client for food, clothing, shelter, transportation, medicine, and other basic living expenses, provided that the lawyer may not:

(i) promise, assure, or imply the availability of such gifts prior to retention or as an inducement to enter into the client-lawyer relationship or to continue the client-lawyer relationship after retention;

(ii) seek or accept reimbursement, including from the proceeds of a settlement or judgment, from the client, a relative of the client, or anyone affiliated with the client; or

(iii) publicize or advertise a willingness to provide such gifts to prospective clients.

Gifts of financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

(4) When a non-profit organization that provides free legal and other services to indigent clients has received donations or other funding to provide humanitarian aid to persons in need, such as financial assistance to pay for food, clothing, shelter, transportation, medicine, and other basic living expenses, the organization's use of such donations or other funding to provide humanitarian aid to its clients, or the clients' families, shall not be deemed a violation of Rule 1.8(e).

(f)

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.

(g)

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h)

A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i)

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
(2) contract with a client for a reasonable contingent fee in a civil case.

(j)

A lawyer shall not:

(1) during the course of any representation by the lawyer or the lawyer's firm, employ coercion, intimidation, or undue influence to enter into or continue sexual relations with a client; or

(2) as a condition of entering into or continuing any representation by the lawyer or the lawyer's firm, require or demand sexual relations with a client or prospective client.

(k)

While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (j) that applies to any one of them shall apply to all of them.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended March 26, 2015, effective July 1, 2015; amended July 13, 2022, effective October 1, 2022.

Comment

Business Transactions Between Client and Lawyer

[1]

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2]

Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(g) (definition of informed consent).

[3]
The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4]
If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Confidential Information Related to Representation

[5]
Use of confidential information relating to the representation to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person violates the lawyer's duty of loyalty. Paragraph (b) prohibits such use of client confidential information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1, and 8.3. Paragraph (b) applies when such information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase.

Gifts to Lawyers

[6]
A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7]
If effectuation of a substantial gift to a lawyer or person closely related to the lawyer requires preparing a legal instrument such as a will or conveyance, the client should have the detached

advice that another lawyer can provide. The sole exception to this Rule is where the client is a person closely related to the donee.

[8]
Appointments as executor of a client's estate or other potentially lucrative fiduciary position will be subject to the general conflict of interest provision in Rule 1.7. The lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9]
An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10]
Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11]
Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee may give the client modest gifts for basic living expenses, such as contributions for food, clothing, shelter, transportation, medicine, and similar basic necessities of life. This rule applies to a lawyer in private practice representing an indigent client pro bono. The rule also applies to a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization or through a law school clinical or pro bono program. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12]
The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. This rule is intended to permit a lawyer to provide compassionate assistance to clients on a one-time or very occasional basis. It does not

permit a lawyer to subsidize a client's living expenses during the pendency of a case, nor does it permit the advancement of living expenses to be repaid as an expense of the case.

[12A]
Whether a gift constitutes an inducement to enter into or continue a client-lawyer relationship in violation of paragraph (e)(3)(i) may be inferred from various factors, including the amount of the gift, the continuous or repetitive nature of gifts, the nature of the lawyer's practice (including whether the lawyer regularly makes such gifts), and, in a case where an award of fees is possible, the likelihood of a recovery of fees, the amount of fees potentially recoverable, and evidence of competition among lawyers for the representation.

[13]
Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

[13A]
Paragraph (e)(4) confirms that where a non-profit organization that provides free legal and other services to indigent clients receives donations or other funding to provide humanitarian aid to persons in need, the use of those donations does not violate paragraph (e)(3) even if the recipients of the aid are the indigent clients of the non-profit organization, or family members of such clients.

[14]
Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer’s independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer’s professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[15]
Sometimes, it will be sufficient for the lawyer to obtain the client’s informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer’s representation of the client will be materially limited by the lawyer’s own interest in the fee arrangement or by the lawyer’s responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent

of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[16]

Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the client's informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(g) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class. Similar considerations may apply in derivative actions.

Limiting Liability and Settling Malpractice Claims

[17]

Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement, including compliance with Rule 1.5(f) where applicable. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[18]

Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[19]

Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[20]

The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is often unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. Paragraph (j)(1) seeks to prevent a lawyer from exploiting the professional relationship with a client by prohibiting the use of coercion, intimidation, or undue influence to obtain sexual relations with a client or a prospective client of the lawyer or the lawyer's firm, while paragraph (j)(2) more generally prohibits a lawyer from demanding sexual relations as a condition of providing legal services, even if the demand does not otherwise appear to involve coercion, intimidation, or undue influence. A sexual relationship that is permissible under paragraph (j) may nevertheless interfere with the lawyer's exercise of professional judgment and create a conflict between the lawyer's personal interests and the best interests of the client. See Rule 1.7, Comment 12.

[21] Reserved

[22] Reserved

Imputation of Prohibitions

[23]

Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (j) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client.

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 a 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 or for the lawyer's advantage or 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; or
(2) (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.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended March 26, 2015, effective July 1, 2015; comment amended July 13, 2022, effective October 1, 2022.

Comment

[1]

After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment 9. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2]

The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3]

Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4]

When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the Rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the Rule should not unreasonably hamper lawyers from forming new associations

and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5]
Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6]
Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7]
Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8]
Paragraph (c) provides that confidential information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person unless the client gives informed consent, except as permitted or required by these Rules. However, the fact that a lawyer has once served a client ordinarily does not preclude the lawyer from using generally known information about that client when later representing another client. See Comment 3A to Rule 1.6.

[9]
The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(g). With regard to the effectiveness of an advance waiver, see Comment 22 to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

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 Rules 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 in a court of general jurisdiction of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred 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.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended March 26, 2015, effective July 1, 2015; comment amended March 10, 2016, effective May 1, 2016.

Comment

Definition of "Firm"

[1]

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and

occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

[2]
With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[3]
Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

[4]
Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(d)(2)(i). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.

[5] Reserved.

Principles of Imputed Disqualification

[6]
The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b), (d) and (e).

[6A]
The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not

effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified.

[7]
Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[8]
Paragraphs (d) and (e) of Rule 1.10 apply when a lawyer moves from a private firm to another firm ("new firm") and are intended to create procedures similar in some cases to those under Rule 1.11(b) for lawyers moving from a government agency to a private firm. Paragraphs (d) and (e) of Rule 1.10, unlike the provisions of Rule 1.11, do not permit a firm, without the consent of the former client of the disqualified lawyer or of the disqualified lawyer's former firm, to handle a matter with respect to which the personally disqualified lawyer was involved to a degree sufficient to provide a substantial benefit to the new firm's client or had confidential information relating to the matter sufficient to provide a substantial benefit to the new firm's client, as noted in Comment 11 below. Like Rule 1.11, however, Rule 1.10(d) can only apply if the lawyer no longer represents the client of the former firm after the lawyer arrives at the lawyer's new firm.

[9]
If the lawyer has no information protected by Rule 1.6 or Rule 1.9 about the representation of the former client, the new firm is not disqualified and no screening procedures are required. This would ordinarily be the case if the lawyer did no work on the matter and the matter was not the subject of discussion with the lawyer generally, for example at firm or working group meetings. The lawyer must search his or her files and recollections carefully to determine whether he or she has confidential information. The fact that the lawyer does not immediately remember any details of the former client's representation does not mean that he or she does not in fact possess confidential information material to the matter.

[10]
If the lawyer does have confidential information about the representation of the client of his former firm, the firm with which he or she is newly associated may represent a client with interests adverse to the former client of the newly associated lawyer only if the personally disqualified lawyer did not have involvement or confidential information relating to the matter sufficient to provide a substantial benefit to the new firm's client, the personally disqualified lawyer is apportioned no part of the fee, and all of the screening procedures are followed, including the requirement that the personally disqualified lawyer and the new firm reasonably believe that the screening procedures will be effective. For example, in a very small firm, it may be difficult to keep information screened. On the other hand, screening procedures are more likely to be successful if the personally

disqualified lawyer practices in a different office of the firm from those handling the matter from which the personally disqualified lawyer is screened.

[11]
In situations where the personally disqualified lawyer was involved in a matter to a degree sufficient to provide a substantial benefit to the new firm's client or had confidential information relating to a matter sufficient to provide a substantial benefit to the new firm's client, the new firm will generally only be allowed to handle the matter if the former client of the personally disqualified lawyer or of the former law firm consents and the new firm reasonably believes that the representation will not be adversely affected, all as required by Rule 1.7. This differs from the provisions of Rule 1.11, in that Rule 1.11(a) permits a firm to handle a matter against a government agency, without the consent of the agency, with respect to which one of its associated lawyers was personally and substantially involved for that agency, provided that the procedures of Rule 1.11(a)(1) and (2) are followed.

Likewise, Rule 1.11(b) permits a firm to handle a matter against a government agency, without the consent of the agency, with respect to which one of its associated lawyers had substantial material information even if that lawyer was not personally and substantially involved for that agency, provided that the lawyer is screened and not apportioned any part of the fee.

[12]
The former client is entitled to review of the screening procedures if the former client believes that the procedures will not be or have not been effective. If the matter involves litigation, the court before which the litigation is pending would be able to decide motions to disqualify or to enter appropriate orders relating to the screening, taking cognizance of whether the former client is seeking the disqualification of the firm upon a reasonable basis or without a reasonable basis for tactical advantage or otherwise. If the matter does not involve litigation, the former client can seek judicial review of the screening procedures from a trial court.

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; and
(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.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended March 26, 2015, effective July 1, 2015; comment amended July 13, 2022, effective October 1, 2022.

Comment

[1]

A lawyer who has served or is currently serving as a public officer or employee or is specially retained by the government is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. See G. L. c. 268A. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(g) for the definition of informed consent.

[2]

Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3]

Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4]

This Rule represents a balancing of interests. On the one hand, where the successive clients are a public agency and another client, the risk exists that power or discretion vested in public authority might be used for the special benefit of another client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only

from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5]

When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment 9.

[6]

Paragraphs (b) and (c) contemplate a screening arrangement. These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7]

Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8]

Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9]

Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10]

For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

Rule 1.12: Former Judge, Arbitrator, Mediator or Other 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 current proceeding give informed consent, confirmed in writing.

(b)

A lawyer shall not negotiate for 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 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, or 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.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended March 26, 2015, effective July 1, 2015; comment amended July 13, 2022, effective October 1, 2022.

Comment

[1]

This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited by these Rules from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The lawyer should also consider applicable statutes and regulations, e.g. G. L. c. 268A. The term "adjudicative officer" includes such officials

as magistrates, referees, special masters, hearing officers and other parajudicial officers. Canon 6A(2) of the Code of Judicial Conduct (S.J.C. Rule 3:09) provides that a retired judge recalled to active service "shall not, for a period of six months following the date of retirement, resignation, or most recent service as a retired judge pursuant to G. L. c. 32, §§ 65E-65G, perform court-connected dispute resolution services except on a pro bono publico basis, enter an appearance, or accept an appointment to represent any party in any court of the Commonwealth."

[2]

Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(g) and (d). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3]

Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4]

Requirements for screening procedures are stated in Rule 1.10(f). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5]

Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[6]

Law clerks who serve before they are admitted to the bar are subject to the limitations stated in Rule 1.12(b). For purposes of this Rule, the term "law clerk" shall include judicial interns and others who provide similar legal assistance to a judge or other adjudicative officer or to an arbitrator, mediator, or other third-party neutral.

Rule 1.13: Organization as Client.

(a)

A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b)

If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c)

Except as provided in paragraph (d), if (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d)

Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e)

A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f)

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g)

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended December 30, 1997, effective March 1, 1998; amended November 28, 2007, effective January 1, 2008; comment amended March 26, 2015, effective July 1, 2015; comment amended July 13, 2022, effective October 1, 2022.

Comment

The Entity as the Client

[1]
An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2]
When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3]
When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(h), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4]
In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter

be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5]
Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6]
The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3, 4.1 or 8.3. Moreover, the lawyer may be subject to disclosure obligations imposed by law or court order as contemplated by Rule 1.6(b)(5). Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal confidential information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)-(7). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7]
Paragraph (d) makes clear that the authority of a lawyer to disclose confidential information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged violation of law. This is necessary in order to

enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8]
A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal. Nothing in these rules prohibits the lawyer from disclosing what the lawyer reasonably believes to be the basis for his or her discharge or withdrawal.

Government Agency

[9]
The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10]
There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11]
Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12]

Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13]

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14]

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Rule 1.14: Client with Diminished Capacity.

(a)

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b)

When the lawyer reasonably believes that the client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, is at risk of substantial physical, financial or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action in connection with the representation, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c)

Confidential information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal confidential information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended July 22, 2008, effective September 1, 2008; amended March 26, 2015, effective July 1, 2015.

Comment

[1]

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client has diminished capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2]

The fact that a client has diminished capacity does not lessen the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3]

The client may wish to have family members or other persons participate in discussions with the lawyer. The lawyer may also consult family members even though they may be personally interested in the situation. Before the lawyer discloses confidential information of the client, the lawyer should consider whether it is likely that the person or entity to be consulted will act adversely to the client's interests. Decisions under Rule 1.14(b) whether and to what extent to consult or to disclose confidential information are matters of professional judgment on the lawyer's part.

[4]

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rules 1.2(d), 1.6, 3.3 and 4.1.

Taking Protective Action

[5]

If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make

adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6]
In determining whether a client has diminished capacity that prevents the client from making an adequately considered decision regarding a specific issue that is part of the representation, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7]
If a client is unable to make an adequately considered decision regarding an issue, and if achieving the client's expressed preferences would place the client at risk of a substantial harm, the attorney has four options. The attorney may:

i. advocate the client's expressed preferences regarding the issue;
ii. advocate the client's expressed preferences and request the appointment of a guardian ad litem or investigator to make an independent recommendation to the court;
iii. request the appointment of a guardian ad litem or next friend to direct counsel in the representation; or
iv. determine what the client's preferences would be if he or she were able to make an adequately considered decision regarding the issue and represent the client in accordance with that determination.

In the circumstances described in clause (iv) above where the matter is before a tribunal and the client has expressed a preference, the lawyer will ordinarily inform the tribunal of the client's expressed preferences. However, there are circumstances where options other than the option in clause (i) above will be impermissible under substantive law or otherwise inappropriate or unwarranted. Such circumstances arise in the representation of clients who are competent to stand trial in criminal, delinquency and youthful offender, civil commitment and similar matters.

Counsel should follow the client's expressed preference if it does not pose a risk of substantial harm to the client, even if the lawyer reasonably determines that the client has not made an adequately considered decision in the matter.

Disclosure of the Client's Condition

[8]

Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Confidential information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9]

In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10]

A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

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 that 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 that 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 that 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 paragraph, "family member" refers to 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.

(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 contemporaneous and complete records of the receipt, maintenance, and disposition of that trust property, including all records required by this paragraph. 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 (1)G 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 that 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 that 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 that 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, § 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 that the charitable entity intends to preserve for future use; and
(vii) reporting to the court in such manner as the court may direct.

(5)

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.

(6)
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 and IOLTA Account Inactivity Notification.

All trust accounts shall be established in compliance with the following provisions:

(1)
A lawyer shall maintain trust accounts only in financial institutions that have filed with the Board of Bar Overseers an agreement, in a form provided by the Board, (i) 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 in accordance with subparagraph (h)(4) of this Rule, and (ii) to report inactivity in an IOLTA account in accordance with subparagraphs (h)(5) and (h)(6) of this Rule.

(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 that 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)
The IOLTA account inactivity notification agreement shall provide that the financial institution shall give notice as follows:

(i) After two and one-half years of inactivity in an IOLTA account, the financial institution shall notify the lawyer and, if known, the law firm at which the lawyer last practiced while holding the account that the account has shown no activity for two and one-half years and that such inactivity shall be reported to the Board if it continues for six more months.
(ii) After three years of inactivity in an IOLTA account, the financial institution shall notify the Board that the account is inactive, with copies to the lawyer and, if known, the law firm at which the lawyer last practiced while holding the account.

Inactivity shall be measured from the date of the last transaction or the date when the lawyer notifies the financial institution that the account shall remain open pursuant to subparagraph (h)(7) of this Rule, whichever is later. For purposes of this Rule, automatic interest accrual and disbursement of interest to the IOLTA Committee shall not constitute activity.

(6)

The notifications required by subparagraph (h)(5) of this Rule shall contain the account name, the account number, the lawyer's (or law firm's) name, the current balance of the account, and the date and amount of the last transaction in the account other than automatic interest accrual and disbursement of interest to the IOLTA Committee.

(7)

When a lawyer receives a copy of the inactivity notification that a financial institution sent to the Board, the lawyer shall close the account and distribute the funds either to the owner of the funds or to the IOLTA Committee, as applicable, unless the IOLTA account contains no unidentified or unclaimed funds, and the lawyer has a valid reason for maintaining the IOLTA account. The lawyer shall notify the Board in writing of the action taken or, if no action is taken, of the reason that the IOLTA account will remain open. If the IOLTA account will remain open, the lawyer shall also notify the financial institution in writing that the IOLTA account will remain open. If, within one year from the date the financial institution sent the inactivity notification to the Board, the lawyer neither closes the IOLTA account nor notifies the financial institution that the IOLTA account will remain open, the financial institution shall distribute the balance of the IOLTA account to the IOLTA Committee and close the IOLTA account.

(8)

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.

(9)

The following definitions shall be applicable to paragraph (h) of this Rule:

(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 that accepts for deposit funds held in trust by lawyers.
(ii) "Notice of dishonor" refers to the notice that a financial institution is required to give, under the laws of this Commonwealth, upon presentation of an instrument that the institution dishonors.
(iii) "Properly payable" refers to an instrument that, if presented in the normal course of business, is in a form requiring payment under the laws of this Commonwealth.

(i) Disposition of Unidentified and Unclaimed Funds in IOLTA Accounts.

(1)

When a lawyer discovers that an IOLTA account contains funds that the lawyer reasonably believes are unidentified funds or unclaimed funds, the lawyer shall promptly make reasonable and diligent

efforts to identify the owner of the unidentified funds or locate the owner of the unclaimed funds and to transmit the funds to the owner.

(2)
If the lawyer has made reasonable and diligent but unsuccessful efforts to identify the owner of unidentified funds or locate the owner of unclaimed funds, the lawyer may remit the funds to the IOLTA Committee at any time before the funds are required to be remitted to the IOLTA Committee pursuant to paragraph (i)(3) of this Rule.

(3)
If the lawyer has been unable to identify the owner of unidentified funds or to locate the owner of unclaimed funds and transmit the funds to the owner within three years after discovering that the IOLTA account contains unidentified or unclaimed funds, the lawyer shall remit the funds to the IOLTA Committee.

(4)
When a lawyer remits funds to the IOLTA Committee pursuant to paragraph (i)(2) or (i)(3) of this Rule, (i) the lawyer shall provide a report to the IOLTA Committee in a form provided by the IOLTA Committee and shall comply with the procedures of the IOLTA Committee for the transfer of funds, and (ii) if the amount of funds transferred to the IOLTA Committee in a twelve-month period exceeds the applicable threshold amount, the lawyer shall, in a form provided by the Board, provide a report to the Board within 14 days of transferring the funds that bring the twelve-month total of funds transmitted to the IOLTA Committee above the applicable threshold amount.

(5)
A lawyer shall:

(i) respond to requests from the Board for information regarding the lawyer's efforts to identify or locate the owner of funds held in the lawyer's IOLTA account;
(ii) cooperate with the Board in any investigation of a claim of ownership of funds previously remitted to the IOLTA Committee;
(iii) notify the Board and the IOLTA Committee if the lawyer identifies or locates the owner of funds previously remitted to the IOLTA Committee pursuant to this section and make reasonable and diligent efforts to assist the owner in reclaiming the funds.

(6)
The following definitions shall be applicable to paragraph (i) of this Rule:

(i) "Unidentified funds" refer to funds in an IOLTA account, the owner of which cannot be identified.
(ii) "Unclaimed funds" refer to funds in an IOLTA account, the owner of which can be identified but not located or contacted, or the owner of which can be located but has indicated an intent not to claim them.
(iii) The "owner" of unidentified or unclaimed funds refers to the person on whose behalf the lawyer was holding the funds and any court-appointed representative of that person or the person's estate.

(iv) The "applicable threshold amount" is $500, or such amount as may be proposed by the Board, and after approval by the Supreme Judicial Court, published by the Board as the applicable threshold amount.

Rule History

Adopted June 9, 1997, effective January 1, 1998; amended September 5, 2003, effective July 1, 2004; amended March 26, 2015, effective July 1, 2015; amended July 13, 2022, effective October 1, 2022; amended January 11, 2024, effective September 1, 2024.

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. For the obligation to refund an unearned fee in the event of a discharge or withdrawal, see Rule 1.16(d).

[3]

Lawyers often receive funds from third parties from which the lawyer’s fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer’s contention. The disputed portion of the funds must be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4]
Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[5]
The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[6]
How much time should elapse between the receipt of funds by the lawyer and notice to the client or third person for whom the funds are held pursuant to paragraph (c) depends on the circumstances. By example, notice must be furnished immediately upon receipt of funds in settlement of a disputed matter, but a lawyer acting as an escrow agent or trustee routinely collecting various items of income may give notice by furnishing a complete statement of receipts and expenses on a regular periodic basis satisfactory to the client or third person. Notice to a client or third person is not ordinarily required for payments of interest and dividends in the normal course, provided that the lawyer properly includes all such payments in regular periodic statements or accountings for the funds held by the lawyer. A lawyer's inability to identify or locate the owner of funds held in the lawyer's IOLTA account does not relieve the lawyer of the duties set forth in paragraph (c) of this Rule.

[6A]
Paragraph (d)(2) provides that, on or before the date of any withdrawals from a trust account to pay fees due, the lawyers must provide the client in writing with, among other information, an itemized bill or other accounting showing the services rendered. Because the definition of "trust property" in paragraph (a)(1) includes funds held in a fiduciary capacity, lawyers who represent themselves as fiduciaries(such as personal representatives, executors, conservators, guardians or trustees) must comply with paragraph (d)(2) by creating, prior to or contemporaneous with any withdrawal of fees, the bills or accountings required by the rule to justify payment. Such accountings may consist of itemized written time records, formal written bills, or other contemporaneous written accountings that show the services rendered and the method for calculating the fees. The lawyer is also required to maintain all trust account records specified in paragraphs (e) and (f) of this rule.

[7]
Paragraph (e)(3) requires attorneys to provide a written notice to the bank or other depository when opening any account that is a trust account within the meaning of this Rule, regardless of whether the account is an IOLTA account or an individual trust account. The notice must be acknowledged in writing by the bank and an executed copy retained for the lawyer's own records. Forms for opening an IOLTA account (called an Attorney's Notice of Enrollment) may be found on the IOLTA Committee website or obtained by contacting the IOLTA Committee directly. See the IOLTA Guidelines for additional procedures to be used when opening IOLTA accounts. Forms for notice to

a bank when opening an individual (i.e., non-IOLTA) trust account may be obtained online from the website of the Board of Bar Overseers. The use of these forms shall not prevent the use of other forms consistent with this Rule.

[8]

Paragraph (e)(4) states the general rule that all withdrawals and disbursements from trust account must be made in a manner that permits the recipient or payee of the withdrawal to be identified. It does not prohibit electronic transfers or foreclose means of withdrawal that may be developed in the future, provided that the recipient of the payment is identified as part of the transaction. When payment is made by check, the check must be payable to a specific person or entity. A prenumbered check must be used, except that starter checks may be used for a brief period between the opening of a new account and issuance of numbered checks by the bank or depository.

[9]

Paragraph (f) lists records that a lawyer is obliged to keep in order to comply with the requirement that "complete records" be maintained. Additional records may be required to document financial transactions with clients or third persons. Depending on the circumstances, these records could include retainer, fee, and escrow agreements and accountings, including RESPA or other real estate closing statements, accountings in contingent fee matters, and any other statement furnished to a client or third person to document receipt and disbursement of funds.

[10]

The "Check Register," "Individual Client Ledger" and "Ledger for Bank Fees and Charges" required by paragraph (f)(1) are all chronological records of transactions. Each entry made in the check register must have a corresponding entry in one of the ledgers. This requirement is consistent with manual record keeping and also comports with most software packages. In addition to the data required by paragraph (f)(1)(B), the source of the deposit and the purpose of the disbursement should be recorded in the check register and appropriate ledger. For non-IOLTA accounts, the dates and amounts of interest accrual and disbursement, including disbursements from accrued interest to defray the costs of maintaining the account, are among the transactions that must be recorded. Check register and ledger balances should be calculated and recorded after each transaction or series of related transactions.

[11]

Periodic reconciliation of trust accounts is also required. Generally, trust accounts should be reconciled on a monthly basis so that any errors can be corrected promptly. Active, high-volume accounts may require more frequent reconciliations. A lawyer must reconcile all trust accounts at least every sixty days.

The three-way reconciliation described in paragraph (f)(1)(E) must be performed for any account in which funds related to more than one client matter are held. The reconciliation described in paragraph (f)(1)(E)(iii) need not be performed for accounts that only hold the funds of a single client or third person, but the lawyer must be sure that the balance in that account corresponds to the balance in the individual ledger maintained for that client or third person. The method of preparation and form of the periodic reconciliation report will depend upon the volume of

transactions in the accounts during the period covered by the report and whether the lawyer maintains records of the account manually or electronically. By example, for an inactive single-client account for which the lawyer keeps records manually, a written record that the lawyer has reconciled the account statement from the financial institution with the check register maintained by the lawyer may be sufficient.

[12]

Lawyers who maintain records electronically should back up data on a regular basis. For moderate to high-volume trust accounts, weekly or even daily backups may be appropriate.

[13]

Paragraph (f)(4), along with Rule 1.17(e), provides for the preservation of a lawyer's client trust account records in the event of dissolution or sale of a law practice. These provisions reflect the supervisory responsibilities of partners under Rule 5.1. Regardless of the arrangements the partners make among themselves for maintenance of the client trust records, each partner can be held responsible for ensuring the availability of these records. For the definition of "law firm," "partner," and "reasonable," see Rules 1.0(e), (i), and (l).

[14]

The provisions of paragraphs (h)(1)(ii), (h)(5), (h)(6), (h)(7) and (i) were added to the Rule in response to the holding in Matter of Olchowski, 485 Mass. 807 (2020) ("Olchowski") that funds in an IOLTA account are not subject to the Massachusetts abandoned property law, G. L. c. 200A. The provisions of Rule 1.15(i) provide a means by which unidentified and unclaimed funds in lawyers' IOLTA accounts are to be transferred to the Massachusetts IOLTA Committee.

[15]

Where a lawyer has failed to disburse funds from an IOLTA account because of uncertainty as to the ownership of such funds, or because the owner is known but cannot be located or has failed to negotiate the lawyer's IOLTA account check, the lawyer must make reasonable and diligent efforts to identify or locate the owners and remit the funds to the owner, as provided in subparagraph (i)(1) of this Rule. What constitutes reasonable and diligent efforts will depend on the circumstances, but may include, in the case of unidentified funds, a thorough review of bank records, accounting records, and client files; and, in the case of unclaimed funds, making inquiries of the client's family or acquaintances, examining public records, and conducting internet-based research. If such efforts are unsuccessful, paragraph (i)(3) requires the lawyer to transfer the unclaimed or unidentified funds to the IOLTA Committee after three years. Under paragraph (i)(2), a lawyer who has made a diligent but unsuccessful effort to identify the owner of unidentified funds or locate the owner of unclaimed funds may transfer the funds to the IOLTA Committee before the expiration of three years.

[16]

Nothing in paragraphs (h) and (i) alters a lawyer's duties to maintain complete records of all funds in an IOLTA account, comply with all operational requirements for a trust account, and promptly disburse funds held in trust for clients or third parties when payment is due. Violations of Rule 1.15 or other rules that cause unidentified funds or unclaimed funds to accumulate in an IOLTA account

may be grounds for discipline whether or not the lawyer transfers the funds to the IOLTA Committee in accordance with paragraph (i).

[17]
The records associated with unclaimed and unidentified funds may be necessary to a later determination of ownership of those funds pursuant to Rule 1.15(i). Rule 1.15A prohibits a lawyer who has transferred such funds from destroying the related client file or files for up to 10 years.

[18]
The Olchowski decision and Rule 1.15 do not address how funds that are held in trust accounts other than IOLTA accounts and whose owner can be identified but not located or contacted are to be handled. Funds held in trust accounts other than IOLTA accounts and for which the owner cannot be located or contacted are governed by the Massachusetts abandoned property law, G.L. c. 200A.

Rule 1.15A: Client Files.

(a)
For purposes of this Rule, the client's file consists of the following physical and electronically stored materials:

(1) all papers, documents, and other materials, whether in physical or electronic form, that the client supplied to the lawyer;
(2) all correspondence relating to the matter, whether in physical or electronic form;
(3) all pleadings and other papers filed with or by the court or served by or upon any party relevant to the client's claims or defenses;
(4) all investigatory or discovery documents, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence;
(5) all intrinsically valuable documents of the client; and
(6) copies of the lawyer's work product.

Paragraph (a) does not impose an obligation to preserve documents that a lawyer following customary practices would not normally preserve in the client's file. For purposes of subparagraph (5), documents are intrinsically valuable where they constitute trust property as defined in Rule 1.15 or have legal, operative, personal, historical or other significance in themselves, including wills, trusts and other executed estate planning documents, deeds, securities, negotiable instruments, and official corporate or other records. For purposes of this Rule, work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by the lawyer's employee, agent, or consultant, and not described in subparagraphs (2), (3), (4) or (5) above. Examples of work product include without limitation legal research, closing binders, records of witness interviews, and reports of negotiations.

(b)

A lawyer must make the client’s file available to a client or former client within a reasonable time following the client's or former client’s request for his or her file, provided however, that:

(1) the lawyer may at the lawyer’s own expense retain copies of documents turned over to the client;
(2) the client may be required to pay (i) any copying charges for copying the material described in subparagraphs (a)(3) and (a)(6), consistent with the lawyer's actual copying cost, unless the client has already paid for such material, and (ii) the lawyer’s actual cost for the delivery of the file;
(3) the lawyer is not required to turn over to the client investigatory or discovery documents for which the client is obligated to pay under the fee agreement but has not paid; and
(4) unless the lawyer and the client have entered into a contingent fee agreement, the lawyer is only required to turn over copies of the lawyer's work product for which the client has paid.

Notwithstanding anything in this paragraph (b) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would unfairly prejudice the client.

(c)

(1)

Unless the lawyer has transferred the client's file to the client or successor counsel or as otherwise directed by the client, or unless the client agrees in writing to an alternative arrangement for the file's custody or destruction, a lawyer shall take reasonable measures to retain a client's file in a matter until the latest of (i) for documents governed by paragraph (d) below, when the conditions of that paragraph have been satisfied; (ii) for files subject to paragraph (f) below, the periods specified in paragraph (f) below; (iii) for files relating to the representation of a minor, six years after the minor reaches the age of majority; and (iv) for all other documents and files, six years have elapsed after the completion of the matter or the termination of the representation in the matter.

(2)

If the client has not requested the file within the period of retention set forth in paragraph (c)(1), the file may be destroyed, except as provided in paragraph (e) below.

(3)

When a lawyer transfers a client's file or items to the client or successor counsel or agrees in writing to an alternative arrangement for the file's custody or destruction, the lawyer shall retain a copy of the writing describing the alternative arrangement, or a cover letter or other document evidencing the transmittal of the file to the client or successor counsel or as otherwise directed by the client, for at least six years following the date of the completion of the matter or the termination of the representation in the matter.

(d)

Intrinsically valuable documents that constitute trust property of the client must be delivered to the client as provided in Rule 1.15(c). All other intrinsically valuable documents must be appropriately safeguarded and delivered in accordance with paragraph (b) above, or retained until such time as

the documents no longer possess intrinsic value. If the client cannot be found, the lawyer shall securely retain such documents or, where applicable, deliver such items to an appropriate governmental repository.

(e)

A lawyer shall not destroy a client's file if the lawyer knows or reasonably should know that:

(1) a lawsuit or other legal claim related to the client matter is pending or anticipated;
(2) a criminal or other governmental investigation related to the client matter is pending or anticipated;
(3) a disciplinary investigation or proceeding related to the client matter or a claim before the Client Security Board is pending or anticipated; or
(4) less than ten years have elapsed since unclaimed or unidentified funds potentially related to the client file have been transferred to the IOLTA Committee pursuant to Rule 1.15(i).

(f)

Criminal defense counsel and defense counsel in delinquency cases shall retain a client's files as follows:

(1) for the life of the client if the matter resulted in a conviction and a sentence of death or life imprisonment with or without the possibility of parole; and
(2) in all other criminal or delinquency matters, for ten years after the latest of the completion of the representation, the conclusion of all direct appeals, or the running of an incarcerated defendant's maximum period of incarceration, but in no event longer than the life of the client.

(g)

A lawyer appointed to represent a client by the Committee for Public Counsel Services shall retain a copy of the client's file in accordance with the requirements set forth in the Committee for Public Counsel Services Assigned Counsel Manual.

(h)

A lawyer shall take reasonable measures to ensure that the destruction of all or any portion of a client file shall be carried out in a manner consistent with all applicable confidentiality obligations.

Rule History

Adopted June 7, 2018, effective September 1, 2018; amended July 13, 2022, effective October 1, 2022; amended January 11, 2024, effective September 1, 2024.

Comments

[1]

In order to represent clients competently in a matter, lawyers customarily maintain a file of papers and electronically stored information that will in the lawyers' judgment aid in the representation. This Rule governs lawyers' obligations with respect to the custody and destruction of client files. A lawyer's obligations with respect to client funds are governed by Rule 1.15 and, with specific respect to trust property such as jewelry and other valuables entrusted to the lawyer by the client,

by Rule 1.15(b)(4). Lawyers are encouraged to address disposition of client files in the written engagement letter required by Rule 1.5(b)(1) and, in instances where particular arrangements for disposition or transfer have not been made, in the lawyer's final communication to the client at the conclusion of a matter.

[2]

The client's file in a given matter consists of those items that must be made available upon the client's direction to the client or successor counsel to provide a reasonably complete record of the services provided and, if the matter is unfinished, to give successor counsel what is needed to complete the representation. Thus, the client file for a litigation matter would include the pleadings and court filings, rulings and other documents issued by the court, all correspondence including with the client and opposing counsel, deposition transcripts, documents produced or received in discovery (subject to applicable protective orders), investigatory materials and expert reports, the trial record, memorialized legal research and analysis, and any settlement documents. In a case with a limited number of parties, the pleadings would include all the material pleadings. In a large case with many parties, such as a large bankruptcy proceeding, the pleadings would only include those directly relevant to the client's claims and defenses. The client file for a transactional matter would include all correspondence, including with the client and counterparties and the exchange of drafts, contracts and other documents establishing the terms of the transaction (often gathered into a "closing binder"), and memorialized legal research and analysis.

[3]

Multiple copies or drafts of the same document ordinarily do not constitute part of the client's file unless the matter is unfinished, and the client and successor counsel must have the drafts to complete the representation. Similarly, a lawyer's personal notes ordinarily do not constitute part of the client's file unless the notes are the only record of a witness interview, a settlement negotiation, a meeting with regulators or prosecutors, or some similar event. Once a document is finalized or personal notes of an event are memorialized, this Rule does not require preservation of the drafts or notes. However, documents that are part of the client's file at the time of a request for the file must thereafter be preserved and produced. Except as provided in Comment 4, this Rule does not require preservation of any physical documents that have been converted to electronic form.

[4]

Unless other applicable law requires a particular document to be physically preserved for its legal effectiveness, a lawyer may maintain a client's file in electronic form, provided, however, that, for documents stored only in electronic form, the lawyer must make reasonable efforts to store such electronic files in a form that can be read with available technology for any period during which the file must be retained. If the original form of the document is important, however, it should not be destroyed without the client's permission.

[5]

The client's file does not include a lawyer's administrative files such as conflict checks, billing and accounting records, and communications within a law firm concerning matters of administration such as account creation, billing and collections, logistics, and the assignment and evaluation of personnel assigned to the matter. Such documents may be subject to discovery in a dispute

concerning the representation, but ordinarily do not need to be provided to the client or successor counsel at the client's direction.

[6]

Rule 1.15A does not supersede obligations imposed by court order, rules of a tribunal, or other law including discovery rules in civil cases, subpoenas and other mandatory process, and the law of spoliation and obstruction of justice. Similarly, Rule 1.15A does not supersede specific retention requirements imposed by other rules of professional conduct. See, e.g., Rule 1.5(c). The maintenance of records required for trust property and trust accounts is governed exclusively by Rule 1.15. A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period.

[7]

Under paragraphs (c) and (f) of this Rule, the nature of the underlying case dictates the minimum time period that a file must be retained before it may be destroyed without client agreement. In addition, a lawyer may not destroy the files under paragraph (e) if the lawyer knows that there are legal or disciplinary proceedings pending or anticipated that relate to the matter for which the lawyer created the files, if the materials at issue are intrinsically valuable documents under paragraph (d), if less than 10 years have passed since funds relating to one or more client files were turned over to the IOLTA Committee under Rule 1.15(i), or if the lawyer has agreed otherwise. If the conditions imposed by this Rule are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9 and other applicable law such as the Massachusetts Privacy Act, Mass. Gen. Laws c. 93H, and the HIPAA Privacy Rule, 45 C.F.R. Parts 160 and 164. See Rule 1.6(c). A lawyer may destroy a client's file in accordance with this Rule notwithstanding the possibility that there could be further proceedings after the expiration of the time limits set forth in this Rule (such as a motion for a new trial or for relief from a judgment in light of changes in the law or the discovery of additional evidence), so long as such proceedings are not pending or anticipated at the time of the destruction.

[8]

For a lawyer to rely on an agreement in writing of the client as an alternative for the file's custody or destruction pursuant to paragraph (c)(1), for an unemancipated minor client the agreement must be entered into with an adult representative authorized to act for the client, and for an adult client or emancipated minor client, the adult or emancipated minor client must be competent to enter into a binding agreement.

[9]

The lawyer's obligations under this Rule to retain and return files to the client are not excused because the lawyer forwarded papers to the client from time to time during the course of the representation.

[10]

Nothing in this Rule is intended to mandate that a lawyer destroy a file. A lawyer appropriately may decide to retain certain types or portions of files, or portions of files for longer than six years, such as files relating to a structured settlement or other matters creating long-term obligations to or by

the client. Unless the lawyer and the client have otherwise agreed, a lawyer may retain a copy of the file or any document in the file.

Rule 1.16: Declining or Terminating Representation.

(a)

Except as stated in paragraph (c) below, a lawyer shall not represent a client in a matter or, where representation has commenced, shall withdraw from the representation if:

(1) the representation will result in violation of the rules of professional conduct or other law;
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
(3) the lawyer is discharged; or
(4) the lawyer knows that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(d) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

(b)

Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails 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;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

(c)

If permission for withdrawal from the representation is required by the rules of a tribunal, a lawyer shall not withdraw from the representation in a proceeding before that tribunal without its permission.

(d)

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for engagement of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred.

Rule History

Adopted March 26, 2015, effective July 1, 2015; amended June 7, 2018, effective September 1, 2018; amended March 20, 2025, effective June 1, 2025.

Comment

[1]

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest or other violations of law, and to completion. A lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine whether such circumstances exist before beginning the representation or might arise during the representation. See Rule 1.7, Comment 3; Rule 5.1, Comment 2. For example, if during a representation new parties to a case or transaction become involved, an additional conflict check should be undertaken. Ordinarily, a representation in a matter is concluded when the services the lawyer has undertaken to perform have been completed. See Rules 1.1, 1.2(c) and 6.5. See also Rule 1.3, Comment 4.

Mandatory Withdrawal

[2]

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. However, such a suggestion or other circumstances may warrant the lawyer's further inquiry into the facts and circumstances to assess the risk that the client seeks to use the lawyer's services to commit or further a crime or fraud. If the client persists in demanding that the lawyer counsel or assist in a crime or fraud, then under paragraph (a)(4) the lawyer must withdraw. See Rule 1.2(d), Comment 10.

[2A]

A lawyer should be alert to signs that a client intends to use the lawyer's services for money laundering, terrorist financing activities or other similar criminal activity. Factors to be considered in determining the level of risk may include: (i) the lawyer's experience and familiarity with the client; (ii) whether the client is an entity, and, if an entity, who the beneficial owners of that entity are; (iii) the nature of or significant changes in the requested legal services; (iv) the relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for money laundering or terrorist financing); and (v) the identities of those depositing into or receiving funds from the lawyer's trust account.

For example, if a client traditionally uses a lawyer to acquire local real estate through the use of domestic limited liability companies, with financing from a local bank, a duty of inquiry may arise if the same client asks the lawyer to create a multi-tier corporate structure formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's funding through the lawyer's trust account. Such a request could indicate a money-laundering scheme, or a scheme to conceal assets or other illegal conduct.

[3]
When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. If a lawyer's withdrawal is mandatory under these Rules, the lawyer's statement to that effect should ordinarily be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4]
A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5]
An appointed lawyer should advise a client seeking to discharge the appointed lawyer of the consequences of such an action, including the possibility that the client may be required to proceed pro se.

[6]
If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7]
A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8]
A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9]

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client.

[10]

Rule 1.15(c) specifies the lawyer's obligation to return funds and other property to which the client is entitled, and Rule 1.15A(b) details the lawyer's obligation to make client files available to a client or former client at the client's request.

Rule 1.17: Sale of Law Practice.

A lawyer or law firm may sell, and a lawyer or law firm may purchase, with or without consideration, a law practice, including good will, if the following conditions are satisfied:

(a) Reserved

(b) Reserved

(c)

The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;
(2) the client's right to retain other counsel or to take possession of the file; and
(3) the fact that the client's consent to the transfer of that client's representation will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice. If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera confidential information relating to the representation only to the extent necessary to obtain an order authorizing the transfer.

(d)

The fees charged clients shall not be increased by reason of the sale. The purchaser may, however, refuse to include a particular representation in the purchase unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

(e)

Upon the sale of a law practice, the seller shall make reasonable arrangements for the maintenance of property and records specified in Rule 1.15.

Rule History

Adopted March 26, 2015, effective July 1, 2015; comment amended July 13, 2022, effective October 1, 2022.

Comment

[1]

The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice and another lawyer or firm takes over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

[2] Reserved

[3] Reserved

[4] Reserved

[5] Reserved

[6] Reserved

Client Confidences, Consent and Notice

[7]

Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to detailed confidential information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8]

A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. If necessary to preserve client confidences, the lawyer shall request that the petition for a court order be considered in camera.

[9]

All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Fee Arrangements Between Client and Purchaser

[10]

The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored

by the purchaser. The purchaser may, however, refuse to include a particular representation in the purchase unless the client consents to pay the purchaser fees at a rate not exceeding the fees charged by the purchaser for rendering substantially similar services prior to the initiation of the purchase negotiations.

Other Applicable Ethical Standards

[11]
Lawyers participating in the sale of some or all of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(g) for the definition of informed consent); and the obligation to protect confidential information relating to the representation (see Rules 1.6 and 1.9).

[12]
If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13]
This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice that does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14]
Admission to or retirement from a law firm, retirement plan and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15]
This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice.

[16]
This Rule does not require the seller to cease to engage in the practice of law in a geographical area. This is a matter for agreement between the parties to the transfer.

[17]
Under Rule 1.17, a lawyer may sell all or part of the practice.

[18]
A law practice may be transferred and acquired without the necessity of consideration, and the client's consent referred to in Rule 1.17(c)(3) is only to the transfer of that client's representation.

[19]
The Rule permits the estate or representative of a lawyer to make a transfer of the lawyer's practice to one or more purchasers.

[20]
Paragraph (e) provides for the preservation of a lawyer's client trust account records in the event of the sale of a law practice and is the counterpart to Rule 1.15(f)(4), which applies when the law practice is dissolved. Comment 13 to Rule 1.15 is also applicable to paragraph (e) of this Rule.

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 confidential information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to confidential 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 confidential 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.

Rule History
Adopted March 26, 2015, effective July 1, 2015; comment amended July 13, 2022, effective October 1, 2022.

Comment

[1]

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2]

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of confidential information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides confidential information in response. See also Comment 4. In contrast, a consultation does not occur if a person provides confidential information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates uninvited confidential information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3]

It is often necessary for a prospective client to reveal confidential information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4]

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5]
A lawyer may condition a consultation with a prospective client on the person's informed consent that no confidential information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(g) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of confidential information received from the prospective client.

[6]
Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client confidential information that could be significantly harmful if used in the matter.

[7]
Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.10(e) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8]
Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9]
For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Counselor

Rule 2.1: Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

Scope of Advice

[1]
A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2]
Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3]
A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4]
Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5]
In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. See Comment 8 to Rule 1.4. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 2.2: Intermediary [Reserved]

Reserved June 9, 1997, effective January 1, 1998.

Comment

[1]

ABA Model Rule 2.2 sets forth circumstances in which a lawyer may act as an intermediary between clients. The court concluded that a lawyer representing more than one client should be governed by the conflict of interest principles stated in Rule 1.7. Specific Massachusetts Comments 12 through 12F to Rule 1.7 provide guidance concerning the joint representation of clients.

Special Massachusetts Comment. See Special Massachusetts Comment to Rule 1.7 concerning joint representation.

Rule 2.3: Evaluation for use by Third Persons.

(a)

A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and
(2) the client gives informed consent or providing the evaluation is impliedly authorized to carry out the representation.

(b) Reserved.

(c)

Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

Definition

[1]

An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[1A]
Where the person receiving the evaluation is also a client of the lawyer, the propriety of providing the evaluation is governed by Rule 1.7 and not this Rule. The propriety of a lawyer's use of the client's confidential information in preparing the evaluation is governed by Rule 1.6.

[2]
A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3]
When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4]
The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

[5] Reserved.

Financial Auditors' Requests for Information

[6]

When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Rule 2.4: Lawyer Serving as Third-Party Neutral.

(a)

A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b)

A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Rule History

Adopted March 26, 2015, effective July 1, 2015; comment amended March 26, 2015, effective July 1, 2015; comment amended July 13, 2022, effective October 1, 2022.

Comment

[1]

Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2]

The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American

Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution. In particular, lawyers in Massachusetts may be subject to the Uniform Rules of Dispute Resolution set forth in Supreme Judicial Court Rule 1:18.

[3]

Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4]

A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12. See also Uniform Rule of Dispute Resolution 9(e) set forth in S.J.C. Rule 1.18.

[5]

Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(r)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Advocate

Rule 3.1: Meritorious Claims and Contentions.

A lawyer shall not bring, continue, or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

[1]

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2]

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person, or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3]

The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule. The principle underlying the provision that a criminal defense lawyer may put the prosecution to its proof in all circumstances often will have equal application to proceedings in which the involuntary commitment of a client is in issue.

[4]

The option granted to a criminal defense lawyer to defend the proceeding so as to require proof of every element of a crime does not impose an obligation to do so. Sound judgment and reasonable trial tactics may reasonably indicate a different course.

Rule 3.2: Expediting Litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

[1]

Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper

for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Rule 3.3: Candor Toward the Tribunal.

(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;
(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
(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.

(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.

(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.

(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.

(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.

Rule History

Adopted March 26, 2015, effective July 1, 2015; comment amended July 13, 2022, effective October 1, 2022.

Comment

[1]
This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(r) 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.

[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.

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).

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.

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.

[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.

[7] Reserved.

[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(h). 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.

[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.

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.

[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.

[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 perjuriously. 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.

[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.

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.

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

[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).

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 confidential information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Rule 3.4: Fairness to Opposing Party and Counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in appearing before a tribunal on behalf of a client:

  (1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;

  (2) assert personal knowledge of facts in issue except when testifying as a witness; or

  (3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein;

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

  (1) the person is a relative or an employee or other agent of a client; and

  (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information;

(g) pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his or her testimony or the outcome of the case, provided that a lawyer may advance, guarantee, or acquiesce in the payment of:

  (1) expenses reasonably incurred by a witness in preparing, attending or testifying;

(2) reasonable compensation to a witness for loss of time in preparing, attending or testifying; and
(3) a reasonable fee for the professional services of an expert witness; or

(h) present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in a private civil matter.

Rule History

Adopted March 26, 2015, effective July 1, 2015; amended July 13, 2022, effective October 1, 2022.

Comment

[1]

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2]

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3]

With regard to paragraph (b), it is not improper to pay a witness as provided in paragraph (g).

[3A]

The obligations covered by paragraph (c) include, where the rules of the tribunal so require, obligations to cooperate in scheduling and case management and to meet and confer in good faith to resolve or narrow issues before submitting them to the tribunal for decision.

[4]

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

[5]

Paragraph (g) concerns the payment of funds to a witness. Compensation of a witness may not be based on the content of the witness's testimony or the result in the proceeding. A lawyer may pay a

witness reasonable compensation for time lost and for expenses reasonably incurred in preparing for or attending the proceeding. A lawyer may pay a reasonable fee for the professional services of an expert witness.

[6]
Paragraph (h) prohibits filing or threatening to file disciplinary charges as well as criminal charges solely to obtain an advantage in a private civil matter. The word "private" makes clear that a government lawyer may pursue criminal or civil enforcement, or both criminal and civil enforcement, remedies available to the government. This Rule is never violated by a report under Rule 8.3 made in good faith because the report would not be made "solely" to gain an advantage in a civil matter.

Rule 3.5: Impartiality and Decorum of the Tribunal.

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, either directly or through communications with the judge or otherwise, a desire not to communicate with the lawyer; or
    (3) the communication involves misrepresentation, coercion, duress or harassment; or
    (4) the communication is initiated by the lawyer without the notice required by law; or
(d) engage in conduct intended to disrupt a tribunal.

Rule History

Adopted March 26, 2015, effective July 1, 2015; amended November 16, 2017, effective December 1, 2017; comment amended July 13, 2022, effective October 1, 2022.

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. Subject to the notice requirements discussed below, the lawyer may do so unless the communication is prohibited by law or a court order. For example, in most cases common-law principles bar inquiry into the contents of jury deliberations and the thought processes of jurors, but not into extraneous influences. The lawyer must respect the desire of the juror not to talk with the lawyer. Where a juror makes known to the judge a desire not to communicate with the lawyer, and the judge so informs the lawyer, the lawyer may not initiate contact with that juror, directly or indirectly. The lawyer may not engage in improper conduct during the communication.

[3A]
If the lawyer wishes to initiate the communication with a juror or prospective juror after discharge of the jury, the lawyer must send notice of the lawyer's intent to initiate such contact to counsel for the opposing party or parties (or directly to the opposing party or parties, if not represented by counsel) five business days before contacting any juror. The notice must include a description of the proposed manner of contact and the substance of any proposed inquiry to the jurors, and, where applicable, a copy of any letter or other form of written communication the lawyer intends to send. The preferred method of initiating contact with a juror is by written letter, and the letter must include a statement that the juror may decline any contact with the lawyer or terminate contact once initiated. If the lawyer seeks to initiate contact through an oral conversation (whether in person, by telephone, or otherwise), the lawyer is nonetheless required to provide opposing counsel or opposing parties with prior notice of the substance of the intended communication five business days before the contact is initiated. See Commonwealth v. Moore, 474 Mass. 541, 551-52 (2016).

[3B]
If the juror initiates the communication with the lawyer and seeks to communicate about permissible subjects, such as the existence of extraneous influences on the jury deliberation process or the lawyer's performance during the trial, the lawyer is permitted to communicate with that juror after discharge of the jury without following these notice requirements.

[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(r).

Rule 3.6: Trial Publicity.

(a)

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b)

Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense, or defense involved, and, except when prohibited by law, the identity of the persons involved;
(2) the information contained in a public record;
(3) that an investigation of the matter is in progress;
(4) the scheduling or result of any step in litigation;
(5) a request for assistance in obtaining evidence and information necessary thereto;
(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
(7) in a criminal case, in addition to subparagraphs (1) through (6):
    (i) the identity, residence, occupation, and family status of the accused;
    (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
    (iii) the fact, time, and place of arrest; and
    (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c)

Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d)

No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

(e)

This rule does not preclude a lawyer from replying to charges of misconduct publicly made against him or her or from participating in the proceedings of a legislative, administrative, or other investigative body.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

[1]

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2]

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3]

The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4]

Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5]

There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6]
Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7]
Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[7A]
In making the statements permitted by paragraph (e), a lawyer must safeguard confidential information relating to the representation of a client as required by Rule 1.6.

[8]
See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.7: Lawyer as Witness.

(a)
A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b)

A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule History

Adopted March 26, 2015, effective July 1, 2015; comment amended July 13, 2022, effective October 1, 2022.

Comment

[1]

Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2]

The trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The combination of roles may also prejudice another party's rights in the litigation.

A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3]

To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony. This Rule does not prohibit the lawyer from acting as a witness if the lawyer is a party to the action and is appearing pro se.

[4]

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

[5]
Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6]
In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(d) for the definition of "confirmed in writing" and Rule 1.0(g) for the definition of "informed consent."

[7]
Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

Rule 3.8: Special Responsibilities of a Prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists, and refrain from threatening to prosecute a charge where the prosecutor lacks a good faith belief that probable cause to support the charge exists or can be developed through subsequent investigation;
(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 a 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) 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 prosecutor's action and that serve a legitimate law enforcement purpose:
    (1) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule; and
    (2) take reasonable steps 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 avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused; and

(h) refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct.

(i) When, because of new, credible, and material evidence, a prosecutor knows that there is a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:
    (1) if the conviction was not obtained by that prosecutor's office, disclose that evidence to an appropriate court or the chief prosecutor of the office that obtained the conviction, and
    (2) if the conviction was obtained by that prosecutor's office, disclose that evidence to the appropriate court;
        (i) notify the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;
        (ii) disclose that evidence to the defendant unless a court authorizes delay for good cause shown; and
        (iii) undertake or assist in any further investigation as the court may direct.

(j) When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.

(k) 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 (i) and (j), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

Rule History

Amended January 7, 2016, effective April 1, 2016.

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 a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[1A]

While a prosecutor may not threaten to prosecute a charge that the prosecutor knows is not supported by probable cause, this rule does not prohibit a prosecutor from declaring the intention to prosecute an individual for as yet uncharged criminal conduct if the prosecutor has a good faith belief that probable cause to support the charge can be developed through subsequent investigation.

[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.

[3A]

The obligations imposed on a prosecutor by the rules of professional conduct are not coextensive with the obligations imposed by substantive law. Disclosure is required when the information tends to negate guilt or mitigates the offense without regard to the anticipated impact of the information. The obligations imposed under paragraph (d) exist independently of any request for the information. However, regardless of an individual's right to disclosure of exculpatory or mitigating information in criminal proceedings, a prosecutor violates paragraph (d) only if the information required to be disclosed is known to the prosecutor as tending to be exculpatory or mitigating.

[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 a 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 consequences 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 nonlawyers 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 take reasonable steps to prevent all those assisting or associated with the prosecution team, but not under the direct supervision or control of the prosecutor, including law enforcement personnel, from making improper extrajudicial statements. A prosecutor's issuing the appropriate cautions to such persons will ordinarily satisfy the obligations of paragraph (f).

[7]

Consistent with the objectives of Rules 4.2 and 4.3, disclosure under paragraph (i) to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate. Paragraph (i) applies to new, credible, and material evidence regardless of whether it could previously have been discovered by the defense. The disclosures required by paragraph (i) should ordinarily be made promptly.

[8]

Under paragraph (j), once the prosecutor knows that clear and convincing evidence establishes that the defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor must seek to remedy the injustice. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant, and notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.

Rule 3.9: Advocate in Nonadjudicative Proceedings.

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

[1]

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

[2]

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3]

This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for license or other privilege or the client's compliance with generally applicable reporting requirements, such as filing of income tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

[4]

Unless otherwise expressly prohibited, ex parte contacts with legislators and other persons acting in a legislative capacity are not prohibited.

Transactions With Persons Other Than Clients

Rule 4.1: Truthfulness in Statements to Others.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

Misrepresentation

[1]

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2]

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3]

Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed as having assisted the client's crime or fraud. In paragraph (b) the word "assisting" refers to that level of assistance which would render a third party liable for another's crime or fraud, i.e., assistance sufficient to render one liable as an aider or abettor under criminal law or as a joint tortfeasor under principles of tort and agency law. The requirement of disclosure in this paragraph is not intended to broaden what constitutes unlawful assistance under criminal, tort or agency law, but instead is intended to ensure that these Rules do not countenance behavior by a lawyer that other law marks as criminal or tortious.

[4]

Paragraph (b) requires a lawyer in certain circumstances to disclose material facts to a third person "unless disclosure is prohibited by Rule 1.6." Rule 1.6(a) prohibits disclosure of confidential information relating to the representation of a client unless the client consents or the disclosure is impliedly authorized to carry out the representation. Rule 1.6(b), however, gives the lawyer

permission to disclose confidential information without client consent in certain circumstances. For example, under Rule 1.6(b)(2), a lawyer may reveal confidential information to prevent a criminal or fraudulent act that is likely to result in substantial injury to the property of another. If Rule 1.6(b) gives a lawyer permission to make disclosure, then disclosure is not prohibited by Rule 1.6, and disclosure under paragraph (b) of this Rule is mandatory. If Rule 1.6(b) does not give permission to disclose – as in the previous example when the injury from a criminal or fraudulent act is not "substantial" – then the disclosure requirement of Rule 4.1(b) does not apply. See Rule 1.6, Comment 6A. Even if Rule 1.6 prohibits disclosure, the lawyer may have other duties, such as a duty to withdraw from the representation. See Rule 1.2(d) and Rule 1.16(a)(1).

Rule 4.2: Communication with Person Represented by Counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule History

Adopted March 26, 2015, effective July 1, 2015; Comment amended July 13, 2022, effective October 1, 2022; amended March 12, 2024, effective April 1, 2024.

Comment

[1]

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of confidential information relating to the representation.

[2]

This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3]

The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4]

This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. Except as provided in Comment 4A, parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally

entitled to make. A lawyer may not, however, make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. For example, counsel could prepare and send written default notices and written demands required by such laws as Chapter 93A of the General Laws.

[4A]

Lawyers representing themselves in a matter in which they are personally involved are "representing a client" for the purposes of this Rule.

[5]

Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6]

A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7]

In the case of a represented organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8]

The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has knowledge of the fact of the representation; but such knowledge may be inferred from the circumstances. See Rule 1.0(h). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9]
In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Rule 4.3: Dealing with Unrepresented Person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule History
Adopted March 26, 2015, effective July 1, 2015.

Comment

[1]
An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2]
The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Rule 4.4: Respect for Rights of Third Persons.

(a)

In representing a client, a lawyer shall not

(1) use means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person,
(2) use methods of obtaining evidence that violate the legal rights of such a person, or
(3) engage in conduct that manifests bias or prejudice against such a person based on race, sex, marital status, religion, national origin, disability, age, sexual orientation, or gender identity. This clause (3) does not preclude legitimate advice or advocacy otherwise consistent with these Rules.

(b)

A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Rule History

Adopted March 26, 2015, effective July 1, 2015; amended July 13, 2022, effective October 1, 2022; amended March 12, 2024, effective April 1, 2024.

Comment

[1]

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons, including other parties, counsel, witnesses, court personnel, and other participants in the legal process. It is impractical to catalog all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[1A]

It is also impractical to catalog all the ways in which a person may be harassed. A non-exhaustive, illustrative list of examples of harassment includes: physical conduct that would cause a reasonable person to feel threatened; following a person (or causing another to follow a person) in or about a public place or places (other than legitimate investigation relating to a matter); communicating to or about such other person any lewd, lascivious or threatening language or images; communicating (or causing another to communicate) repeatedly in an anonymous manner or repeatedly at extremely inconvenient hours; and engaging in a course of conduct that is reasonably likely to cause fear, distress, or physical or psychological harm.

[1B]

Professional actions by an attorney that manifest bias or prejudice in violation of paragraph (a)(3) undermine confidence in the legal profession and strike at the heart of the legal system, under which all persons are to be treated equally and with equal dignity. Paragraph (a)(3) concerns conduct in the representation of a client that manifests bias or prejudice based on race, sex, marital status, religion, national origin, disability, age, sexual orientation or gender identity of any person. When these factors are relevant to a representation, paragraph (a)(3) does not prohibit legitimate advocacy or advice.

[1C]
Lawyers representing themselves in a matter in which they are personally involved are "representing a client" for the purposes of this Rule.

[2]
Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning or deleting the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3]
Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Law Firms and Associations

Rule 5.1: Responsibilities of Partners, Managers and Supervisory Lawyers

(a)
A partner in a law firm, 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 all lawyers in the firm conform 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.

Rule History

Adopted March 26, 2015, effective July 1, 2015; Comment amended July 13, 2022, effective October 1, 2022.

Comment

[1]

Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(e). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2]

Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3]

Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can

influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[3A]
Dealing with colleagues whose mental, emotional, or physical abilities have declined to the point of impairing their ability to provide competent representation or otherwise conform to these rules falls within the obligations imposed by this rule. See Rules 1.1 and 1.3. Persons with managerial authority in a law firm should encourage such colleagues to seek assistance, and shall put in place procedures such as auditing the lawyer's past work and limiting or monitoring future work as reasonably necessary to protect clients.

[4]
Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5]
Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter.

Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer’s involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6]
Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7]
Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer’s conduct is a question of law beyond the scope of these Rules.

[8]
The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

Rule 5.2: Responsibilities of a Subordinate Lawyer.

(a)

A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b)

A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule History

Adopted June 9, 1997, effective January 1, 1998.

Comment

[1]

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2]

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Corresponding ABA Model Rule. Identical to Model Rule 5.2.

Corresponding Former Massachusetts Rule. None.

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.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

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.

Nonlawyers Within the Firm

[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 give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential 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.

Nonlawyers Outside the Firm

[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 nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[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.

Rule 5.4: Professional Independence of a Lawyer.

(a)

A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the
(2) lawyer's estate or to one or more specified persons;
(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
(5) a lawyer or law firm may agree to share a statutory or tribunal-approved fee award, or a settlement in a matter eligible for such an award, with a qualified legal assistance organization that referred the matter to the lawyer or law firm, if the client consents, after being informed that a division of fees will be made, to the sharing of the fees and the total fee is reasonable.

(b)

A lawyer shall not form a partnership or other business entity with a nonlawyer if any of the activities of the entity consist of the practice of law.

(c)

A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d)

A lawyer shall not practice with or in the form of a limited liability entity authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation including a limited liability company; or
(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Rule History

Adopted March 26, 2015, effective July 1, 2015; amended March 10, 2016, effective May 1, 2016; comment amended June 20, 2016, effective August 1, 2016.

Comment

[1]

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2]

This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

[3]

Rule 5.4(a)(4) explicitly permits a lawyer, with the client's consent, to share certain fees with a qualified legal assistance organization that has referred the matter to the lawyer. The financial needs of these organizations, which serve important public ends, justify a limited exception to the prohibition against fee-sharing with nonlawyers. Should abuses occur in the carrying out of such arrangements, they may constitute a violation of Rule 5.4(c) or Rule 8.4(d) or (h). The permission to share fees granted by this Rule is not intended to restrict the ability of those qualified legal assistance organizations that engage in the practice of law themselves to receive a share of another lawyer's legal fees pursuant to Rule 1.5(e).

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law.

(a)

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b)

A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c)

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d)

A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
(2) are services that the lawyer is authorized to provide by federal law or other law or rule of this jurisdiction.

(e)

For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice

as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Rule History

Adopted March 26, 2015, effective July 1, 2015, amended March 10, 2016, effective May 1, 2016; amended March 12, 2024, effective April 1, 2024.

Comment

[1]

A lawyer may practice law in this jurisdiction only if admitted to practice generally or if authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2]

Limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3]

A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies.

[4]

Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous, for example by placing a name on the office door or letterhead of another lawyer without qualification, even if the lawyer is not physically present here. A lawyer not admitted to practice in this jurisdiction must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rule 7.1.

[4A]

Lawyers who are not admitted to practice in Massachusetts may remotely practice the law of the jurisdictions in which they are licensed while physically present in Massachusetts if they do not hold themselves out as being admitted to practice in Massachusetts, do not advertise or otherwise hold themselves out as having an office in Massachusetts, and do not provide, offer to provide, or hold themselves out as authorized to provide legal services in Massachusetts. Remote practice that satisfies these requirements does not constitute systematic and continuous presence in this jurisdiction for purposes of Rule 5.5(b)(1).

[5]
There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of the lawyer's clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(l) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6]
There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7]
Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) means the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8]
Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9]
Lawyers not admitted to practice generally in this jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10]
Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with

the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11]

When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12]

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13]

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14]

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15]

Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or foreign jurisdiction, and is not disbarred or suspended from practice in any

jurisdiction or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted to any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. Except as provided in paragraphs (d)(l) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16]

Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees that are unrelated to their employment. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The nature of the relationship between the lawyer and client provides a sufficient safeguard that the lawyer is competent to advise regarding the matters for which the lawyer is employed.

[17]

If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for appropriate fees and charges.

[18]

Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in this jurisdiction even though not admitted when the lawyer is authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19]

A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20]

In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not admitted to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21]

Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.3.

Rule 5.6: Restrictions on Right to Practice.

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

[1]

An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2]

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3]

This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

Rule 5.7: Responsibilities Regarding Law-Related Services.

(a)

A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures, which shall include notice in writing, to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b)

The term "law related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Rule History

Adopted March 26, 2015, effective July 1, 2015; amended March 12, 2024, effective April 1, 2024.

Comment

[1]

When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2]

Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3]

When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures, which shall include notice in writing, to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4]

Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures, which shall include notice in writing, to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5]
When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6]
In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication must be made before entering into an agreement for provision of or providing law-related services, and must be in writing.

[7]
The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8]
Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity which the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9]
A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10]
When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a),(b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating

to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation.

[11]
When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Public Service

Rule 6.1: Voluntary Pro Bono Publico Service.

A lawyer should provide annually at least 25 hours of pro bono publico legal services for the benefit of persons of limited means. In providing these professional services, the lawyer should:

(a) provide all or most of the 25 hours of pro bono publico legal services without compensation or expectation of compensation to persons of limited means, or to charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means. The lawyer may provide any remaining hours by delivering legal services at substantially reduced compensation to persons of limited means or by participating in activities for improving the law, the legal system, or the legal profession that are primarily intended to benefit persons of limited means; or,
(b) contribute from $250 to 1% of the lawyer's annual taxable, professional income to one or more organizations that provide or support legal services to persons of limited means.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

[1]
Every lawyer, regardless of professional prominence or professional work load, should provide legal services to persons of limited means. This Rule sets forth a standard which the court believes each member of the Bar of the Commonwealth can and should fulfill. Because the Rule is aspirational, failure to provide the pro bono publico services stated in this Rule will not subject a lawyer to discipline. The Rule calls on all lawyers to provide a minimum of 25 hours of pro bono publico legal services annually. Twenty-five hours is one-half of the number of hours specified in the ABA Model Rule 6.1 because this Massachusetts rule focuses only on legal activity that benefits those unable to afford access to the system of justice. In some years a lawyer may render greater or fewer than 25 hours, but during the course of his or her legal career, each lawyer should render annually, on average, 25 hours. Also, it may be more feasible to act collectively, for example, by a firm's providing through one or more lawyers an amount of pro bono publico legal services sufficient to satisfy the

aggregate amount of hours expected from all lawyers in the firm. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation.

[2]

The purpose of this Rule is to make the system of justice more open to all by increasing the pro bono publico legal services available to persons of limited means. Because this Rule calls for the provision of 25 hours of pro bono publico legal services annually, instead of the 50 hours per year specified in ABA Model Rule 6.1, the provision of the ABA Model Rule regarding service to non-profit organizations was omitted. This omission should not be read as denigrating the value of the voluntary service provided to non-profit community and civil rights organizations by many lawyers. Such services are valuable to the community as a whole and should be continued. Service on the boards of non-profit arts and civic organizations, on school committees, and in local public office are but a few examples of public service by lawyers. Such activities, to the extent they are not directed at meeting the legal needs of persons of limited means, are not within the scope of this Rule. While the American Bar Association Model Rule 6.1 also does not credit general civic activities, it explicitly provides that some of a lawyer's pro bono publico obligation may be met by legal services provided to vindicate "civil rights, civil liberties and public rights." Such activities, when undertaken on behalf of persons of limited means, are within the scope of this Rule. [2A] Paragraph (a) describes the nature of the pro bono publico legal services to be rendered annually under the Rule. Such legal services consist of a full range of activities on behalf of persons of limited means, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making, community legal education, and the provision of free training or mentoring to those who represent persons of limited means.

[3]

Persons eligible for pro bono publico legal services under this Rule are those who qualify for publicly-funded legal service programs and those whose incomes and financial resources are above the guidelines used by such programs but who, nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations composed of low-income people, to organizations that serve those of limited means such as homeless shelters, battered women's centers, and food pantries or to those organizations which pursue civil rights, civil liberties, and public rights on behalf of persons of limited means. Providing legal advice, counsel and assistance to an organization consisting of or serving persons of limited means while a member of its board of directors would be pro bono publico legal services under this Rule.

[4]

In order to be pro bono publico services under the first sentence of Rule 6.1(a), services must be provided without compensation or expectation of compensation. The intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of this paragraph. Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected. The award of statutory attorney's fees in a case accepted as a pro bono case, however, would not disqualify such services from inclusion under this Rule.

[5]
A lawyer should perform pro bono publico services exclusively or primarily through activities described in the first sentence of paragraph (a). Any remaining hours can be provided in the ways set forth in the second sentence of that paragraph, including instances in which an attorney agrees to receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments and provision of services to individuals when the fee is substantially below a lawyer's usual rate are encouraged under this sentence.

[6]
The variety of activities described in Comment 3 should facilitate participation by government and corporate attorneys, even when restrictions exist on their engaging in the outside practice of law. Lawyers who by the nature of their positions are prohibited from participating in the activities described in the first sentence of paragraph (a) may engage in the activities described in the second sentence of paragraph (a) or make a financial contribution pursuant to paragraph (b).

[7]
The second sentence of paragraph (a) also recognizes the value of lawyers engaging in activities, on behalf of persons of limited means, that improve the law, the legal system, or the legal profession. Examples of the many activities that fall within this sentence, when primarily intended to benefit persons of limited means, include: serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator, and engaging in legislative lobbying to improve the law, the legal system, or the profession.

[8]
Lawyers who choose to make financial contributions pursuant to paragraph (b) should contribute from $250 to 1% of the lawyer's adjusted net Massachusetts income from legal professional activities. Each lawyer should take into account his or her own specific circumstances and obligations in determining his or her contribution.

[9] Reserved

[10] Reserved

[11]
Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

Rule 6.2: Accepting Appointments.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

[1]

A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1.

An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2]

For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3]

An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

Rule 6.3: Membership in Legal Services Organization.

A lawyer may serve as a director, officer, or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

Rule History

Adopted June 9, 1997, effective January 1, 1998.

Comment

[1]

Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2]

It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Corresponding ABA Model Rule. Identical to Model Rule 6.3.

Corresponding Former Massachusetts Rule. None.

Rule 6.4: Law Reform Activities Affecting Client Interests.

A lawyer may serve as a director, officer, or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Rule History

Adopted June 9, 1997, effective January 1, 1998.

Comment

[1]

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefited.

Corresponding ABA Model Rule. Identical to Model Rule 6.4.

Corresponding Former Massachusetts Rule. None. But see G. L. c. 211D, § 1, as to members of the Committee for Public Counsel Services.

Rule 6.5: Nonprofit and Court-Annexed Limited Legal Services Programs.

(a)

A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is not subject to Rule 1.5(b);
(2) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
(3) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b)

Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

Rule History

Adopted June 8, 2005, effective July 1, 2005; amended October 24, 2012, effective January 1, 2013.

Comment

[1]

Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services – such as advice or the completion of legal forms – that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2]

A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3]

Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires

compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4]
Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(3). Paragraph (a)(3) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5]
If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Corresponding ABA Model Rule. Identical to Model Rule 6.5.

Corresponding Former Massachusetts Rule. No counterpart.

Information About Legal Services

Rule 7.1: Communications Concerning a Lawyer's Services.

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.

Rule History

Adopted March 26, 2015, effective July 1, 2015; amended July 13, 2022, effective October 1, 2022.

Comment

[1]
This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2]
Misleading statements, even if truthful, are 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 misleading if a substantial likelihood exists 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. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3]

A communication 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 claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim 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]

It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5]

Firm names, letterhead, and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased or retired members where there has been a succession in the firm's identity, or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased or retired lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer, or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6]

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.

[7]

Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(e), because to do so would be false and misleading. For example, lawyers who are not in fact 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.

[8]

It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

[9]

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.

Rule 7.2: Communications Concerning a Lawyer's Services; Specific Rules.

(a)

A lawyer may communicate information regarding the lawyer's services through any media.

(b)

A lawyer shall neither compensate nor give or promise 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 legal service plan, not-for-profit lawyer referral service, or qualified legal assistance organization;
(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) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c)

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. However, a lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless the certifying organization is clearly identified in the communication, and:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate State authority or that has been accredited by the American Bar Association; or
(2) the communication states that the certifying organization is "a private organization, whose standards for certification are not regulated by a state authority or the American Bar Association."

(d)

Any communication made under this Rule must include the name of at least one lawyer or law firm responsible for its content.

Rule History

Adopted March 26, 2015, effective July 1, 2015; amended July 13, 2022, effective October 1, 2022.

Comment

[1]

This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2]

Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer’s services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3]

Paragraph (b)(1) 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, 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, television and radio station employees or spokespersons, and website designers.

[4]
Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5]
A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment 2 (definition of "recommendation"). 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).

[6]
A lawyer may pay the usual charges of a legal service plan, not-for-profit lawyer referral service, or qualified legal assistance organization. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service is a consumer-oriented organization that provides unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and affords other client protections, such as complaint procedures or malpractice insurance requirements. A qualified legal assistance organization is defined by Rule 1.0(k).

[7]
A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association

[8]
A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest

created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9]
Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services. Lawyers who hold themselves out as specialists should expect to be held to the standard of performance of specialists in that particular service, field, or area.

[10]
The Patent and Trademark Office has a long-established policy of licensing lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[11]
This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia, or a United States Territory, or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia, or a United States Territory to accredit organizations that certify lawyers as specialists. 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 ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure 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.

Rule 7.3: Solicitation of Clients

(a)

"Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b)

A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a

(1) lawyer;
(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
(3) (i) representative of an organization, including a non-profit or government entity, in connection with the activities of such organization, or (ii) person engaged in trade or commerce as defined in G. L. c. 93A, § 1 (b), in connection with such person's trade or commerce.

(c)

A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer;
(2) the solicitation involves coercion, duress or harassment; or
(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 prohibition in this clause (3) only applies to solicitations for a fee.

(d)

This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e)

Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Rule History

Adopted March 26, 2015, effective July 1, 2015; amended July 13, 2022, effective October 1, 2022.

Comment

[1]

Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not 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 electronic searches.

[2]

For purposes of the prohibition in paragraph (b), "live person-to-person contact" means in-person, face-to-face, live telephone, and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching. The prohibitions of paragraph (b) do not of course apply to in-person communications after contact has been initiated by a person seeking legal services.

[3]

The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person’s judgment.

[4]

The contents of live person-to-person 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]

Paragraph (b) acknowledges that there is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business, or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer, or is a representative of an organization, including a non-profit or government entity, or is a person engaged in trade or commerce as defined in G. L. c. 93A, § 1 (b), where the contact is in connection with the activities of such organization or the person's trade or commerce. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee, or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6]

Prohibited solicitations include those that contain false or misleading information within the meaning of Rule 7.1, that involve contact with someone who has made known to the lawyer a

desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1), that involve coercion, duress, or harassment within the meaning of Rule 7.3(c)(2), or that involve communications with someone who the lawyer knows or should know cannot exercise reasonable judgment in employing a lawyer within the meaning of Rule 7.3(c)(3). In determining whether a contact is permissible under Rule 7.3(c)(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. Likewise, persons who are elderly or disabled, or who are not fluent in the language of the solicitation, may be especially vulnerable to coercion or duress. 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 (c)(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 (c)(2) of the Rule or Rule 8.4(c) or (d). The references in paragraph (b) and (c)(3) of the Rule to solicitation for "the lawyer's or the law firm's pecuniary gain" or "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.

[7]

This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8]

Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9]

Paragraph (e) of this Rule permits a lawyer to participate with an organization that uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must

not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(c).

Rule 7.4: Communication of Fields of Practice [Repealed]

Rule History

Repealed July 13, 2022, effective October 1, 2022.

Rule 7.5: Firm Names and Letterheads [Repealed]

Rule History

Repealed July 13, 2022, effective October 1, 2022.

Maintaining the Integrity of the Profession

Rule 8.1: Bar Admission and Disciplinary Matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or
(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule History

Adopted March 26, 2015, effective July 1, 2015; amended March 12, 2024, effective April 1, 2024.

Comment

[1]

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have

made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2]
This Rule is subject to the provisions of the Fifth amendment of the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3]
A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Rule 8.2: Judicial and Legal Officials.

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge or a magistrate, or of a candidate for appointment to judicial or legal office.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

[1]
Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for appointment to judicial or legal offices. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice. A lawyer violates this Rule by impugning the integrity of a judge or magistrate either by making an intentionally false statement or by making a false statement when the lawyer has no reasonably objective basis for the statement.

Rule 8.3: Reporting Professional Misconduct.

(a)

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the Bar Counsel's office of the Board of Bar Overseers.

(b)

A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the Commission on Judicial Conduct.

(c)

This Rule does not require disclosure of information otherwise protected by Rule 1.6.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

[1]

This Rule requires lawyers to report serious violations of ethical duty by lawyers and judges. Even an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2]

A report about misconduct is not permitted or required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3]

While a measure of judgment is required in complying with the provisions of the Rule, a lawyer must report misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or disbarment, including misconduct that would constitute a "serious crime" as defined in S.J.C. Rule 4:01, § 12(3). Precedent for determining whether an offense would warrant suspension or disbarment may be found in the Massachusetts Attorney Discipline Reports. Section 12(3) of Rule 4:01 provides that a serious crime is "any felony, and ... any lesser crime a necessary element of which ... includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another to commit [such a crime]." In addition to a conviction of a felony, misappropriation of client funds and perjury before a tribunal are common examples of reportable conduct. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A lawyer has knowledge of a violation when he or she possesses supporting evidence such that a reasonable lawyer under the circumstances would form a firm opinion that the conduct in question had more likely occurred than not. A report should be made to Bar Counsel's office or to the Judicial Conduct Commission, as the case may be. Rule 8.3 does not preclude a lawyer from reporting a violation of the Massachusetts Rules of Professional Conduct in circumstances where a report is not mandatory.

[3A]

In most situations, a lawyer may defer making a report under this Rule until the matter has been concluded, but the report should be made as soon as practicable thereafter. An immediate report is ethically compelled, however, when a client or third person will likely be injured by a delay in reporting, such as where the lawyer has knowledge that another lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.

[4]
The duty to report past professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

Rule 8.4: Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability (1) to influence improperly a government agency or official or (2) to achieve results by means that violate the Rules of Professional Conduct or other law;
(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
(g) fail without good cause to cooperate with the Bar Counsel or the Board of Bar Overseers as provided in S.J.C. Rule 4:01, § 3; or
(h) engage in any other conduct that adversely reflects on his or her fitness to practice law.

Rule History

Adopted March 26, 2015, effective July 1, 2015.

Comment

[1]
Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2]
Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated

offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] [Reserved]

[4]

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5]

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

[6]

Paragraph (e) prohibits the acceptance of referrals from a referral source, such as court or agency personnel, if the lawyer states or implies, or the client could reasonably infer, that the lawyer has an ability to influence the court or agency improperly.

[7]

Paragraph (h) prohibits conduct that adversely reflects on a lawyer's fitness to practice law, even if the conduct does not constitute a criminal, dishonest, fraudulent, or other act specifically described in the other paragraphs of this Rule.

Rule 8.5: Disciplinary Authority; Choice of Law.

(a) Disciplinary Authority.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law.

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a governmental tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
(2) for any other conduct, the rules of the jurisdiction in which the lawyer's principal office is located shall be applied, unless the predominant effect of the conduct is in a different jurisdiction, in which case the rules of that jurisdiction shall be applied. A lawyer shall not

be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Rule History

Adopted June 9, 1997, effective January 1, 1998. Amended May 26, 2009, effective July 1, 2009.

Comment

Disciplinary Authority

[1]

It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction.

[1A]

In adopting Rule 5.5, Massachusetts has made it clear that out-of-state lawyers who engage in practice in this jurisdiction are subject to the disciplinary authority of this state. A great many states have rules that are similar to, or identical with, Rule 5.5, and Massachusetts lawyers therefore need to be aware that they may become subject to the disciplinary rules of another state in certain circumstances. Rule 8.5 deals with the related question of the conflict of law rules that are to be applied when a lawyer's conduct affects multiple jurisdictions.

Comments 2-7 state the particular principles that apply.

[1B]

There is no completely satisfactory solution to the choice of law question so long as different states have different rules of professional responsibility. When a lawyer's conduct has an effect in another jurisdiction, that jurisdiction may assert that its law of professional responsibility should govern, whether the lawyer was physically present in the jurisdiction or not.

Choice of Law

[2]

A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3]

Paragraph (b) seeks to resolve such potential conflicts. Minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, paragraph (b) provides that any particular act of a lawyer shall be subject to only one set of rules of professional conduct, makes the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of the appropriate regulatory interests of

relevant jurisdictions, and provides protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4]
Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a government tribunal, the lawyer shall be subject only to the rules of the government tribunal, if any, or of the jurisdiction in which the government tribunal sits unless the rules of that tribunal, including its choice of law rule, provide otherwise. By limiting application of the rule to matters before a government tribunal, e.g. a court or administrative agency, parties may establish which disciplinary rules will apply in private adjudications such as arbitration.

[4A]
As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, the choice of law is governed by paragraph (b)(2). Paragraph (b)(2) creates a "default" choice of the rules of the jurisdiction in which the lawyer's principal office is located. There are several reasons for identifying such a default rule. First, the jurisdiction where the lawyer principally practices has a clear regulatory interest in the conduct of such lawyer, even in situations where the lawyer's conduct affects other jurisdictions. Second, lawyers are likely to be more familiar with the rules of the jurisdiction where they principally practice than with rules of another jurisdiction, even if licensed in that other jurisdiction. Indeed, most lawyers will be licensed in the jurisdiction where they principally practice, and familiarity with a jurisdiction's ethical rules is commonly made a condition of licensure. Third, in many situations, a representation will affect many jurisdictions, such as a transaction among multiple parties who reside in different jurisdictions involving performance in yet other jurisdictions. The selection of any of the jurisdictions that are affected by the representation will often be problematic.

[4B]
There will be some circumstances, however, where the predominant effect of the lawyer's conduct will clearly be in a jurisdiction other than the jurisdiction in which the lawyer maintains his or her principal office. Accordingly, paragraph (b)(2) provides that when the predominant effect of the lawyer's conduct is in a jurisdiction other than the jurisdiction in which the lawyer's principal office is located, the ethical rules of such other jurisdiction apply to such conduct. For example, when litigation is contemplated but not yet instituted in another jurisdiction, a lawyer whose principal office is in this jurisdiction may well find that the rules of that jurisdiction govern the lawyer's ability to interview a former employee of a potential opposing party in that jurisdiction. Likewise, under Rule 8.5(b), when litigation is contemplated and not yet begun in this jurisdiction, a lawyer whose principal office is in another jurisdiction may well find that the rules of this jurisdiction govern the lawyer's ability to interview a former employee of a potential opposing party in this jurisdiction.

[4C]
A lawyer who serves as in-house counsel in this jurisdiction pursuant to Rule 5.5, and whose principal office is in this jurisdiction will be subject to the rules of this jurisdiction unless the predominant effect of his or her conduct is clearly in another jurisdiction.

[5]
The application of these rules will often involve the exercise of judgment in situations in which reasonable people may disagree. So long as the lawyer's conduct reflects an objectively

reasonable application of the choice of law principles set forth in paragraph (b), the lawyer shall not be subject to discipline under this Rule.

[6]
If this jurisdiction and another jurisdiction were to proceed against a lawyer for the same conduct, they should identify and apply the same governing ethics rules. Disciplinary authorities in this jurisdiction should take all appropriate steps to see that they do apply the same rule to the same conduct as authorities in other jurisdictions, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7]
The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. Moreover, no lawyer should be subject to discipline in this jurisdiction for violating the regulations governing advertising or solicitation of a non-U.S. jurisdiction where the conduct would be constitutionally protected if performed in this jurisdiction.

IOLTA Guidelines

IOLTA Guidelines (updated July 1, 2009)

3:08 Disciplinary Rules Applicable to Practice as a Prosecutor or as a Defense Lawyer. [Repealed]

Repealed effective January 1, 1999.

3:09 Code of Judicial Conduct.

As amended October 8, 2015, effective January 1, 2016.

Editor's Note

Words marked with an asterisk (*) in Rule 3:09 are defined in the section titled "Terminology".

Preamble

[1]

An independent, fair, and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of persons of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law.

Inherent in all the Rules in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and must strive to maintain and enhance confidence in the legal system.

[2]

Judges should maintain the dignity of judicial office at all times, and avoid both impropriety* and the appearance of impropriety* in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence,* impartiality,* integrity,* and competence.

[3]

The Code of Judicial Conduct establishes standards for the ethical conduct of judges. It is not intended as an exhaustive guide for the conduct of judges, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and to assist judges to maintain the highest standards of judicial and personal conduct, and to provide a basis for regulation of their conduct through disciplinary authorities.

Scope

[1]

The Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Code. An Application section establishes when the various Rules apply to a judge.

[2]

The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules: Where a Rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the judge, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

[3]

The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They include explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment includes the term "must," it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.

[4]

Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

[5]

The Rules of the Code of Judicial Conduct are rules of reason that should be applied consistently with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence* of judges in making judicial decisions.

[6]

Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Some conduct that literally may violate a Rule may not violate the policy behind the prohibition, or the violation may be de minimis. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

[7]

The Code is not designed or intended to be a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

Terminology

Whenever any term listed below is used in the Code, it is followed by an asterisk (*).

“Close personal friend” means a friend whose relationship to the judge is such that the friend's appearance or interest in a proceeding pending* or impending* before the judge would require disqualification of the judge. See Rule 3.13.

“Court personnel” means court employees subject to the judge's direction and control. See Rules 2.3, 2.5, 2.8, 2.9, 2.10, 2.11, 2.12, 2.13, and 3.5.

“Domestic partner” means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.11, 2.13, and 3.l3.

“Economic interest” means ownership of more than a de minimis legal or equitable interest. Unless the judge participates in the management of such a legal or equitable interest, or the

interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;
(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner,* parent, or child serves as a director, an officer, an advisor, or other participant;
(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
(4) an interest in government securities held by the judge. See Rules 1.3, 2.11, and 3.2.

"Fiduciary" includes relationships such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative. See Rules 2.11, 3.2, and 3.8.

"Fundraising event" means an event for which the organizers' chief objectives include raising money to support the organization's activities beyond the event itself. See Rule 3.7.

"Impartial," "impartiality," and **"impartially"** mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties or their representatives, as well as maintenance of an open mind in considering issues that may come before a judge. See Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.4, 3.6, 3.7, 3.12, 3.13, 3.14, and 4.1.

"Impending matter" is a matter that is imminent or expected to occur in the near future. A matter is impending if it seems probable that a case will be filed, if charges are being investigated, or if someone has been arrested although not yet charged. See Rules 2.9, 2.10, 3.2, and 3.13.

"Impropriety" means conduct that violates the law,* including provisions of this Code, conduct that constitutes grounds for discipline under G. L. c. 211C, § 2(5), and conduct that undermines a judge's independence,* integrity,* or impartiality.* See Rules 1.2, 2.10, and 3.13.

"Independence" means a judge's freedom from influences or controls other than those established by law.* See Rules 1.2, 2.7, 2.10, 3.1, 3.2, 3.4, 3.7, 3.12, and 3.13.

"Integrity" means probity, fairness, honesty, uprightness, and soundness of character. See Rules 1.2, 2.7, 2.10, 2.15, 3.1, 3.2, 3.4, 3.7, 3.12, and 3.13.

"Judicial applicant" means any person who has submitted an application for appointment as a judge in any court of the Commonwealth. See Rule 2.11.

"Judicial nominee" means any person who has been nominated by the Governor to judicial office but who has not assumed judicial office. See Rule 2.11.

"Knowingly," "knowledge," "known," and **"knows"** mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Rules 1.3, 2.5, 2.9, 2.11, 2.15, 2.16, 3.3, 3.5, and 3.6.

"Law" includes court rules and standing orders issued by the Supreme Judicial Court, the Appeals Court, the Chief Justice of the Trial Court, or a Chief Justice of a Trial Court Department, as well as statutes, constitutional provisions, and decisional law. Chapter 268A §§ 3 and 23(b)(2) provide that

conduct explicitly recognized by another statute or regulation may supersede certain provisions of Chapter 268A. The Rules of the Supreme Judicial Court are considered regulations for this purpose. In several instances, provisions of this Code supersede provisions of Chapter 268A: See Rule 1.1.

"Member of the judge's family" means any of the following persons: a spouse or domestic partner*; a child, grandchild, parent, grandparent, or sibling, whether by blood, adoption, or marriage; or another relative or person with whom the judge maintains a close family-like relationship. Residence in the household of a judge may be relevant but is not dispositive when determining whether a judge maintains a close family-like relationship with another relative or person. See Rules 3.7, 3.8, 3.10, and 4.1.

"Member of the judge's family residing in the judge's household" means any of the following persons who resides in the judge's household: a relative by blood, adoption, or marriage; a domestic partner*; or a person with whom the judge maintains a close family-like relationship. See Rules 2.11 and 3.13.

"Nonpublic information" means information that is not available to the public. Nonpublic information includes information that is sealed or expunged by statute or court order, or information that is impounded or communicated in camera. See Rule 3.5.

"Pending matter" is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.10, 3.2, and 3.13.

"Political organization" means a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office or the passage or defeat of ballot questions. See Rule 4.1.

"Specialty court" means a specifically designated court session that focuses on individuals with underlying medical, mental health, substance abuse, or other issues that contribute to the reasons such individuals are before the courts. Specialty court sessions integrate treatment and services with judicial case oversight and intensive court supervision. Examples include drug courts, mental health courts, veterans' courts, and tenancy preservation programs. See Rule 2.9.

"Substantial value" means a dollar value determined by the State Ethics Commission in 930 C.M.R. 5.05. See Rules 3.13 and 3.15.

"Third degree of relationship" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.11.

Application

The Application section establishes when the various Rules apply to a judge.

I. Applicability of this Code

(A) Active Judges:

The provisions of the Code apply to all judges of the Trial Court, the Appeals Court, and the Supreme Judicial Court until resignation, removal, or retirement, except as provided in Paragraph (B) below.

(B) Retired Judges:

A judge whose name has been placed upon the list of retired judges eligible to perform judicial duties, pursuant to G. L. c. 32, §§ 65E-65G, shall comply with all provisions of this Code during the term of such eligibility.

II. Time for Compliance

A person to whom this Code becomes applicable shall comply immediately with all its provisions except Rules 3.8 and 3.11(B), and shall comply with those sections as soon as reasonably possible and in any event within one year.

Comment

[1]

A judge who has retired or resigned from judicial office shall not, for a period of six months following the date of retirement, resignation, or most recent service as a retired judge pursuant to G. L. c. 32, §§ 65E-65G, perform dispute resolution services with a court-connected program except on a pro bono publico basis, or enter an appearance, or accept an appointment to represent any party, in any court of the Commonwealth.

[2]

Judges should be aware that their conduct prior to assuming judicial office may have consequences under the law.* See, e.g., G. L. c. 211C, § 2(2), Rule 2.11(A)(4).

[3]

This Code does not apply to judicial applicants* and judicial nominees.*

Historically, by Executive Order, the Governor of the Commonwealth has created a code of conduct for judicial applicants* and judicial nominees.*

[4]

An active judge who becomes an applicant or candidate for a different judicial office, state or federal, must comply with the requirements of any appointing authority in addition to this Code.

Canon 1

A judge shall uphold and promote the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety* and the appearance of impropriety* (Rule 1.1 to Rule 1.3).

Rule 1.1 Compliance with the Law

A judge shall comply with the law,* including the Code of Judicial Conduct.

Comment

[1]

A judge's obligation to comply with the law* ordinarily includes the obligation to comply with the State conflict of interest law, G. L. c. 268A and c. 268B. However, the unique role of judges requires that judges on occasion follow rules that may be more or less restrictive than those followed by other public employees. In many instances, this Code imposes more stringent restrictions on judges' activities because of their obligation to act at all times in a manner that promotes public confidence in the judiciary. Thus, for example, the Code regulates aspects of a judge's personal conduct, including a judge's participation in extrajudicial activities unrelated to the law,* and prohibits judges from political and campaign activities open to many other public employees. See, e.g., Rules 3.7 and 4.1. However, in a few instances, this Code creates exemptions from particular restrictions imposed by G. L. c. 268A §§ 3 and 23(b)(2) so that judges may more fully participate in activities related to the law,* the legal system, and the administration of justice. See, e.g., Rules 3.1(E) and 3.13(D)-(E).

Rule 1.2 Promoting Confidence in the Judiciary

A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety* and the appearance of impropriety.*

Comment

[1]

Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety.* This principle applies to both the professional and personal conduct of a judge.

[2]

A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3]

Conduct that compromises or appears to compromise the independence,* integrity,* or impartiality* of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4]

A judge is encouraged to participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.

[5]
Improprieties include violations of law* or this Code, or other conduct for which the judge could be disciplined pursuant to G. L. c. 211C, § 2(5). The test for appearance of impropriety* is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality,* temperament, or fitness to serve as a judge.

[6]
A judge is encouraged to initiate and participate in appropriate community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code. See, e.g., Rules 3.1 and 3.7.

Rule 1.3 Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests* of the judge or others, or allow others to do so.

Comment

[1]
It is improper for a judge to use or attempt to use the judge's position to gain personal advantage or preferential treatment of any kind. For example, a judge must not refer to the judge's judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting personal business.

[2]
A judge may provide an educational or employment reference or recommendation for an individual based on the judge's personal knowledge.* The judge may use official letterhead and sign the recommendation using the judicial title if the judge's knowledge* of the applicant's qualifications arises from observations made in the judge's judicial capacity. The recommendation may not be accompanied by conduct that reasonably would be perceived as an attempt to exert pressure on the recipient to hire or admit the applicant. Where a judge's knowledge* of the applicant's qualifications does not arise from observations made in the judge's judicial capacity, the judge may not use official letterhead, court email, or the judicial title, but the judge may send a private letter stating the judge's personal recommendation. The judge may refer to the judge's current position and title in the body of the private letter only if it is relevant to some substantive aspect of the recommendation.

Court hiring policies may impose additional restrictions on recommendations for employment in the judicial branch, and the law* may impose additional restrictions on recommendations for employment in state government. See, e.g., G. L. c. 66, § 3A; G. L. c. 276, § 83; G. L. c. 211B, § 10(D). See also Trial Court Personnel Policies and Procedures Manual, § 4.000, et seq. See Rule 3.3 for instances when a judge is asked to provide a character reference on behalf of a bar applicant or provide information for a background investigation in connection with an application for public employment or for security clearance.

[3]
Judges may participate in the process of judicial selection by cooperating with screening, nominating, appointing, and confirming authorities. Judges may make recommendations to and respond to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office. Judges also may testify at confirmation hearings.

[4]
Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law.* A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law.* In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

Canon 2

A judge shall perform the duties of judicial office impartially,* completely, and diligently (Rule 2.1 to Rule 2.16).

Rule 2.1 Giving Precedence to the Duties of Judicial Office

The duties of judicial office, as prescribed by law,* shall take precedence over all of a judge's personal and extrajudicial activities.

Comment

[1]
To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2]
Although it is not a duty of judicial office unless prescribed by law,* judges are encouraged to participate in activities that promote public understanding of and confidence in the justice system. See Rule 3.7.

[3]
With respect to time devoted to personal and extrajudicial activities, this Rule must be construed in a reasonable manner. Family obligations, illnesses, and emergencies may require a judge's immediate attention. Attending to those obligations and situations is not prohibited by this Rule.

Rule 2.2 Impartiality and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

Comment

[1]

To ensure impartiality* and fairness to all parties, a judge must be objective and open-minded.

[2]

Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law* without regard to whether the judge approves or disapproves of the law* in question.

[3]

When applying and interpreting the law,* a judge sometimes may make good faith errors of fact or law.* Errors of this kind do not violate this Rule. In the absence of fraud, corrupt motive, or clear indication that the judge's conduct was in bad faith or otherwise violates this Code, it is not a violation for a judge to make findings of fact, reach legal conclusions, or apply the law as the judge understands it.

[4]

It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants are provided the opportunity to have their matters fairly heard. See Rule 2.6(A).

Rule 2.3 Bias, Prejudice, and Harassment

(A)

A judge shall perform the duties of judicial office, including administrative duties, without bias, prejudice, or harassment.

(B)

A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice or engage in harassment, including bias, prejudice, or harassment based upon a person's status or condition. A judge also shall not permit court personnel* or others subject to the judge's direction and control to engage in such prohibited behavior.

(C)

A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice or engaging in harassment against parties, witnesses, lawyers, or others, including bias, prejudice, or harassment based upon a person's status or condition.

(D)

This rule does not preclude judges or lawyers from malting legitimate reference to a person's status or condition when it is relevant to an issue in a proceeding.

Comment

[1]

A judge who manifests bias or prejudice or engages in harassment in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. A judge must avoid words or conduct that may reasonably be perceived as manifesting bias or prejudice or engaging in harassment.

[2]

As used in this Rule, examples of status or condition include but are not limited to race, color, sex, gender identity or expression, religion, nationality, national origin, ethnicity, citizenship or immigration status, ancestry, disease or disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[3]

As used in this Rule, examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; improper suggestions of connections between status or condition and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey an appearance of bias or prejudice to parties and lawyers in the proceeding, jurors, the media, and others.

[4]

As used in this Rule, harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as those listed in Comment [2].

[5]

Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

Rule 2.4 External influences on Judicial Conduct

(A)

A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(B)

A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C)

A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

Comment

An independent judiciary requires that judges decide cases according to the law* and facts, without regard to whether particular laws* or litigants are popular or unpopular with the public, the

media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences.

Rule 2.5 Competence, Diligence, and Cooperation

(A)

A judge shall perform judicial and administrative duties competently, diligently, and in a timely manner.

(B)

A judge shall cooperate with other judges and court officials in the administration of court business.

Comment

[1]

Competence in the performance of judicial duties requires the legal knowledge,* skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2]

A judge should seek the necessary resources to discharge all adjudicative and administrative responsibilities.

[3]

Timely disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under advisement, and to tale reasonable measures to ensure that court personnel,* litigants, and lawyers cooperate with the judge to that end.

[4]

In disposing of matters efficiently and in a timely manner, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Rule 2.6 Ensuring the Right to be Heard

(A)

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* A judge may make reasonable efforts, consistent with the law,* to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.

(B)

A judge may encourage parties and their lawyers to resolve matters in dispute and, in accordance with applicable law,* may participate in settlement discussions in civil proceedings and plea discussions in criminal proceedings, but shall not act in a manner that coerces any party into settlement or resolution of a proceeding.

Comment

[1]

The right to be heard is an essential component of a fair and impartial* system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[1A]

The judge has an affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard. In the interest of ensuring fairness and access to justice, judges may make reasonable accommodations that help self-represented litigants to understand the proceedings and applicable procedural requirements, secure legal assistance, and be heard according to law.* The judge should be careful that accommodations do not give self-represented litigants an unfair advantage or create an appearance of judicial partiality. In some circumstances, particular accommodations for self-represented litigants are required by decisional or other law.* In other circumstances, potential accommodations are within the judge's discretion. By way of illustration, a judge may: (1) construe pleadings liberally; (2) provide brief information about the proceeding and evidentiary and foundational requirements; (3) ask neutral questions to elicit or clarify information; (4) modify the manner or order of taking evidence or hearing argument; (5) attempt to make legal concepts understandable; (6) explain the basis for a ruling; and (7) make referrals as appropriate to any resources available to assist the litigants. For civil cases involving self-represented litigants, the Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants (April 2006) provides useful guidance to judges seeking to exercise their discretion appropriately so as to ensure the right to be heard.

[2]

A judge may encourage parties and their lawyers to resolve matters in dispute. A judge's participation in settlement discussions in civil proceedings and plea discussions in criminal proceedings must be conducted in accordance with applicable law.* Judicial participation may play an important role, but the judge should be careful that the judge's efforts do not undermine any party's right to be heard according to law.* The judge should keep in mind the effect that the judge's participation may have not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if these efforts are unsuccessful and the case remains with the judge. Other factors that a judge should consider when deciding upon an appropriate practice for a case include: (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge; (2) whether the parties and their counsel are relatively sophisticated in legal matters; (3) whether the case will be tried by the judge or a jury; (4) whether the parties participate with their counsel in the discussions; (5) whether any parties are self-represented; (6) whether the matter is civil or criminal; and (7) whether there is a history of physical or emotional violence or abuse between the parties. See Rule 2.9(A)(4).

[3]
Judges must be mindful of the effect settlement or plea discussions can have not only on their objectivity and impartiality,* but also on the appearance of their objectivity and impartiality.* Despite a judge's best efforts, there may be instances when information obtained during such discussions could influence a judge's decision-making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11.

Rule 2.7 Responsibility to Decide

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.*

Comment

[1]
Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence,* integrity,* and impartiality* of the judiciary, judges must be available to decide matters that come before the court.

Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

Rule 2.8 Decorum, Demeanor, and Communication with Jurors

(A)
A judge shall require order and decorum in proceedings before the court.

(B)
A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court personnel,* and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court personnel,* and others subject to the judge's direction and control.

(C)
A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community.

Comment

[1]
The duty to conduct all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2]
Commending or criticizing jurors for their verdict, other than in a court order or opinion, may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial* in a subsequent case. Such commendations or criticisms of verdicts could also be perceived as calling into question the judge's ability to rule impartially* on any post-trial motions, or on remand, in the same case.

[3]
A judge who is not otherwise prohibited by law* from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

Rule 2.9 Ex Parte Communications

(A)

A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending* or impending matter,* except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
   (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
   (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may engage in ex parte communications in specialty courts,* as authorized by law.*

(3) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, subject to the following:
   (a) a judge shall take all reasonable steps to avoid receiving from court personnel* or other judges factual information concerning a case that is not part of the case record. If court personnel* or another judge nevertheless brings information about a matter that is outside of the record to the judge's attention, the judge may not base a decision on it without giving the parties notice of that information and an opportunity to respond. Consultation is permitted between a judge, clerk-magistrate, or other appropriate court personnel* and a judge taking over the same case or session in which the case is pending with regard to information learned from prior proceedings in the case that may assist in maintaining continuity in handling the case;
   (b) when a judge consults with a probation officer, housing specialist, or comparable court employee about a pending* or impending* matter, the consultation shall take place in the presence of the parties who have availed themselves of the opportunity to appear and respond, except as provided in Rule 2.9(A)(2);

(c) a judge shall not consult with an appellate judge, or a judge in a different Trial Court Department, about a matter that the judge being consulted might review on appeal; and

(d) no judge shall consult with another judge about a pending matter* before one of them when the judge initiating the consultation knows* the other judge has a financial, personal or other interest that would preclude the other judge from hearing the case, and no judge shall engage in such a consultation when the judge knows* he or she has such an interest.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle civil matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when authorized by law* to do so.

(B)

If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication.

(C)

A judge shall consider only the evidence presented and any adjudicative facts that may properly be judicially noticed, and shall not undertake any independent investigation of the facts in a matter.

(D)

A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court personnel.*

Comment

[1]

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[1A]

“Ex pane communication” means a communication pertaining to a proceeding that occurs without notice to or participation by all other parties or their representatives between a judge (or court personnel* acting on behalf of a judge) and (i) a party or a party's lawyer, or (ii) another person who is not a participant in the proceeding.

[2]

Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is self-represented, the party, who is to be present or to whom notice is to be given, unless otherwise required by law.* For example, court rules with respect to Limited Assistance Representation may require that notice be given to both the party and the party's limited assistance attorney.

[3]
The proscription against ex parte communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4]
Paragraph (A)(2) permits a judge to engage in ex pane communications in conformance with law,* including court rules and standing orders, governing operation of specialty courts.*

[4A]
Ex parte communications with probation officers, housing specialists, or other comparable court employees are permitted in specialty courts* where authorized by law.* See Paragraph (A)(2) and Comment [4]. Where ex parte communications are not permitted, a judge may consult with these employees ex parte about the specifics of various available programs so long as there is no discussion about the suitability of the program for a particular party.

[5]
A judge may consult with other judges, subject to the limitations set forth by this Rule. This is so whether or not the judges serve on the same court. A judge must avoid ex parte communications about a matter with a judge who has previously been disqualified from hearing the matter or with an appellate judge who might be called upon to review that matter on appeal. The same holds true with respect to those instances in which a judge in one department of the trial court may be called upon to review a case decided by a judge in a different department; for example, a judge in the Superior Court may be required to review a bail determination made by a judge in the District Court. The appellate divisions of the Boston Municipal Court and of the District Court present a special situation. The judges who sit as members of these appellate divisions review on appeal cases decided by judges who serve in the same court department. However, the designation of judges to sit on the appellate divisions changes quite frequently; every judge on the Boston Municipal Court will, and every judge on the District Court may, serve for some time as a member of that court's appellate division. Judges in the same court department are not barred from consulting with each other about a case, despite the possibility that one of the judges may later review the case on appeal. However, when a judge is serving on an appellate division, the judge must not review any case that the judge has previously discussed with the judge who decided it; disqualification is required. Consultation between or among judges, if otherwise permitted, is appropriate only if the judge before whom the matter is pending* does not abrogate the responsibility personally to decide it.

[6]
The prohibition in Paragraph (C) against a judge independently investigating adjudicative facts applies equally to information available in all media, including electronic media.

[7]
A judge may consult the Committee on Judicial Ethics, the State Ethics Commission, outside counsel, or legal experts concerning the judge's compliance with this Code.

Rule 2.10 Judicial Statements on Pending and Impending Cases

(A)

A judge shall not make any statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any Massachusetts court.

(B)

A judge shall not, in connection with cases, controversies, or issues that are likely to come before any Massachusetts court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the duties of judicial office.

(C)

A judge shall require court personnel* to refrain from making statements that the judge would be prohibited from making by Paragraphs (A) and (B).

(D)

Subject to the restrictions in Paragraphs (A) and (B), a judge may make statements that explain the procedures of the court, general legal principles, or what may be learned from the public record in a case. A judge may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E)

Subject to the restrictions in Paragraphs (A) and (B), a judge may respond directly or through a third party to public criticisms of the judge's behavior, but shall not respond to public criticisms of the substance of the judge's rulings other than by statements consistent with Paragraph (D).

(F)

Subject to the restrictions in Paragraphs (A) and (B), a judge may speak, write, or teach about issues in pending* or impending* matters, but not matters pending* or impending* before that judge, when such comments are made in legal education programs and materials, scholarly presentations and related materials, or learned treatises, academic journals, and bar publications.

Comment

[1]

This Rule's restrictions on judicial speech are essential to the maintenance of the independence,* integrity,* and impartiality* of the judiciary.

[2]

Paragraph (A) does not apply to any oral or written statement or decision by a judge in the course of adjudicative duties. A judge is encouraged to explain on the record at the time decisions are made the basis for those decisions or rulings, including decisions concerning bail and sentencing. By helping litigants to understand the basis for decisions in cases, the judge also promotes public understanding of judicial proceedings.

[3]
"[A]ny Massachusetts court" for purposes of this Rule means any state or federal court within the Commonwealth of Massachusetts.

[4]
The requirement that a judge abstain from statements regarding, a pending* or impending* matter continues throughout the appellate process and until final disposition.

[5]
This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. However, even in such instances, a judge must act in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety* and the appearance of impropriety.*

[6]
Paragraph (D) permits the dissemination of public information to educate and inform the public, while assuring the public that cases are tried only in the judicial forum devoted to that purpose. A judge may explain to the media or general public the procedures of the court and general legal principles such as the procedures and standards governing a "dangerousness hearing" under G. L. c. 276, § 58A; or restraining orders under G. L. c. 209A. A judge may also explain to the media or the general public what may be learned from the public record in a particular case. For example, a judge may respond to questions from a reporter about a judicial action that was taken and may correct an incorrect media report by referring to matters that may be learned from pleadings, documentary evidence, and proceedings held in open court. Paragraph (D) permits similar responsive comments or explanations by a judge acting in accordance with the judge's administrative duties.

[7]
As used in Paragraph (E), "behavior" does not include the substance of a judge's rulings, For example, a judge may respond to criticism that the judge is disrespectful to litigants, but may not respond to criticism that the judge made an incorrect ruling other than by statements allowed by Paragraph (D).

[8]
The authorizations to comment in this Rule are permissive, not suggestive. A judge is not required to respond to statements in the media or elsewhere. Depending on the circumstances, the judge should consider the timing of any response and whether it may be preferable for a third party, rather than the judge, to respond.

[9]
When speaking, writing, or teaching about issues in cases or matters, a judge must take care that the judge's comments do not impair public confidence in the independence,* integrity,* or impartiality* of the judiciary.

[10]
When a judge orally renders a decision and intends to explain the judge's reasons in a written memorandum, the judge should simultaneously inform the parties that an explanatory

memorandum will be forthcoming. When a judge has not indicated at the time the judge issues the underlying order that a written explanatory comment will be forthcoming and such a memorandum has not been requested by a party or by an appellate single justice or court, a judge has the discretion to issue an explanatory memorandum. The exercise of that discretion should be informed by the following guidance:

(i) A judge should weigh, at a minimum, the following factors:
- the importance of avoiding or alleviating the parties' or the public's misunderstanding or confusion by supplementing the record to reflect in more detail the reasons in support of the judge's earlier decision;
- the amount of time that has elapsed since the order was issued and the extent to which the judge's reasons for the decision remain fresh in the judge's mind;
- the risk that an explanatory memorandum may unfairly affect the rights of a party or appellate review of the underlying order; and
- the danger that the issuance of an explanatory memorandum would suggest that judicial decisions are influenced by public opinion or criticism voiced by third parties, and would not promote confidence in the courts and in the independence,* integrity,* and impartiality* of judges.

(ii) An explanatory memorandum is appropriate only if issued within a reasonable time of the underlying order and if the judge clearly recalls the judge's reasons for the decision. An explanatory memorandum should not rely on any information that was not in the record before the judge at the time of the underlying order.

(iii) A judge. may not issue an explanatory memorandum if the court no longer has authority to alter or amend the underlying order. For example, a judge may not issue an explanatory memorandum when:
- the underlying order is the subject of an interlocutory appeal, report, or other appellate proceeding that has already been docketed in the appellate court, unless such a memorandum has been requested by an appellate single justice or court;
- the case has been finally adjudicated in the trial court, no timely-filed post-judgment motions are pending,* and the time within which the court may modify its orders and judgments on its own initiative has passed; or
- an appeal has been taken from a final order or judgment, and the appeal has been docketed in the appellate court.

Rule 2.11 Disqualification

(A)

A judge shall disqualify himself or herself in any proceeding in which the judge cannot be impartial* or the judge's impartiality* might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of facts that are in dispute in the proceeding.

(2) The judge knows* that the judge, the judge's spouse or domestic partner,* or a person within the third degree of relationship* to either of them, or the spouse or domestic partner* of such a person is:
   (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
   (b) acting as a lawyer in the proceeding;
   (c) a person who has more than a de minimis financial or other interest that could be substantially affected by the proceeding; or
   (d) likely to be a material witness in the proceeding.

(3) The judge knows* that he or she, individually or as a fiduciary,* or the judge's spouse, domestic partner,* parent, or child, or any other member of the judge's family residing in the judge's household, X has an economic interest* in the subject matter in controversy or is a party to the proceeding.

(4) The judge, while a judge or a judicial applicant* or judicial nominee,* has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(5) The judge:
   (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
   (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
   (c) was a material witness concerning the matter; or
   (d) previously presided as a judge over the matter in another court.

(B)

A judge shall keep informed about the judge's personal and fiduciary* economic interests,* and make a reasonable effort to keep informed about the personal economic interests* of the judge's spouse or domestic partner* and minor children residing in the judge's household.

(C)

A judge subject to disqualification under this Rule, other than for bias or prejudice under Paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of and without participation by the judge and court personnel,* whether to waive disqualification. If, following a consultation that is free from coercion, express or implied, the parties and lawyers agree that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Comment

[1]

A judge is disqualified from any matter if the judge cannot satisfy both a subjective and an objective standard. The subjective standard requires disqualification if the judge concludes that he or she

cannot be impartial.* The objective standard requires disqualification whenever the judge's impartiality* might reasonably be questioned by a fully informed disinterested observer, regardless of whether any of the specific provisions of Paragraphs (A)(1) through (5) apply. By way of example, a judge must disqualify himself or herself from any proceeding in which the judge 'is a client of a party's lawyer or the lawyer's firm. Whether a judge must continue to disqualify himself or herself after this attorney-client relationship has concluded should be determined by considering all relevant factors, including the terms on which the lawyer provided representation, the length of time since the representation concluded, the nature and subject matter of the representation, and the extent of the attorney-client relationship, including the length of the relationship and the frequency of contacts between the judge and the lawyer. A judge must also bear in mind that social relationships may contribute to a reasonable belief that the judge cannot be impartial.

[2]
A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3]
The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4]
The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, under the circumstances, the judge's impartiality* might reasonably be questioned under Paragraph (A), then the judge's disqualification is required.

[5]
A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6]
The filing of a judicial discipline complaint during the pendency of a matter does not necessarily require disqualification of the judge presiding over the matter. The judge's decision to disqualify in such circumstances must be resolved on a case-by-case basis.

Rule 2.12 Supervisory Duties

(A)
A judge shall require court personnel* and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

(B)

A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

Comment

[1]

A judge may not direct court personnel* to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge.

[2]

Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that those under the judge's supervision administer their workloads promptly.

Rule 2.13 Administrative Appointments

(A)

In making administrative appointments, a judge shall:

(1) exercise the power of appointment impartially* and on the basis of merit; and
(2) avoid nepotism, favoritism, and unnecessary appointments.

(B)

A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Comment

[1]

Appointees of a judge may include assigned counsel, guardians ad litem, special masters, receivers, and any court personnel* subject to appointment by a judge. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this Rule. Compliance with court rules pertaining to fee-generating appointments satisfies the judge's obligations under Paragraph (A). See SJC Rule 1:07.

[2]

Unless otherwise defined by law,* nepotism is the appointment or hiring of any relative within the third degree of relationship* of either the judge or the judge's spouse or domestic partner,* or the spouse or domestic partner* of such relative. See also Trial Court Personnel Policies and Procedures Manual, § 4.304.

Rule 2.14 Disability and Impairment

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Comment

[1]

Taking appropriate action to address disability or impairment pursuant to this Rule is part of a judge's judicial duties. This Rule requires a judge to take appropriate action even if the disability or impairment has not manifested itself in a violation of the Rules of Professional Conduct or the Code of Judicial Conduct. See Rule 2.15, which requires a judge to take action to address violations of the Rules of Professional Conduct or the Code of Judicial Conduct.

[2]

Appropriate action means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or malting a referral to an assistance program. If the lawyer is appearing before the judge, a judge may defer taking action until the matter has been concluded, but must do so as soon as practicable thereafter. However, immediate action is compelled when a lawyer is unable to provide competent representation to the lawyer's client.

[3]

Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge maybe required to take other action. See Rule 2.15.

Rule 2.15 Responding to Judicial and Lawyer Misconduct

(A)

A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, integrity,* trustworthiness, or fitness as a judge in other respects shall inform. The Chief Justice of the Supreme Judicial Court, the Chief Justice of the court on which the judge sits, and if the judge is a Trial Court judge, the Chief Justice of the Trial Court.

(B)

A judge having knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, integrity,* trustworthiness, or fitness as a lawyer in other respects shall inform the Office of Bar Counsel.

(C)
A judge having knowledge* of or receiving credible information indicating a substantial likelihood that another judge has otherwise violated this Code shall take appropriate action.

(D)
A judge having knowledge* of or receiving credible information indicating a substantial likelihood that a lawyer has otherwise violated the Rules of Professional Conduct shall take appropriate action.

Comment
[1]
Taking action to address known* misconduct is part of a judge's duties. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate authority the known* misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, integrity,* trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known* misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent. If the lawyer is appearing before the judge, a judge may defer malting a report until the matter has been concluded, but the report should be made as soon as practicable thereafter. However, an immediate report is compelled when a person will likely be injured by a delay in reporting, such as where the judge 'has knowledge* that a lawyer has embezzled client or fiduciary* funds and delay may impair the ability to recover the funds.

[2]
A judge who has knowledge* or receives credible information indicating a substantial likelihood that a judge has otherwise violated this Code, or that a lawyer has otherwise violated the Rules of Professional Conduct, is required to take appropriate action under Paragraph (C) or (D). Appropriate action pursuant to Paragraph (C) may include communicating directly with the judge, reporting to the first justice or regional administrative justice of the court where the violation occurred or where that judge often sits, reporting to the Chief Justice of that judge's court, and/or calling the judicial hotline maintained by Lawyers Concerned for Lawyers. Appropriate action pursuant to Paragraph (D) may include communicating directly with the lawyer, reporting to the lawyer's supervisor or employer, and/or reporting to the Office of Bar Counsel. These lists of actions are illustrative and not meant to be limiting. If the lawyer is appearing before the judge, a judge may defer taking action until the matter has been concluded, but action should be taken as soon as practicable thereafter. Reporting a violation is especially important where the victim is unlikely to discover the offense, and an immediate report is compelled when a person will likely be injured by a delay in reporting.

Rule 2.16 Cooperation with Disciplinary Authorities

(A)
A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary authorities.

(B)

A judge shall not retaliate, directly or indirectly, against a person known* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

Comment

[1]

Cooperation with investigations and proceedings of judicial and lawyer discipline authorities, as required in Paragraph (A), instills confidence in judges' commitment to the integrity* of the judicial system and the protection of the public.

Canon 3

A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office (Rule 3.1 to Rule 3.15).

Rule 3.1 Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law* or this Code. However, when engaging in extrajudicial activities, a judge shall not:

(A) participate in activities that are reasonably likely to interfere with the proper performance of the judge's judicial duties;
(B) participate in activities that are reasonably likely to lead to recurrent disqualification of the judge;
(C) participate in activities that would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality*;
(D) engage in conduct that would appear to a reasonable person to be coercive; or
(E) make use of court premises, staff, stationery, equipment, or other resources, except for use that is reasonable in scope, not prohibited by law,* and incidental to activities that concern the law,* the legal system, or the administration of justice.

Comment

[1]

To the extent that time permits, and judicial independence* and impartiality* are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law,* the legal system, and the administration of justice. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. * Participation in both law related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system. See Rule 3.7.

[2]
This Rule emphasizes that when engaging in any extrajudicial activity, a judge must consider the obligations of judicial office and avoid any activities that are reasonably likely to interfere with those obligations.

[3]
Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's independence,* integrity,* or impartiality.* Examples include jokes or other remarks that demean individuals based upon their race, color, sex, gender identity or expression, religion, nationality, national origin, ethnicity, citizenship or immigration status, ancestry, disease or disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4]
While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, a judge's urging a lawyer who appears in the judge's court to assist on a time-consuming extrajudicial project would create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

[5]
Paragraph (E) recognizes that reasonable use of public resources to support a judge's law-related activities advances the legitimate interests of the public and the court system.

Rule 3.2 Appearances before Governmental Bodies and Consultation with Government Officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or legislative body or official, except:

(A) in connection with matters concerning the law,* the legal system, or the administration of justice; or
(B) when the judge is acting pro se in a matter involving the judge's legal or economic interests,* or when the judge is acting in a fiduciary* capacity pursuant to Rule 3.8.

Comment

[1]
Judges possess special expertise in matters of law,* the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials by, for example, proposing new legislation, commenting on new legislation proposed by others, or proposing or commenting on amendments to existing law.* The types of topics that a judge may address include but are not limited to court facilities, funding, staffing, resources, and security; terms of employment, compensation, and other benefits of judges and

court personnel*; personal safety of judges and court personnel*; court jurisdiction and procedures; the work of specialty courts*; the admissibility or inadmissibility of evidence; judicial discretion in sentencing; funding for the legal representation of indigents; access to justice; and similar matters.

[2]
In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, which prohibits judges from abusing the prestige of office to advance their own or others' interests; Rule 2.10, which governs public comment on pending* and impending matters*; and Rule 3.1(C), which prohibits judges from engaging in extrajudicial activities that would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*

[3]
In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid abusing the prestige of judicial office.

Rule 3.3 Testifying as a Character Witness

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

Comment

[1]
A judge who, without being subpoenaed, testifies as a character witness lends the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

[2]
This Rule does not preclude a judge from voluntarily testifying or otherwise vouching for the qualifications, including the character, of an applicant or nominee for judicial or court-related office, as long as the judge's observations are based on the judge's personal knowledge.* See Rule 1.3.

[3]
This Rule does not preclude a judge from providing a character reference based on personal knowledge* for an applicant to the bar of any state.

[4]
This Rule does not preclude a judge from responding based on personal knowledge* to an inquiry from any state or federal entity, or a contractor for such an entity, conducting a background investigation in connection with an application for public employment or for security clearance.

Rule 3.4 Appointments to Governmental Positions

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law,* the legal system, or the administration of justice.

Comment

[1]
This Rule implicitly acknowledges the value of judges accepting appointments to entities that concern the law,* the legal system, or the administration of justice. However, a judge must assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment, see Rule 3.2, and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the importance of respecting the separation of powers, upholding the independence,* integrity,* and impartiality* of the judiciary, and minimizing judicial disqualification. Furthermore, acceptance of extrajudicial appointments is subject to applicable restrictions relating to multiple office holding set forth in the Constitution of the Commonwealth. See Part 2, Chapter 6, Article II and Article VIII of the Amendments to the Constitution. A judge should regularly reexamine the propriety of continuing in the appointed position, as the composition and/or mission of any such committee, board, or commission may change.

[2]
A judge may represent the United States, the Commonwealth of Massachusetts, or the judge's county, city or town on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

Rule 3.5 Use of Nonpublic Information

A judge shall not knowingly* disclose or use nonpublic information* acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

Comment

[1]
In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to the performance of judicial duties.

[2]
This Rule is not intended to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of the judge's family,* court personnel,* or any other person if consistent with other provisions of this Code.

Rule 3.6 Affiliation with Discriminatory Organizations

(A)
A judge shall not hold membership in any organization that practices invidious discrimination.

(B)
A judge shall not use the benefits or facilities of an organization if the judge knows* or should be aware that the organization practices invidious discrimination. A judge's attendance at an event in a facility of such organization is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

Comment
[1]
A judge's public manifestation of approval of invidious discrimination diminishes public confidence in the integrity* and impartiality* of the judiciary. A judge's membership in an organization that practices invidious discrimination similarly diminishes public confidence in the integrity* and impartiality* of the judiciary.

[2]
Whether an organization practices invidious discrimination is a complex question to which judges must be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members that do not stigmatize any excluded persons as inferior and therefore unworthy of membership. The purpose of this Rule is to prohibit judges from joining organizations practicing invidious discrimination, whether or not an organization's membership practices are constitutionally protected. When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[3]
Whether an organization engages in invidious discrimination is a threshold issue but not the end of the judge's inquiry. Even an organization that does not engage in invidious discrimination may engage in practices such that a judge's membership in the organization might erode public confidence in the impartiality* of the judiciary. Before holding membership in any organization, a judge must consider whether membership would appear to undermine the judge's impartiality* in the eyes of a reasonable litigant. See Rules 3.1 and 3.7.

[4]
A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

[5]
This Rule does not apply to national or state military service.

Rule 3.7 Participation in Legal, Educational, Religious, Charitable, Fraternal, or Civic Organizations anal Activities

(A)

Subject to the requirements of Rule 3.1, a judge may participate in activities of or sponsored by or on behalf of (i) legal, educational, religious, charitable, fraternal, or civic organizations, which are not conducted for profit, or (ii) governmental entities concerned with the law,* the legal system, or the administration of justice. Permitted participation includes but is not limited to the following:

- (1) A judge may serve as a member of the organization.
- (2) A judge may plan and attend events and activities of the organization.
- (3) A judge may participate in internal discussions related to fundraising. However, a judge shall not otherwise participate in fundraising, and shall not manage or invest funds belonging to or raised by the organization unless the organization is composed entirely or predominantly of judges and exists to further the educational or professional interests of judges.
- (4) A judge shall not solicit contributions or members for the organization, except that a judge may solicit contributions or members from members of the judge's family* or from judges over whom the judge does not exercise supervisory or appellate authority.
- (5) A judge may serve as an officer, director, trustee, or nonlegal advisor of the organization, unless it is likely that the organization:
    - (a) will be engaged in proceedings that would ordinarily come before the judge; or
    - (b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.
- (6) A judge may serve as a keynote or featured speaker at, receive an award or other comparable recognition at, be featured on the program of, and permit the judge's title to be used in connection with the promotion of an organization's event that is not a fundraising event,* but shall not do so at a fundraising event* except as permitted in Paragraph (6A).
- (6A) A judge may serve as a keynote or featured speaker at, receive an award or other comparable recognition at, be featured on the program of, and permit the judge's title to be used in connection with the promotion of a fundraising event* only if the event is sponsored by an organization concerned with the law,* the legal system, the administration of justice, and that organization promotes the general interests of the judicial branch of government or the legal profession, including enhancing the diversity and professionalism of the bar.

- (7) A judge may make recommendations to public or private fund granting organizations or agencies for programs and projects, but only on behalf of organizations that are concerned with the law,* the legal system, or the administration of justice.

(B)

A judge may encourage lawyers to provide pro bono publico legal services.

(C)

A judge may, as a parent or guardian, assist minor children in their fundraising activities if the procedures employed are not coercive and the sums solicited are modest.

Comment

[1]

This Rule governs a judge's participation in a variety of activities sponsored by organizations not conducted for profit, whether public or private, and by governmental entities (collectively referred to as "organizations"). Paragraph (A) identifies the types of organizations covered by this Rule. Examples include bar associations, other not-for-profit private organizations, and court-created commissions. The first clause of Paragraph (A), "subject to the requirements of Rule 3.1," emphasizes that even with respect to activities that are explicitly permitted by Rule 3.7, a judge must always consider whether participation would violate Rule 3.1.

[1A]

In considering whether participation in any extrajudicial activity would violate Rule 3.1, a judge should consider all relevant factors, including the membership and purposes of the organization, the nature of the judge's participation in or association with the organization or event, whether the organization or its members typically advocate on one side of issues before or likely to come before the court of which the judge is a member or any court subject to the appellate jurisdiction of the court of which the judge is a member, and-the number, diversity, and identity of the financial supporters of the organization or sponsors of a particular event. Although activities permitted under this Rule must be of or sponsored by an organization not conducted for profit, this requirement does not preclude the judge from participating in events of an organization that receives sponsorship or financial support from for-profit entities. A judge must avoid giving the impression that the organization, its members, or an event's sponsors are in a special position to influence the judge, and, where appropriate, a judge must avoid giving the impression that the judge favors the organization's mission.

[1B]

The Code explicitly encourages certain activities where the nature of a judge's participation will promote public understanding of and confidence in an independent* judiciary, foster collegiality among the bar and communication and cooperation between the judiciary and the bar, enhance the judge's ability to perform judicial or administrative duties, or otherwise further the goals of the courts. See, e.g., Rule 1.2, Comments [4] and [6]. So, for example, judges are encouraged to speak about the administration of justice to not-for-profit groups, including business and community groups and bar associations. Such speaking engagements ordinarily will not raise an issue under Rule 3.1 even when an event or program is held in space provided by a law firm or is financially

supported or sponsored by one or more for-profit entities, such as law firms or legal vendors, that do substantial business in the court on which the judge sits. If, however, fundraising is a chief objective of the event or program, Paragraph (A)(6A) governs whether a judge may be a keynote or featured speaker. Giving a presentation at an educational conference where the judge's involvement would help to further the goals of the court system is another example of encouraged participation. Such participation would not ordinarily raise an issue under Rule 3.1 even when the conference is financially supported or sponsored by organizations or vendors that do business in the court on which the judge sits.

[2]

The restrictions in Paragraph (A)(4) are necessary because, depending on the circumstances, a judge's solicitation of contributions or members for an organization might create the risk that the person solicited would feel obligated to respond favorably or would do so to curry favor with the judge. However, a judge may be identified by name and title as an organization's officer, director, trustee, non-legal advisor, or member on websites, emails, letterhead, and any other communication materials created and issued by others within the organization to solicit or accept donations or to enroll members so long as comparable designations are used for other persons.

[3]

As used in Paragraphs (A)(6) and (A)(6A), a fundraising event* is one for which the organizers' chief objectives include raising money to support the organization's activities beyond the event itself. Unless that is the case, an event is not a fundraising event,* even if the revenues ultimately exceed the cost. A judge may attend a fundraising event* but may not participate in additional activities except as permitted by Paragraph (A)(6A). However, a judge who attends a fundraising event* is not in violation of this Rule merely because a laudatory reference to or about the judge, not announced in advance, is made at the event.

[4]

Paragraph (A)(6A) permits a judge to participate in additional activities (e.g., being a featured speaker or receiving an award) at fundraising events* of or sponsored by organizations concerned with the law,* the legal system, or the administration of justice that serve the general interests of the judicial branch of government and the legal profession, including organizations that enhance the diversity and professionalism of the bar. The nature of such organizations makes it unlikely that a judge's involvement would reflect adversely upon that judge's independence,* integrity,* or impartiality.* Organizations concerned with the general interests of the judicial branch of government and the legal profession include general purpose and affinity bar associations (e.g., county bar associations, bar associations composed exclusively or primarily of members of an ethnic group, bar associations specializing in particular practice areas but whose members take positions on both sides of disputed issues), organizations dedicated to enhancing the professionalism of the judicial branch (e.g., the National Center for State Courts), and organizations composed entirely or primarily of judges (e.g., the Massachusetts Judges Conference, the Flaschner Judicial Institute), but exclude organizations composed exclusively or primarily of lawyers who typically take one side of contested issues (e.g., plaintiffs' personal injury bar associations, insurance defense bar associations), organizations dedicated to influencing opinion

on contested legal or constitutional issues, or organizations that represent one constituency (e.g., prosecutors, criminal defense counsel).

[5]
In addition to the types of participation expressly contemplated by this Rule, a judge's permissible extrajudicial activities often involve teaching or writing on law-related subjects and, on occasion, non-law-related subjects. See Rule 1.3 for special considerations that arise when a judge writes or contributes to publications of a for-profit entity. Similar considerations also may arise if a judge teaches for a for-profit entity.

[6]
In addition to appointing lawyers to serve as counsel for indigent parties in individual cases as authorized by law,* a judge may promote broader access to justice by encouraging lawyers to provide pro bono publico or reduced fee legal services, if in doing so the judge does not employ coercion or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

[7]
Paragraph (C) is intended to allow a judge to participate in a child's normal, daily activities. Thus, for example, a judge may accompany the judge's child while the child sells Girl Scout cookies or collects UNICEF donations, or may work at a refreshment stand at a school sponsored sports event intended to raise money to finance a class trip. On the other hand, this provision does not permit a judge to participate in fundraising activities for the primary or exclusive benefit of the judge's own child, such as raising funds so that the judge's child may participate in a school-sponsored trip. The word “assist” is intended to convey that a judge should not engage in direct solicitations on behalf of the child other than from members of the judge's family.* A judge may not, for example, sell Girl Scout cookies in the workplace.

Rule 3.8 Appointments to Fiduciary Positions

(A)
A judge shall not accept appointment to serve in a fiduciary* position, except for the estate, trust, or person of a member of the judge's family,* and then only if such service will not interfere with the proper performance of judicial duties.

(B)
A judge shall not serve in a fiduciary* position if the judge as fiduciary* will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(C)
A judge acting in a fiduciary* capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(D)

If a person who is serving in a fiduciary* position becomes a judge, he or she must comply with this Rule as soon as reasonably possible and in any event within one year.

Comment

[1]

A judge should recognize that other restrictions imposed by this Code may conflict with a judge's obligations as a fiduciary.* In such circumstances, a judge should resign as fiduciary* as soon as reasonably possible and in any event within one year. For example, serving as a fiduciary* might require frequent disqualification of a judge under Rule 2.11 because a judge is deemed to have an economic interest* in shares of stock held by a trust if the amount of stock held is more than de minimis.

Rule 3.9 Service as Arbitrator or Mediator

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.*

Comment

[1]

This Rule does not prohibit a judge from participating in mediation, conciliation, or settlement conferences performed as part of judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.*

Rule 3.10 Practice of Law

A judge shall not practice law,* except that:

(A) A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,* but is prohibited from serving as the family member's lawyer in any forum, and

(B) A judge may serve as a judge advocate general in the context of a judge's service in the United States Armed Forces, the reserve components of the United States Armed Forces, or the National Guard.

Comment

[1]

A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bodies.

[2]
A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

[3]
While performing legal services in the context of a judge's military service, the judge must confine that conduct to authorized activities.

Rule 3.11 Financial, Business, or Remunerative Activities

(A)
A judge may hold and manage investments of the judge and members of the judge's family.*

(B)
A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.*

(C)
A judge shall not engage in financial activities permitted under Paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;
(2) lead to frequent disqualification of the judge;
(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves;
(4) result in violation of other provisions of this Code.

Comment
[1]
As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

[2]
Under this Rule, a judge must consider the difference between the permitted management of an investment and the prohibited management of a business. For example, a judge who owns residential or commercial properties as investments may establish policy and participate in decisions regarding the purchase, sale, and use of land, but must leave the actual day-to-day management to others.

Rule 3.12 Compensation for Extrajudicial Activities

A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law* unless such acceptance would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*

Comment

[1]

A judge is permitted to accept wages, salaries, royalties, or other compensation for teaching, writing, and other extrajudicial activities, provided the compensation is commensurate with the task performed and the judge's qualifications to perform that task. A judge must ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. See Rule 1.3. In addition, the source, amount, and timing of the payment, alone or in combination, must not raise any question of undue influence or undermine the judge's ability to act independently,* impartially,* and with integrity.* The judge should also be mindful that judicial duties must take precedence over other activities. See Rule 2.1.

[2]

A teaching activity may include lecturing in educational programs sponsored by non-profit organizations and associations including but not limited to educational institutions, bar associations, professional associations, providers of continuing legal education, and governmental entities concerned with the law,* the legal system, or the administration of justice. A judge is not permitted to accept an honorarium or fee for a speaking engagement other than a teaching activity, but may accept reimbursement of expenses. See Rule 3.14.

[3]

Compensation derived from extrajudicial activities may be subject to public reporting. See Rule 3.15.

Rule 3.13 Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value

(A)

A judge shall not accept any gifts, loans, bequests, benefits, or other things of value (“gifts” or “benefits”) if acceptance is prohibited by law* or would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.*

(B)

Unless otherwise prohibited by Paragraph (A), a judge may accept the following gifts or benefits provided that they are not given for or because of the judge's official position or action, without publicly reporting them:

(1) gifts or benefits not of substantial value* as that term is defined by the State Ethics Commission, see 930 C.M.R. 5.05;

(2) gifts or benefits from close personal friends* or relatives whose appearance or interest in a matter pending* or impending* before the judge would in any event require disqualification of the judge under Rule 2.11;
(3) ordinary social hospitality;
(4) gifts or benefits given in connection with a judge's participation in the organizations described in Rule 3.7, so long as the same gifts, benefits, and opportunities are made available on the same terms to similarly situated persons who are not judges;
(5) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;
(6) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;
(7) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria; and
(8) gifts or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner,* or other family member of a judge residing in the judge's household,* but that incidentally benefit the judge.

(C)

Unless otherwise prohibited by Paragraph (A), a judge may accept any other gift or benefit provided that it is not given for or because of the judge's official position or action, but the judge must publicly report the gift or benefit in the manner required under Rule 3.15.

(D)

Unless otherwise prohibited by Paragraph (A), a judge may accept the following gifts or benefits given for or because of the judge's official position or action, without publicly reporting them:

(1) a gift, award, or other benefit incident to public recognition of the judge, provided the gift is not of substantial value* as that term is defined by the State Ethics Commission, see 930 C.M.R. 5.05;
(2) invitations to the judge to attend without charge a luncheon, dinner, reception, award ceremony, or similar event, held in Massachusetts, of a bar association or other non-profit organization concerned with the law, the legal system, or the administration of justice;
(3) discounted or free membership to a bar association or other nonprofit organization concerned with the law,* the legal system, or the administration of justice; and
(4) books, magazines, journals, and other resource materials supplied by publishers on a complimentary basis for official use.

(E)

Unless otherwise prohibited by Paragraph (A), a judge may accept the following gifts or benefits given for or because of the judge's official position or action, but the judge must publicly report the gift or benefit in the manner required under Rule 3.15:

(1) a gift, award, or other benefit incident to public recognition of the judge, if the gift is of substantial value* as that term is defined by the State Ethics Commission, see 930 C.M.R. 5.05; and
(2) a complimentary invitation for a spouse or domestic partner,* or other guests, to attend an event of a bar association or other non-profit organization concerned with the law, the legal system, or the administration of justice where a judge is being honored.

Comment

[1]

This Rule addresses whether and in what circumstances a judge may accept gifts or other items of value ("gifts" or "benefits") without paying fair market value. Judges, like other public employees, are governed by the conflict of interest laws set forth in G. L. c. 268A and c. 268B and by associated regulatory exemptions that establish exclusions for certain situations that do not present a genuine risk of a conflict of interest or the appearance of a conflict of interest. This Code is largely consistent with c. 268A and regulations adopted by the State Ethics Commission. However, Rule 3.13 differs from those provisions in two important respects. First, because judges are always obligated to uphold and promote the independence,* integrity,* and impartiality* of the judiciary, a judge may not accept any gift or benefit, even if available to other public employees and unrelated to the judge's official position or action, if acceptance would appear to a reasonable person to undermine the judge's independence,* integrity,* and impartiality.* Second, this Rule carves out a few limited exceptions where a judge may accept a gift or benefit given for or because of the judge's official position or action even if such gift or benefit would ordinarily be prohibited by G. L. c. 268A, §§ 3 and 23(b)(2). See Rule 1.1. These exceptions are intended to allow judges to participate more fully in activities and organizations dedicated to the law,* the legal system, and the administration of justice.

[2]

Paragraph (A) recognizes that whenever a judge accepts a gift without paying fair market value, even one not given for or because of a judge's official position or action, there is a risk that the public may regard the gift as an attempt to influence the judge in the performance of judicial duties. Paragraph (A) therefore requires a judge to reject any gift if acceptance would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.* Paragraphs (B) and (C) address instances when a gift is not given for or because of a judge's official position or action. Paragraph (B) identifies limited circumstances in which a gift may be accepted and not disclosed, while Paragraph (C) allows for additional instances when a judge may accept but must publicly report a gift. Paragraphs (D) and (E) identify limited instances where, after making a threshold determination that acceptance of a gift or benefit would not appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality,* a judge may accept a gift or benefit given for or because of the judge's official position or action. Paragraph (D) identifies instances when the judge may accept such a gift or benefit without public disclosure while Paragraph (E) identifies instances when public reporting is required to foster public confidence in the judiciary.

[3]
A judge's acceptance of a gift from a lawyer or law firm who is appearing before the judge is an example of a gift prohibited by Paragraph (A), as such a gift would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.* A judge's acceptance of a gift or other thing of value from a party when the party's interests are before the judge raises the same concerns. The same concerns also are raised when the lawyer or law firm has appeared before, or the party's interests have come before, the judge in the reasonably recent past or are likely to come before the judge in the future.

[4]
Paragraph (B)(1) provides that a judge may accept and not publicly report a gift or benefit not of substantial value* if it is not prohibited by Paragraph (A) and is not given because of a judge's official position or action.

[5]
Gift-giving between close personal friends* and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety* or cause a reasonable person to believe that the judge's independence,* integrity,* or impartiality* has been compromised even when the close personal friend* or relative is a lawyer. In addition, because the appearance of close personal friends* or relatives in a case would require the judge's disqualification under Rule 2.11, there would be no opportunity for a gift or other thing of value to influence the judge's decision making; nor would a reasonable person believe that the gift was given due to the judge's official position. Paragraph (B)(2) places no restrictions upon the ability of a judge to accept gifts or other things of value from friends or relatives under these circumstances and does not require public reporting.

[6]
“Ordinary social hospitality” consists of those social events and routine amenities, gifts, and courtesies which are normally attended by or exchanged between friends, colleagues, and acquaintances, and which would not create an appearance of impropriety* to a reasonable, objective observer. The test is objective, not subjective. Paragraph (B)(3) permits that type of social event or gift which is so common among people in the judge's community that reasonable person would believe that: (i) the host/giver was intending to or would obtain any advantage; or (ii) the guest/recipient would believe that the host/giver intended to obtain any advantage.

[7]
Paragraph (B)(4) recognizes that a judge's participation in organizations and activities, such as those permitted under Rule 3.7, may lead to the judge's being offered a gift or benefit. A judge may accept such a gift or benefit so long as the same gift or benefit is made available on the same terms to similarly situated persons who are not judges. For example, a local professional performer may offer the members of a neighborhood chorus complimentary tickets of substantial value* to attend a concert. A judge who sings in the chorus may accept a ticket because the gift is offered on the same terms to all of the members.

[8]
Businesses and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based

upon longevity of the relationship, volume of business transacted, and other factors. Paragraphs (B)(5)-(B)(7) provide that a judge may freely accept such benefits if they are available to the general public, or if the judge qualifies for' the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at below-market interest rate unless the same rate was being made available to the general public for a certain period of time or to borrowers with specified qualifications that the judge also possesses.

[9]

This Rule applies only to acceptance of gifts or benefits by a judge. Nonetheless, if a gift or benefit is given to the judge's spouse, domestic partner,* or member of the judge's family residing in the judge's household,* it may be viewed as an attempt to evade this Rule and influence the judge indirectly. Where the gift or benefit is being made primarily to such other persons, and the judge is merely an incidental beneficiary, this concern is reduced and Paragraph (B)(8) does not require disclosure. A judge should remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into account when making decisions about accepting such gifts or benefits.

[10]

Paragraph (C) allows a judge to accept any other gift of substantial value* that is not given because of the judge's official position or action and is not prohibited by Paragraph (A), provided that the judge publicly reports the gift.

[11]

In general, the receipt by a judge of free or discounted legal services caries a significant risk that such a gift would appear to a reasonable person to be given because of the judge's official position or action and to undermine the judge's independence,* integrity,* or impartiality.* There are, however, certain circumstances when that risk is sufficiently abated that a judge may accept and not disclose a gift of free or discounted legal fees pursuant to Paragraphs (B)(2) or (B)(S) or may accept but must disclose the gift pursuant to Paragraph (C). Paragraph (B)(2) permits a judge to accept and not disclose free or discounted legal services from a relative or close personal friend* whose appearance in a matter would require the judge's disqualification if the lawyer is a sole practitioner or at a firm where all the lawyers are relatives or close personal friends* of the judge (e.g., a firm composed of two siblings who are both close personal friends* of the judge). Because a gilt of legal services is always a gift from both the lawyer providing the services and that lawyer's firm, Paragraph (B)(2) does not apply if the lawyer providing the services is a sole practitioner but not a relative or close personal friend* of the judge, or if that lawyer works at a firm where not all of the lawyers are relatives or close personal friends* of the judge.

Paragraph (B)(5) permits a judge to accept and not disclose free or discounted legal services when a lawyer or law firm has offered special pricing or a discount as part of a commercial opportunity or marketing strategy to a group of similarly situated persons who are not judges. For example, a law firm may have different rate structures for individual and corporate clients.

Another example is a law firm that offers a reduced rate for estate planning services to all persons over 65. Paragraph (B)(5) does not apply if the special pricing is offered as a professional courtesy only to judges.

Paragraph (C) provides tar instances when a judge may accept but must disclose free or discounted legal services. A reasonable person would not believe the gift or benefit undermines the judge's independence,* integrity,* or impartiality* when the same discount is extended to non-judges in comparable circumstances, and the lawyer, the lawyer's firm, and their interests are not before the judge, have not come before the judge in the reasonably recent past, and are not likely to come before the judge in the reasonably near future. Examples of comparable circumstances include the following: a law firm's policy is to extend professional courtesies to all former partners, and the judge is a former partner; a law firm's policy to extend professional courtesies to the relatives of partners, and the judge's sibling is a partner at the firm; a lawyer's policy is to offer discounted legal services both to lawyers facing proceedings before the Board of Bar Overseers and to judges facing proceedings before the Commission on Judicial Conduct. Nevertheless, disclosure is necessary to maintain public confidence in the judiciary by making readily identifiable any potential for compromise to the judge's independence,* integrity,* or impartiality.*

[11A]

Where a judge retains legal representation due to a matter before the Commission on Judicial Conduct, a judge may be entitled to the payment of reasonable attorneys' fees by the Commonwealth with the approval of the Supreme Judicial Court as provided by G. L. c. 211C, § 7(15). See SJC Standing Order Regarding Procedure for Judges Seeking a Determination Concerning Attorneys' Fees for Representation in a Matter Before the Commission on Judicial Conduct.

[11B]

A judge may accept free or discounted legal representation due to a matter before the Commission on Judicial Conduct upon a determination by the Supreme Judicial Court that such representation would serve the public interest. See SJC Standing Order Regarding Procedure for Judges Seeking a Determination Concerning Attorneys' Fees for Representation in a Matter Before the Commission on Judicial Conduct.

[12]

Paragraphs (D) and (E) identify limited instances when, after making a threshold determination that, in the particular circumstances, acceptance of a gift or benefit would not appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality,* a judge may accept a gift or benefit given for or because of the judge's official position or action. Paragraph (D) identifies instances where the risk of the appearance of a conflict of interest is so slight that public reporting is not required, while Paragraph (E) identifies instances in which public reporting is required.

[13]

Paragraph (D)(1) permits a judge to accept gifts not of substantial value* that are incident to public recognition of the judge. Examples might include plaques, trophies, and certificates. Gifts that are inscribed or personalized may have little market value.

[14]
Paragraphs (D)(2) and (D)(3) are intended to encourage judicial participation in the activities of bar associations and other non-profit organizations concerned with the law,* the legal system, and the administration of justice. Judicial participation in such activities promotes professionalism within the legal profession and public confidence in the administration of justice. See, e.g., Rules 1.2, 3.1, and 3.7.

Paragraph (D)(2) encourages judicial participation in bar association activities by permitting judges to attend without charge luncheons, dinners, receptions, award ceremonies, or similar events held in Massachusetts. Unlike the invitations addressed in Rule 3.14, invitations under Paragraph (D)(2) may be accepted without obtaining a determination by the Chief Justice of the court on which the judge sits that acceptance will serve a legitimate public purpose, and that such public purpose outweighs any non-work related benefit to the judge or to the organization providing the waiver of expenses. That is because the judge's attendance at these types of events is presumed to serve such a public purpose.

[15]
Paragraph (D)(4) provides that a judge may accept for official use books and other electronic and non-electronic resource materials supplied by publishers on a complimentary basis.

[16]
Paragraph (E)(1) permits a judge to accept a gift of substantial value* incident to public recognition of the judge, but requires the judge to publicly report the gift.

[17]
Paragraph (E)(2) recognizes that there are instances when it may be appropriate for a judge to accept complimentary invitations for family members or guests so long as the judge publicly reports the gift. For example, a judge receiving an award from a bar association may accept an offer of complimentary tickets to be used by the judge's spouse and children.

Rule 3.14 Reimbursement of Expenses and Waivers of Fees or Charges

(A)
Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law,* a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge’s employing entity, if the expenses or charges are associated with the judge’s participation in extrajudicial activities permitted by this Code.

(B)
Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge.

(C)

If the invitation to the judge is connected to the judge's official position or official action and is not covered by Rule 3.13(D)(2), a judge is required to notify the Chief Justice of the court on which the judge sits and obtain a determination that acceptance of the reimbursement or waiver serves a legitimate public purpose and such purpose outweighs any non-work related benefit to the judge or to the person or organization providing the payment or waiver of expenses.

Comment

[1]

This Rule applies specifically to a judge's attendance at tuition-waived and expense-paid seminars and similar events that may be sponsored by law-related organizations or by educational, civic, religious, fraternal, and charitable organizations, and is intended to apply to events not described in Rule 3.13(D)(2).

[2]

Not infrequently, sponsoring organizations invite certain judges to attend seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes include reimbursement for necessary travel, food, lodging, or other incidental expenses. A judge's decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances. The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this Code.

[3]

A judge must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality.* This decision involves consideration of the totality of circumstances, including but not limited to the nature of the sponsor, the source of the funding, whether the sponsor or source of the funding frequently takes positions on issues before or likely to come before the court where the judge sits, and the content of the program or event, including whether differing viewpoints are presented. Where the invitation is associated with any of the judge's non-law-related activities, including educational, religious, fraternal, or civic activities, the judge may accept reimbursement or fee waiver only if the same invitation is offered to similarly-situated non-judges who are engaged in similar ways as the judge.

[4]

Paragraph (C) is intended to ensure that a judge obtains a determination from the Chief Justice of the court on which the judge sits that a legitimate public purpose is served by the judge's acceptance of the reimbursement or waiver when the invitation is connected to the judge's official position or official action. In contrast, no such determination is required in the circumstances covered by Rule 3.13(D)(2) because a legitimate public purpose is presumed.

Rule 3.15 Reporting Requirements

(A)

A judge shall annually complete the Public Report of Extra-Judicial Income in the form promulgated by the Supreme Judicial Court and the Statement of Financial Interests in the form promulgated by the Massachusetts State Ethics Commission.

(B)

The Public Report of Extra-Judicial Income shall require the public reporting of the following items if they are of substantial value*:

(1) compensation received for extrajudicial activities permitted under Rule 3.12; and
(2) gifts and other things of value where disclosure is required by Rule 3.13.

Canon 4

A judge shall refrain from political activity inconsistent with the independence,* impartiality,* or integrity,* of the judiciary (Rule 4.1 to Rule 4.2).

Rule 4.1 Political and Campaign Activities

(A)

A judge shall not:

(1) act as a leader in, or hold an office in, a political organization*;
(2) make speeches on behalf of a political organization* or candidate;
(3) publicly endorse or oppose a candidate for any public office;
(4) solicit funds for, pay an assessment to, or make a contribution to a political organization* or a candidate for public office; or
(5) attend or purchase tickets for dinners or other events sponsored by a political organization* or a candidate for public office or intended to raise money or gather support for or against a political organization* or candidate.

(B)

A judge may engage in activity in support or on behalf of measures to improve the law,* the legal system, or the administration of justice, provided that the judge complies with the other provisions of this Code.

(C)

On assuming a judicial office, a judge shall resign any elective public office then held.

Comment

[1]

While judges have the right to participate as citizens in their communities and not be isolated from the society in which they live, judges must at all times act in a manner that promotes public

confidence in their independence,* integrity,* and impartiality.* This Rule imposes restrictions on a judge's political activities because public confidence in the judiciary is eroded if judges are perceived to be subject to political influence or give the impression of favoring the interests of a political organization* or candidate.

[2]
The restrictions in Paragraph (A) prohibit a judge from engaging in any public display in support of or opposition to a political candidate, including displaying a bumper sticker on an automobile the judge regularly uses, posting a campaign sign outside the judge's residence, signing nomination papers for a political candidate or ballot issue, carrying a campaign sign, distributing campaign literature, or encouraging people to vote for or give money to a particular candidate or political organization.*

[3]
A judge may not avoid the restrictions imposed by this Rule by making contributions or endorsements through a spouse, domestic partner,* or other member of the judge's family.* Political contributions by the judge's spouse or domestic partner* must result from that person's independent choice, and checks by which contributions are made must not include the name of the judge.

[4]
Although members of the judge's family* are free to engage in their own political activity, including running for public office, a judge must not endorse, appear to endorse, become involved in, or publicly associate with any family member’s political activity or campaign for public office.

[5]
A judge may register as a member of a political party. A judge may also attend non-partisan events, such as a forum that is open to all candidates and is intended to inform the public.

Rule 4.2 Activities of Judges Who Become Candidates for Nonjudicial Office

(A)
Upon becoming a candidate in a primary or general election for elective office, a judge shall resign from judicial office.

(B)
Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

Rule History
Adopted October 8, 2015, effective January 1, 2016.

Comment

[1]

The “resign to run” rule set forth in Paragraph (A) ensures that a judge cannot use the judicial office to promote his or her candidacy. When a judge is seeking appointive nonjudicial office, however, the dangers are not sufficient to warrant imposing the “resign to run” rule.

[2]

Upon being appointed to any nonjudicial office except as permitted by Rule 3.4, a judge must resign from judicial office.

3:10 Assignment of Counsel.

(Applicable to all courts.)

Section 1. Definitions.

The following definitions apply in this rule:

(a) Available funds

A party's liquid assets and disposable net monthly income calculated after providing for the party's bail obligations. A party's available funds shall include the liquid assets and disposable net monthly income of the party's spouse (or person in substantially the same relationship), provided that person lives in the same residence as the party and contributes substantially towards the household's basic living costs, unless that person has an adverse interest in the proceeding (e.g. is the victim, complainant, or petitioning party, is a prospective prosecution witness, or, in a civil matter, is a party) or unless the inclusion of the income of the party's spouse would be contrary to the interests of justice.

(b) Basic living costs

The average monthly amount spent for reasonable payments toward living costs, such as shelter, food, utilities, health care, transportation, clothing, education, child care, alimony and child support payments, and payments and interest on loans for such living costs.

(c) Child welfare proceeding

Where the party is a juvenile, a care and protection proceeding, termination of parental rights proceeding, child requiring assistance proceeding, adoption, guardianship of a minor, or permanency hearing. Where the party is a young adult, a permanency hearing.

(d) Contribution fee

A fee imposed by a judge pursuant to Section 10 on a party who has been determined to be indigent but able to contribute. The contribution fee shall not include the indigent counsel fee, but shall be an amount above and beyond the indigent counsel fee that the party is able to pay without substantial financial hardship for the cost of any attorney appointed to represent the party.

(e) Disposable net monthly income

The income remaining each month after deducting income taxes, social security and Medicare taxes, ordinary retirement contributions, union dues, and basic living costs.

(f) Income

Salary, wages, interest, dividends, rental income, and other earnings and regular cash payments, such as amounts received from pensions, annuities, social security, alimony, and child support. Irregular or infrequent income (e.g., earnings from day labor, seasonal, or on-call work) that a party can reasonably be expected to receive shall count as income under this rule. Irregular or infrequent income that cannot reasonably be anticipated to continue shall not count as income.

(g) Indigency verification process

The attempt by probation to verify a claim of indigency, in accordance with G. L. c. 211D, § 2A(c), by a party or, where appropriate, a parent or guardian, by accessing wage, tax, and asset information in the possession of the Department of Revenue, information regarding benefits received from the Department of Transitional Assistance, and any information relevant to the determination of indigency in the possession of the Registry of Motor Vehicles.

(h) Indigent

A party who is:

(i) receiving one of the following types of public assistance: Transitional Aid to Families with Dependent Children (TAFDC), Emergency Aid to Elderly, Disabled and Children (EAEDC), need-based veterans' benefits, Supplemental Nutrition Assistance Program (SNAP) benefits, Refugee Cash Assistance, or SSI State Supplemental Program;

(ii) receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current poverty guidelines referred to in G. L. c. 261, § 27A(b);

(iii) (1) residing in a tuberculosis treatment center, a mental health facility or a facility for individuals with intellectual or developmental disabilities, including the Bridgewater State Hospital and Massachusetts Treatment Center; or (2) the subject of a proceeding regarding admission or commitment to such a center or facility, a proceeding to make a substituted judgment determination concerning treatment, a proceeding under G. L. c. 190B, § 5-309(g) to admit to a nursing facility defined in G. L. c. 190B, § 5-101(15), or a civil commitment proceeding under G. L. c. 123, § 35; provided, however, that when the judge has reason to believe that the party is not indigent, a determination of indigency shall be made in accordance with Section 5 and other applicable provisions of this rule; or

(iv) a juvenile, a child who is in the care or custody of the Department of Children and Families, or a young adult provided, however, that when a judge has reason to believe that the juvenile or young adult is not indigent, a determination of indigency shall be made in accordance with Section 5 and other applicable provisions of this rule.

(i) Indigent but able to contribute

A party who:

(i) has an annual income, after taxes, of more than one hundred twenty five percent and less than two hundred fifty percent of the current poverty guidelines referred to in G. L. c. 261, § 27A(b), or

(ii) (1) is charged with a felony solely within the jurisdiction of the Superior Court or is the parent, guardian, or custodian of a juvenile or young adult who is the subject of a child welfare proceeding, subject to the exception in Section 6A for a parent or guardian who has had custody of the juvenile removed by a court of competent jurisdiction, or who has an interest adverse to the juvenile or young adult, and (2) has an annual income, after taxes, of more than two hundred fifty percent of the current poverty guidelines referred to in G. L. c. 261, § 27A(b); and (3) whose available funds are insufficient to pay the anticipated cost of counsel for this representation, but are sufficient to pay part of that cost. The anticipated cost of counsel shall be the cost of retaining private counsel for, as applicable, the defense of a felony charge within the jurisdiction of the Superior Court, or a child welfare proceeding, as estimated and published from time to time by the Committee for Public Counsel Services; or

(iii) is over the age of eighteen and is claimed as a dependent for tax purposes by a parent or guardian who is not indigent.

(j) Indigent counsel fee

A fee assessed on a person provided counsel pursuant to G. L. c. 211D, § 2A(f).

(k) Intake report

The report provided to the judge by probation regarding the party's or, where appropriate, the party's parents' or guardians', responses to biographical and financial questions asked by probation.

(l) Juvenile

A child under the age of 18 who is the subject of a child welfare proceeding or a delinquency or youthful offender proceeding.

(m) Juvenile legal fee

The fee assessed on a parent or guardian to pay for the cost of any attorney appointed to represent a party under the age of 18. The fee shall not exceed the fee set forth in G.L. c. 119, § 29A or G.L. c. 119, § 39F.

(n) Liquid assets

Cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real estate, and equity in a motor vehicle or other tangible property, provided that any equity in real or personal property is reasonably convertible to cash. Any motor vehicle necessary to maintain employment, including travel to and from the party's employment, shall not be considered a liquid asset. Expenses associated with the liquidation of assets, including penalties for early withdrawal and tax burdens, shall not be included as available funds.

(o) Party

Any person who may be entitled to the appointment of counsel in relation to any court proceeding on the basis of indigency under the law of the Commonwealth.

(p) Probation

The Office of the Commissioner of Probation or any member of its staff.

(q) Young adult

A person between the ages of 18 and 22 who is the subject of a child welfare proceeding.

Section 2. Advice as to Right to Counsel.

If any party to a proceeding appears in court without counsel where the party has a right to be represented by counsel under the law of the Commonwealth, the judge shall advise the party or, if the party is a juvenile, the party and a parent or legal guardian, where appropriate, that: (a) the party may be entitled to the appointment of counsel at public expense; and (b) the Committee for Public Counsel Services will provide counsel to the party at no cost or at a reduced cost if the court finds that the party wants but cannot afford counsel.

Section 3. Waiver of Counsel.

If the party elects to proceed without counsel, the party shall sign a written waiver and the judge shall certify in writing that the party executed the waiver in the judge's presence after the judge informed the party of the right of counsel. If the party elects to proceed without counsel but refuses to sign the written waiver, the judge shall so certify in writing.

Before allowing a waiver of counsel, the judge, after conducting a colloquy with the party, shall make written findings that the party is competent to waive counsel and that the party has knowingly and voluntarily elected to proceed without counsel.

Section 4. Standby Counsel.

Notwithstanding a party's waiver of counsel, where the interests of justice so require, the judge may assign standby counsel to assist the party in the course of the proceedings regardless of whether the party is indigent.

Section 5. Determination of Indigency Status.

(a)

If the party requests appointment of counsel, or if counsel is appointed under Section 6 or 6A of this rule, or if the judge for any reason finds that the party has not knowingly and voluntarily elected to proceed without counsel, probation shall provide the judge with an intake report. Probation shall attempt to verify the self-reported information on the intake report through the indigency verification process.

(b)

Unless the party is a juvenile, or is a person over eighteen who is claimed as a dependent for tax purposes, probation shall make a recommendation as to the indigency of the party. Where the party is a juvenile, probation shall make a recommendation as to the indigency of the parents or guardian in accordance with Sections 1, 6 and 6A of this rule and G.L. c. 119, § 29A and 39F. Where a person over eighteen is claimed as a dependent for tax purposes, probation shall make a recommendation as to the indigency of the parents or guardian.

(c)

After reviewing the intake report and recommendation and questioning the party, as appropriate, the judge shall make a determination that:

(i) the party is indigent,
(ii) the party is indigent but able to contribute, or
(iii) the party is not indigent.

The clerk shall enter the judge's determination on the court docket.

(d)

In order to determine a party's current financial status, the judge shall evaluate (1) the party's income in the current calendar quarter (i.e., January-March, April-June, July-September, October-December), and (2) the party's income in the three preceding calendar quarters.

(e)

Any party seeking appointment of counsel shall bear the burden of proving indigency by a preponderance of the evidence.

(f)

Even where a party meets or fails to meet the definitions of "indigent" or "indigent but able to contribute," the judge retains the discretion to determine that the interests of justice require a different determination based on the party's available funds in relation to the party's basic living costs, or special circumstances, or both. A judge may consider, for example, receipt of Medicaid benefits as one factor in assessing whether the interests of justice would require a different determination. Where a judge exercises this discretion, the judge shall set forth on the record the reason for doing so.

Section 6. Assignment of Counsel/Notice of Assignment.

If under Section 5 the judge finds that a party is indigent or indigent but able to contribute, the judge shall assign the Committee for Public Counsel Services to provide representation for the party, unless exceptional circumstances, supported by written findings, necessitate a different procedure that is consistent with G. L. c. 211D and the rules of the Supreme Judicial Court. The clerk or register shall promptly notify the party of the assignment of counsel.

If a judge has determined that a party is not indigent, and the party after a reasonable time has not waived counsel, procured counsel, or petitioned for the appointment of counsel on the ground that, despite reasonable efforts, the party has been unable to afford the cost of counsel, the case may be ordered to proceed without appointed counsel. In proceedings where there is an entitlement to the appointment of counsel pursuant to General Laws, chapter 111, §§ 94C and 94G, chapter 123, chapter 123A, and chapter 190B, the judge shall appoint counsel immediately upon the filing of a petition and entry of any requisite findings. If, before the hearing, the judge determines that the party is not indigent, assigned counsel may be dismissed, and the party shall be advised to retain private counsel without delay; provided, however, that the judge shall authorize the continued services of appointed counsel at public expense where the interests of justice so require. The interests of justice may require such appointment if, for example, the party is incompetent to obtain counsel, unable to access funds, or unable to retain counsel. If, after the hearing has commenced, the judge determines that the party is not indigent, appointed counsel shall continue to represent the party and the judge may order the party to reimburse the Commonwealth for the cost of counsel.

Section 6A. Assignment of Counsel for Juveniles.

All juveniles, regardless of the financial status of their parents or guardians, shall be entitled to the appointment of counsel. Unless the juvenile is represented by retained private counsel, the judge shall assign the Committee for Public Counsel Services to represent the juvenile in accordance with Section 6. If the juvenile is provided with appointed counsel and the judge determines that the juvenile's parent or legal guardian is not indigent, the judge shall assess the juvenile legal fee against the parent or guardian as payment toward the cost of counsel supplied by the Committee for Public Counsel Services. If the parent or guardian is determined to be indigent but able to contribute, the court shall order the parent or guardian to pay a reasonable amount toward the cost of appointed counsel, provided that the amount shall not exceed the juvenile legal fee and shall not cause substantial financial hardship. This section shall not apply to a parent or guardian who has had custody of the juvenile removed by a court of competent jurisdiction, or who has an interest adverse to the juvenile. The failure of a juvenile's parent or guardian to pay any fee assessed under this Section shall not be grounds for withholding or revoking the juvenile's appointed counsel.

Section 7. Review of Indigency Determination.

(a)

The judge may review indigency status at any stage of a proceeding if information regarding a change in financial circumstances is obtained by probation through the indigency verification process or from some other source, including the party.

(b)

There shall be a right to an evidentiary hearing to reconsider the judge's findings and determination as to the party's entitlement to appointed counsel. The judge shall schedule the evidentiary hearing promptly after it is requested. If requested by the party, the judge shall appoint counsel to represent the party at the evidentiary hearing. Before the hearing, the judge shall provide the party with a copy of probation's intake report and recommendation described in Section 5(a) and any records in the

court's possession relating to the party's financial status. The judge may issue any protective orders needed to protect the privacy of the party or any third parties. The party shall have the opportunity to introduce any relevant evidence and to call witnesses to testify. The party shall bear the burden of proving indigency by a preponderance of the evidence. At the conclusion of the hearing, the judge shall make written findings regarding whether the party is entitled to appointed counsel. These findings shall be part of the case record and maintained in the official file of the case.

Section 8. Inadmissibility of Information Obtained from a party.

(a)

No information provided by a party pursuant to this rule may be used in any proceeding against the party except in a prosecution for perjury or contempt committed in providing such information or at an evidentiary hearing conducted under Section 7(b).

(b)

No party shall be asked or required to provide any information regarding his or her immigration or citizenship status as part of intake, indigency determination, or verification.

Section 9. Counsel for parties who are indigent or indigent but able to contribute.

(a) Appearance of Counsel.

Counsel assigned by the Committee for Public Counsel Services to represent a party pursuant to this rule shall file an appearance within forty-eight hours after receipt of notification of the assignment.

(b) Withdrawal of Appearance.

If counsel assigned by the Committee for Public Counsel Services has filed an appearance and is unable or unwilling to represent a party, counsel shall move to withdraw the appearance. If the judge allows the motion for withdrawal, the clerk or register shall immediately notify the Committee for Public Counsel Services to make a new assignment of counsel.

Section 10. Contribution toward Cost of Counsel.

(a)

If a judge determines that a party is indigent, the judge may not order, require, or solicit the party to make any payment toward the cost of counsel, except for an indigent counsel fee. The indigent counsel fee shall be waived where a judge, after the indigency verification process, determines that the party is unable without substantial financial hardship to pay the indigent counsel fee within 180 days. Where the indigent counsel fee is not waived, the judge may authorize the party to perform community service in lieu of payment of the indigent counsel fee in accordance with G. L. c. 211D, § 2A(g). The clerk shall enter the judge's determination on the court docket.

(b)

If a judge determines that a party is indigent but able to contribute, the judge shall order the party to pay the indigent counsel fee plus a contribution fee based on the financial circumstances of the party, provided that the amount of the contribution fee shall not cause substantial financial hardship. The party shall be given an opportunity to be heard and to present information, including witness affidavits or testimony, regarding whether the contribution fee would cause substantial financial hardship.

(c)

If a party over the age of eighteen is determined to be indigent but able to contribute under Section 1(h)(iii) because the party is claimed as a dependent for tax purposes by a parent or guardian who is not indigent, the contribution fee shall be based on the financial circumstances of the parent or guardian. The parent or guardian shall be solely responsible for paying any contribution fee assessed under this subsection.

Section 11. Collection of Fees and Contributions.

(a)

All payments toward the cost of counsel, including the indigent counsel fee, the contribution fee, and the juvenile legal fee, shall be made to the office of the clerk of court and shall be deposited with the State Treasurer in accordance with law.

(b)

The clerk shall inform the judge at each court event for a case whether the party has failed to pay an indigent counsel fee or contribution fee. If the party has failed to pay an indigent counsel fee or contribution fee within sixty days of appointment of counsel, the clerk, unless otherwise ordered by the judge, shall report the unpaid amount to the Department of Revenue, the Department of Transitional Assistance, and the Registry of Motor Vehicles as required by G. L. c. 211D, § 2A.

(c)

The failure of a party, parent, or guardian to pay an indigent counsel fee, a contribution fee, or a juvenile legal fee shall not be grounds for withholding or revoking appointed counsel.

(d)

Probation shall not be responsible for monitoring or enforcing payment of any indigent counsel fee, contribution fee, or juvenile legal fee.

(e)

No party may be subject to incarceration for failing to pay an indigent counsel fee or a contribution fee.

Rule History

Amended July 1, 1993, effective October 1, 1993; amended July 20, 2016, effective November 1, 2016.

3:11 Committee on Judicial Ethics.

(1) Structure.

There shall be a Committee on Judicial Ethics (Committee) to render opinions concerning the Code of Judicial Conduct, S. J. C. Rule 3:09. The Committee shall consist of five persons appointed by this court at least three of whom shall be active or retired judges. No Justice currently serving on this court shall be a member of the Committee. This court shall designate one member as Chairperson and one court employee to serve as the staff counsel to the Committee.

Committee members shall be appointed to three-year terms, but the length of a member's initial term may be shorter to create staggered terms among the members. Members may be reappointed to the Committee, but no member shall be appointed to more than two successive full terms. The members of the Committee shall serve without compensation but shall be reimbursed for necessary expenses incurred in the performance of their official duties. A member whose term has expired shall remain on the Committee pending appointment of his or her successor, and until the successor's term begins.

(2) Requests By Individual Judges.

A. The Committee shall render Informal Opinions and Letter Opinions with respect to the interpretation of the Code of Judicial Conduct.

The Committee shall provide opinions with respect to conduct contemplated by judges, but shall not render opinions on hypothetical questions, questions relating solely to past conduct, questions relating to the conduct of persons other than the requestor, or on issues pending before a court, agency, or commission, including the Commission on Judicial Conduct. The Committee may decline to render an opinion for any reasons that it deems sufficient. The Committee may also issue Emergency Opinions to offer guidance to judges faced unexpectedly with questions within the Committee's jurisdiction that require an immediate response.

B. Who May Request.

A request for an Informal Opinion, a Letter Opinion, or an Emergency Opinion may be made by a judge, a person who has been nominated to be a judge, or a former judge to whom provisions of the Code of Judicial Conduct apply.

C. Confidentiality.

All requests for advice and all of the Committee's proceedings thereon, shall be strictly confidential unless the Supreme Judicial Court requires disclosure or the Committee determines that disclosure is necessary to prevent or remedy a serious injury to person, property or the administration of justice. Published Informal and Letter Opinions shall not include the name of the judge requesting the opinion and any other identifying information without the judge's consent.

D. Procedure for Requesting Informal Opinions, Letter Opinions, and Emergency Opinions.

i. Informal Opinions.

A judge may request an Informal Opinion by making an oral or written request to the Committee's staff counsel. Upon making a request for an Informal Opinion, the requesting judge shall be told that in contrast to a Letter Opinion, an Informal Opinion does not carry with it the protection from discipline described in paragraph 2(D)(ii). However, a judge's reliance on an Informal Opinion would be considered as a mitigating factor in any disciplinary proceeding, so long as the judge did not omit or misstate any material fact in the request for an opinion. The Committee may provide an Informal Opinion if the answer to the judge's request may be found in a previously published Informal or Letter Opinion or an Ethics Advisory or is otherwise reasonably clear. An Informal Opinion may be given orally or in writing. If the Committee determines that the answer is unsettled, the Committee shall inform the requestor, and indicate that the Committee will act only in response to a written request for a Letter Opinion. The Committee may publish an Informal Opinion if the Committee concludes that the advice contained in the Informal Opinion will be useful to other judges, but shall redact the name of the judge and any other identifying information unless the judge has consented to its inclusion.

ii. Letter Opinions.

A judge may request a Letter Opinion by making a written request to the Committee's staff counsel. The written request shall set forth fully all facts bearing on the question or questions on which the judge seeks advice. A Letter Opinion requires agreement among a majority of the Committee. Each Letter Opinion shall contain a statement of the facts and a discussion of the application of the relevant rules to the facts. If the judge did not omit or misstate any material fact in the request for an opinion, the judge may rely on a Letter Opinion until and unless revised or revoked. A judge shall not be disciplined for conduct undertaken in reasonable reliance on a Letter Opinion issued to that judge pursuant to this rule. The Committee shall publish Letter Opinions, but shall redact the name of the judge and any other identifying information unless the judge has consented to its inclusion.

iii. Emergency Letter Opinions.

Where a judge seeks the protection of a Letter Opinion but is faced unexpectedly with questions within the committee's jurisdiction that require an immediate response, staff counsel with the approval of at least two members of the Committee may give advice on an emergency basis. The request for advice shall set forth fully all facts bearing on the question or questions on which the judge seeks advice, and whenever possible, shall be in writing. The emergency advice will be given in writing. Emergency advice shall be submitted to the full Committee for action. If the Committee

agrees with the advice given, it will issue a confirming Letter Opinion to the requestor. If it disagrees, it will issue a Letter Opinion to the requestor setting forth the emergency advice that was given so that the judge will have the benefit of the protection of a Letter Opinion given by this rule as to conduct undertaken in reliance on that advice, but it will also set forth the view of the full Committee on the issue presented. A Letter Opinion will supersede all inconsistent emergency advice.

(3) Requests by Organizations or Associations of Judges or Lawyers.

An organization or association composed of judges or lawyers (e.g., Massachusetts Judges Conference, Flaschner Judicial Institute, bar associations) may request an Informal Opinion concerning contemplated conduct by making an oral or written request to the Committee's staff counsel. The request may not pose a question on behalf of a specific judge. The Committee may decline to render an opinion for any reasons that it deems sufficient. The Committee may give an Informal Opinion orally or in writing. All requests for advice, and all of the Committee's proceedings thereon, shall be strictly confidential unless the Supreme Judicial Court requires disclosure or the Committee determines that disclosure is necessary to prevent or remedy a serious injury to person, property or the administration of justice. The Committee may publish an Informal Opinion if the Committee concludes that the advice contained in the Informal Opinion will be useful to judges or lawyers, but shall redact the name of the requestor unless the requestor consents to its publication.

(4) Ethics Advisories.

The Justices of the Supreme Judicial Court may on their own initiative or when a request is made issue an Ethics Advisory to clarify the meaning and application of any provision of the Code of Judicial Conduct, and to expound upon provisions of the Code that are of broad interest and application. An Ethics Advisory may be requested by any judge, lawyer, or organization or association of judges or lawyers (e.g., Massachusetts Judges Conference, Flaschner Judicial Institute, and bar associations). Prior receipt of an Informal or Letter Opinion does not preclude a request for an Ethics Advisory. A request for an Ethics Advisory may pose questions related to past or hypothetical conduct. The court may decline to render an Ethics Advisory for any reasons that it deems sufficient. An Ethics Advisory supersedes all inconsistent Informal Opinions and Letter Opinions, but a judge shall not be disciplined for conduct undertaken in reasonable reliance on a Letter Opinion issued to that judge before the issuance and publication of an Ethics Advisory.

(5) Other Duties.

The Committee shall adopt Rules of the Committee as necessary, subject to the approval of this court, to implement this rule. Each year, the Committee shall submit to the court a report of its activities, together with any recommendations for amendments to the Code of Conduct or the Committee's rules.

Rule History

Adopted March 31, 1988, effective September 1, 1988; amended effective February 1, 1991; amended May 3, 2002, effective May 20, 2002; amended November 5, 2002, effective December 2, 2002; amended December 17, 2008, effective January 1, 2009; amended October 20, 2015, effective January 1, 2016; November 21, 2016, effective November 21, 2016.

3:12 Code of Professional Responsibility for Clerks of the Courts.

Canon 1 Purpose and Applicability.

This Code shall be known as the "Code of Professional Responsibility for Clerks of the Courts of the Commonwealth of Massachusetts." Its purpose is to define norms of conduct and practice appropriate to persons serving in the positions covered by the Code and thereby to contribute to the preservation of public confidence in the integrity, impartiality, and independence of the courts.

The word "Clerk-Magistrate" in this Code, unless otherwise expressly provided, shall mean anyone serving in the position of Clerk-Magistrate, Clerk, Register, Recorder, Assistant Clerk-Magistrate, Assistant Clerk, Assistant Register, Deputy Recorder, Judicial Case Manager, or Assistant Judicial Case Manager in the Supreme Judicial Court, the Appeals Court, or a Department of the Trial Court of the Commonwealth, whether elected or appointed, and whether serving in a permanent or temporary capacity. The words "elected Clerk-Magistrate" shall also include a person who is appointed to complete the term of an elected Clerk-Magistrate. The word "court" in this Code shall mean the Supreme Judicial Court, the Appeals Court, a particular division of a Department of the Trial Court, or a particular Department of the Trial Court if the Department does not have divisions.

Canon 2 Compliance with Statutes and Rules of Court.

A Clerk-Magistrate shall comply with the laws of the Commonwealth, rules of court, and lawful directives of the several judicial authorities of the Commonwealth. The words "judicial authorities" in this Code, unless otherwise expressly provided, shall mean the Justices of the Supreme Judicial Court and Appeals Court, the Chief Administrative Justice of the Trial Court, the Administrative Justices of the several Departments of the Trial Court, or Associate Justices of the Trial Court, as is appropriate under the circumstances. A Clerk-Magistrate shall also comply with the lawful directives of the Court Administrator.

Canon 3 Performance of Duties.

A Clerk-Magistrate shall devote the entire time during normal court hours to the duties of his or her office, but may, according to established procedures, participate during that time in law-related educational and public service activities. An elected Clerk-Magistrate may participate during ordinary court hours in activities reasonably related to his or her duties as an elected Clerk-Magistrate. A Clerk-Magistrate shall not engage in the practice of law, except that a Clerk Magistrate

may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the Clerk Magistrate's family, but may not serve as the family member's lawyer in any forum. Also, a Clerk Magistrate may serve as a judge advocate general in the context of service in the United States Armed Forces, the reserve components of the United States Armed Forces, or the National Guard.

(A) Adjudicative and Administrative Responsibilities.

In the performance of adjudicative and administrative responsibilities, the following additional standards shall apply:

(1) A Clerk-Magistrate shall be faithful to the law and maintain professional competence in it as it relates to the performance of his or her duties. A Clerk-Magistrate shall not be swayed by partisan interests, public clamor, or fear of criticism.
(2) A Clerk-Magistrate should seek to maintain order and decorum in proceedings.
(3) A Clerk-Magistrate should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others in official dealings, and should require similar conduct of those subject to his or her direction and control.
(4) A Clerk-Magistrate shall accord to every person who is legally so entitled the right to be heard in a proceeding in person or through his or her lawyer. A Clerk Magistrate may make reasonable efforts to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard.
(5) A Clerk-Magistrate should diligently carry out his or her responsibilities and should dispose of them promptly.
(6) A Clerk-Magistrate shall facilitate public access to court records that, by law or court rule, are available to the public and shall take appropriate steps to safeguard the security and confidentiality of court records that are not open to the public.
(7) A Clerk-Magistrate may explain his or her own decisions made in the course of his or her official duties and may explain for public information the procedures of the court and the applicability of those procedures in particular circumstances. A Clerk-Magistrate should otherwise abstain from public comment about any pending or impending proceeding in any court, and should require similar abstention by subordinate court personnel.

(B) Administrative Responsibilities.

A Clerk-Magistrate should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other court officials. In so doing, a Clerk-Magistrate should be cognizant of the need to employ efficient, businesslike methods and sound practices. A Clerk-Magistrate should organize and manage the business of the Clerk-Magistrate’s Office with a view to the prompt and convenient dispatch of the business of the court. A Clerk-Magistrate should supervise subordinate personnel and arrange for their training. A Clerk-Magistrate shall make personnel appointments on the basis of merit, and in compliance with applicable personnel standards.

Canon 4 Impartiality and Disqualification.

A Clerk-Magistrate shall perform the duties of Clerk-Magistrate impartially and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judicial branch of government.

(A) Appearance of Impartiality.

A Clerk-Magistrate shall not convey the impression that any person is in a special position to influence the Clerk-Magistrate, and the Clerk-Magistrate should discourage others from suggesting that they are in a position to exert such influence.

(B) Personal Affairs.

A Clerk-Magistrate shall conduct personal affairs in such a way as not to cause public disrespect for the court and the judicial system. A Clerk-Magistrate shall not engage in activities nor incur obligations which would tend to detract from the dignity of the Clerk-Magistrate's office or interfere or appear to interfere with official duty. A Clerk-Magistrate shall not engage in outside activities which would cast doubt on his or her capacity to decide impartially any issue that may come before the Clerk-Magistrate in any official capacity.

(C) Business Activities.

A Clerk-Magistrate shall not enter into any business relationship which reasonably might create a conflict with the proper performance of his or her official duty or detract from the dignity of the office. A Clerk-Magistrate shall not use the influence of the office to promote his or her business interests or those of others.

(D) Activities to Improve the Law.

A Clerk-Magistrate may use his or her title to engage in activity to improve the law, the legal system, or the administration of justice. A Clerk-Magistrate may appear at public hearings and may otherwise consult with governmental bodies or officials on such matters.

(E) Disqualification.

A Clerk-Magistrate should disqualify himself or herself from serving in an adjudicative capacity in a proceeding in which the Clerk-Magistrate's impartiality might reasonably be questioned. A Clerk-Magistrate who would be so disqualified may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If, based on such disclosure, the parties, individually or through counsel, after consultation independent of the Clerk-Magistrate, agree in writing that the Clerk-Magistrate need not be disqualified, the Clerk-Magistrate may participate in the proceeding. The agreement, signed by all parties, shall be incorporated in the record of the proceeding.

Canon 5 Outside Activities.

A Clerk-Magistrate shall regulate outside and personal activities to minimize the risk of conflict with official duties:

(A) Personal Conduct.

A Clerk-Magistrate should not engage in activities which might detract from the dignity of the office of Clerk-Magistrate or interfere with the performance of the duties of the office.

(B) Civic and Charitable Activities.

A Clerk-Magistrate may participate in civic and charitable activities that do not reflect adversely on the Clerk-Magistrate's impartiality or interfere with the performance of his or her official duties. A Clerk-Magistrate may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A Clerk-Magistrate shall not participate if there is a substantial likelihood that the organization, or a significant number of members of the organization, will be engaged in proceedings that would ordinarily come before the Clerk-Magistrate or the court in which the Clerk-Magistrate serves.

(2) A Clerk-Magistrate may solicit funds for any educational, religious, charitable, fraternal, or civic organization, but shall not use or permit the use of the prestige of the office for that purpose or solicit his or her staff for that purpose. A Clerk-Magistrate, however, may call his or her employees' attention to a general fund raising campaign such as the Commonwealth of Massachusetts Employees Campaign. Except as provided in paragraph (3), a Clerk Magistrate may attend but, except for an elected Clerk Magistrate, shall not be a speaker or the guest of honor at an organization's fund raising event. A Clerk-Magistrate may be listed as an officer, director, or trustee of such an organization.

(3) A Clerk Magistrate may serve as a keynote or featured speaker at, receive an award or other comparable recognition at, be featured on the program of, and permit the Clerk Magistrate's title to be used in connection with the promotion of a fundraising event only if the event is sponsored by an organization concerned with the law, the legal system, or the administration of justice, and that organization promotes the general interests of the judicial branch of government or the legal profession, including enhancing the diversity and professionalism of the bar.

(C) Financial Activities.

(1)

A Clerk-Magistrate shall not conduct outside business activities in the courthouse at any time nor shall a Clerk-Magistrate conduct any outside business activities anywhere during normal court hours. A Clerk-Magistrate shall refrain from financial and business dealings that tend to reflect adversely on the Clerk-Magistrate's impartiality, interfere with the proper performance of the position of Clerk-Magistrate, or involve the Clerk-Magistrate in transactions with lawyers or other persons likely to come before the court in which the Clerk-Magistrate is serving.

(2)

Subject to the limitations of subsection 5(C)(1) and subsection 4(C) of this Code, a Clerk-Magistrate may hold and manage investments, including real estate, and engage in other remunerative activity.

(D) Fiduciary Activities.

(1)

A Clerk-Magistrate shall not serve as an executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his or her family, and then only if such service will not interfere with the proper performance of the Clerk-Magistrate's duties. "Member of his or her family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the Clerk-Magistrate maintains or maintained a close familial relationship. As a family fiduciary, a Clerk-Magistrate is subject to the following restrictions:

(a) A Clerk-Magistrate shall not serve in any fiduciary capacity if it is likely that as a fiduciary the Clerk-Magistrate will be engaged in proceedings that would ordinarily come before the Clerk-Magistrate in a decision-making capacity and shall resign as a fiduciary if the estate, trust, or ward becomes involved in adversary proceedings in the court in which he or she is serving.

(b) While acting as a fiduciary, a Clerk-Magistrate is subject to the same restrictions on financial activities that apply to the Clerk-Magistrate in his or her personal capacity.

(2)

A Clerk-Magistrate may serve as an executor, administrator, trustee, guardian, or other fiduciary for the estate, trust, or person of one who is not a member of his or her family provided that the Clerk-Magistrate was acting in the fiduciary position prior to April 1, 1990, or that, in the case of a will designating the Clerk-Magistrate as a fiduciary, the testator or testatrix died prior to April 1, 1990. Such fiduciary activity shall not be permitted if it interferes with the proper performance of the Clerk-Magistrate's duties and shall be subject to the provisions of subsections 5(D)(1)(a) and (b) of this Code.

(E) Appointments.

Except for activities to improve the law, the legal system, or the administration of justice, as permitted by Canon 4(D), a Clerk-Magistrate shall not accept appointment within the geographical jurisdiction of the court in which he or she serves to a governmental committee, commission or other governmental position if there is a substantial likelihood that matters involving that committee, commission or other governmental position will come before the Clerk-Magistrate or the court in which the Clerk-Magistrate serves. A Clerk-Magistrate may, however, represent the United States, the Commonwealth of Massachusetts, or a locality on ceremonial occasions or in connection with historical, educational, armed services, and cultural activities.

(F) Free or Discounted Legal Services.

A Clerk Magistrate may accept free or discounted legal services: 1) from a relative or close personal friend whose appearance in a matter would require the Clerk Magistrate's disqualification if the lawyer is a sole practitioner or at a firm where all the lawyers are relatives or close personal friends of the Clerk Magistrate; 2) when a lawyer or law firm has offered special pricing or a discount as part of a commercial opportunity or marketing strategy to a group of similarly situated persons who are not Clerk Magistrates; and 3) when the same discount is extended to non-Clerk Magistrates in

comparable circumstances, and the lawyer, the law firm and their interests are not likely to come before the Clerk Magistrate in the reasonably near future.

Canon 6 Political Activity and Elective Office.

A Clerk-Magistrate, other than an elected Clerk-Magistrate, shall refrain from political activity and, in particular, shall not:

(1) act as a leader or hold any office in a political organization;
(2) make speeches for a political organization or candidate or publicly endorse a candidate for public office;
(3) solicit funds for a political organization or candidate; or
(4) hold or seek an elective public office if there is a substantial likelihood that matters involving that office will come before the Clerk-Magistrate or the court in which the Clerk-Magistrate serves. An appointed Clerk-Magistrate may become a candidate for an elected Clerk-Magistrate position. An appointed Clerk-Magistrate who holds elective office at the time of the adoption of this Code may continue to serve consecutive terms in that office.

Canon 7 Education.

A Clerk-Magistrate should seek to improve his or her own magisterial and administrative capabilities. The Clerk-Magistrate should also seek to maintain and improve the knowledge, abilities, and skills of all personnel in his or her office.

Canon 8 Non-Discrimination.

A Clerk Magistrate shall not discriminate based on sex, race, color, gender identity or expression, religion, nationality, national origin, ethnicity, citizenship or immigration status, ancestry, disease or disability, political affiliation, sexual orientation, age, marital status or socioeconomic status.

Canon 9 Compliance with the Code of Professional Responsibility for Clerks of the Courts.

A Clerk-Magistrate who has retired or resigned from the judicial branch shall not perform court-connected dispute resolution services except on a pro bono publico basis in any court of the Commonwealth for a period of six months following the date of retirement or resignation.

Rule History

Adopted February 9, 1990, effective April 1, 1990; amended May 30, 1990, effective April 1, 1990; amended effective January 1, 1992; amended May 1, 1998, effective June 1, 1998; amended December 17, 2012, effective January 1, 2013; amended effective January 1, 2013; amended January 24, 2018, effective March 1, 2018.

3:13 Committee on Professional Responsibility for Clerks of the Court.

(1)

Complaints against a court Clerk, Clerk Magistrate, Register or Recorder (hereinafter Clerk), and against an Assistant Clerk, Assistant Clerk-Magistrate, Assistant Register, Deputy Recorder, Judicial Case Manager, and Assistant Judicial Case Manager (hereinafter Assistant Clerk), involving the following actions shall be addressed as set forth in this rule:

(a) conviction of a crime,
(b) wilful misconduct in office,
(c) wilful misconduct that, although not related to duties as a Clerk or Assistant Clerk, brings the office of Clerk or Assistant Clerk into disrepute,
(d) conduct prejudicial to the administration of justice or conduct unbecoming a Clerk or Assistant Clerk, whether conduct in office or outside of duties of the office, that brings the office into disrepute, or
(e) any conduct that constitutes a violation of S.J.C. Rule 3:12.

(2)

Complaints involving trial court Clerks shall be referred to their respective Chief Justice who shall investigate and impose discipline as appropriate, except as provided in paragraphs (4)(B) and (C).

(3)

Complaints involving trial court Assistant Clerks shall be governed by the provisions of the Trial Court Personnel Policies and Procedures Manual. Complaints involving appellate court Clerks and Assistant Clerks shall be addressed as directed by the Justices of the appropriate court.

(4)

There shall be a Trial Court Committee on Professional Responsibility for Clerks of the Courts (hereinafter Committee) with the following authority:

(A)

Upon appeal by a Clerk, the Committee shall review discipline of a Clerk imposed by a trial court Chief Justice that includes a suspension without pay of any length or a recommendation for removal of a Clerk. Discipline imposed on a Clerk by a trial court Chief Justice that does not include any suspension without pay or recommendation for removal may not be appealed to the Committee.

(B)

Upon referral from a trial court Chief Justice, the Committee shall address a complaint of misconduct against a Clerk in the first instance. Such referral by the Chief Justice shall be made in

accordance with guidelines established by the Chief Justice of the Trial Court and the Court Administrator in consultation with representatives of the Clerks. Upon such referral, the Committee may receive information, conduct investigations and hearings, dismiss, informally resolve, issue formal charges, impose any form of discipline except for removal, or otherwise dispose of complaints, and make recommendations to the Supreme Judicial Court concerning removal of a Clerk.

(C)

Upon referral from a trial court Chief Justice, the Committee shall investigate information involving allegations that a Clerk is unable adequately to perform as a Clerk because of a mental or physical disability. Upon such referral, the Committee may receive information, investigate, and take appropriate action relative to any mental or physical disability of a Clerk.

(5)

The Committee shall consist of three members. The Chief Justice of the Trial Court and the Court Administrator shall be permanent members of the Committee unless recused or disqualified in a particular matter pursuant to the Committee's rules. The third member of the Committee shall be selected for each proceeding in accordance with the Committee's rules.

(6)

The rules of the Committee shall be as established by the Supreme Judicial Court.

Rule History

Adopted February 9, 1990, effective April 1, 1990; amended February 25, 2015, effective March 23, 2015.

3:14 Advisory Committee on Ethical Opinions for Clerks of the Courts.

The Supreme Judicial Court may establish a committee to render advisory opinions with respect to the interpretation of rules of court relating to the ethical and professional conduct of Clerk-Magistrates, as defined in rule 3:12. The committee shall consist of at least five persons, none of whom shall be a Justice of the Supreme Judicial Court, at least one of whom shall be a currently elected Clerk-Magistrate and at least one of whom shall be an appointed Clerk-Magistrate. Except in emergency situations, a request for an advisory opinion must be in writing and shall be signed by the Clerk-Magistrate requesting the opinion.

The request must set forth fully all facts bearing on the question or questions on which the Clerk-Magistrate requests advice. The committee shall not render opinions on hypothetical questions, on issues pending before or under consideration by a judicial authority, unless that authority so

requests, or by a court, agency, or commission. The committee may decline to render an opinion for any other reason which it deems sufficient.

Each opinion shall be in writing and shall contain a statement of the facts and a discussion of the application of the relevant rules to the facts. The committee shall publish its opinions, but the name of the Clerk-Magistrate requesting the opinion and other identifying information shall not be included in published opinions unless the concerned Clerk-Magistrate consents to such inclusion. If a Clerk-Magistrate did not omit or misstate any material fact in the request for an opinion, the Clerk-Magistrate may rely on the written opinion until and unless revised or revoked by the committee or this court or superseded by law. The Supreme Judicial Court will not impose sanctions in any disciplinary proceeding involving an ethical violation if the Clerk-Magistrate's conduct was undertaken in reasonable reliance on an opinion issued to the Clerk-Magistrate pursuant to this provision.

Rule History

Adopted February 9, 1990, effective April 1, 1990.

3:15 Pro Hac Vice Registration Fee.

1.

Each attorney not admitted to practice in this Commonwealth who seeks to be admitted pro hac vice in the Superior Court, Land Court, or any appellate court (not including the Appellate Division of the District Court or of the Boston Municipal Court) shall pay a non-refundable pro hac vice registration fee of $355 per case to the Board of Bar Overseers (Board), except when the attorney is providing pro bono publico legal assistance to an indigent client. Each attorney not admitted to practice in this Commonwealth who seeks to be admitted pro hac vice in any other court shall pay a non-refundable pro hac vice registration fee of $101 per case to the Board, except when the attorney is providing pro bono publico legal assistance to an indigent client. For purposes of this Rule, a case shall include an appeal. However, where an attorney has paid the appropriate registration fee of $355 or $101 and the case is removed, transferred, appealed or further appellate review is sought, no additional fee need be paid. Only individual attorneys, not law firms, may seek such admission.

A.

Payment may be made by check, money order or online pursuant to policies established by the Board.

B.

Payment will be accompanied by a form prescribed by the Board including at least the following information:

(1) The name, business address, telephone number, email address and attorney license number and states in which the attorney is licensed;
(2) The court in which the motion for pro hac vice admission is to be made, the name of the party to be represented, and the docket number if it is known; and
(3) a statement, made under the penalties of perjury, that the attorney is admitted to practice and in good standing in every jurisdiction where the attorney is admitted, and an acknowledgment that the attorney is subject to discipline by the Supreme Judicial Court and the Board.

C.

Within seven days of receipt of a pro hac vice registration fee the Board will send an acknowledgment to the attorney seeking admission.

D.

An attorney who is exempt from paying a registration fee because the attorney will provide pro bono publico legal assistance to an indigent client must complete and submit to the Board the form required by paragraph B, along with a statement that the attorney will be providing services pro bono publico to an indigent client.

2.

Motions to a court for admission pro hac vice shall be made by a member of the bar of the Commonwealth of Massachusetts and must aver that the registration fee required by Rule 3:15 has been paid or include, as an attachment, a copy of the Board acknowledgment. An attorney who is exempt from paying a registration fee because the attorney will provide pro bono publico legal assistance to an indigent client must aver that the attorney will provide such assistance.

3.

The Board may retain a portion of each pro hac vice registration fee to cover its costs in administering the fee and will pay the balance to the IOLTA Committee on a quarterly basis. The IOLTA Committee shall disburse the fees in the same manner as other IOLTA funds are disbursed in accordance with Rule 1.15(g)(4) and (5) of Rule 3:07, Massachusetts Rules of Professional Conduct.

Rule History

Adopted April 12, 2012, effective September 4, 2012; amended June 27, 2018, effective January 1, 2019.

3:16 Practicing with Professionalism Course for New Lawyers. [Repealed]

Rule History

Adopted November 20, 2012, effective September 1, 2013; amended December 19, 2018, effective January 1, 2019; amended March 29, 2022, effective June 1, 2022; repealed effective August 14, 2024.

Chapter Four: Bar Discipline and Clients' Security Protection

4:01 Bar Discipline.

Section 1. Jurisdiction.

(1)

Any lawyer or foreign legal consultant admitted to, or engaging in, the practice of law in this Commonwealth shall be subject to this court's exclusive disciplinary jurisdiction and the provisions of this rule as amended from time to time.

(2)

Any Information, report, or other pleading filed in the Supreme Judicial Court pursuant to this rule shall be filed with the clerk of this court for Suffolk County. It shall be presented to the chief justice, who shall designate a justice to hear the matter.

Section 2. Venue of Disciplinary Hearings.

Unless the Board Chair or the Chair's designee specifies a different venue, a hearing on a petition for discipline shall take place at the offices of the Board. The Board Chair or the Chair's designee shall consider the convenience of the complainant, witnesses, the respondent and hearing committee in selecting a hearing location.

Section 3. Grounds for Discipline.

(1)

Each act or omission by a lawyer, individually or in concert with any other person or persons, which violates any of the Massachusetts Rules of Professional Conduct (see Rule 3:07), shall constitute

misconduct and shall be grounds for appropriate discipline even if the act or omission did not occur in the course of a lawyer-client relationship or in connection with proceedings in a court. A violation of this Chapter 4 by a lawyer, including without limitation the failure without good cause (a) to comply with a subpoena validly issued under section 22 of this rule; (b) to respond to requests for information by the Bar Counsel or the Board made in the course of the processing of a complaint; (c) to comply with procedures of the Board consistent herewith for the processing of a petition for discipline or for the imposition of public reprimand or admonition (see section 4 of this rule); or (d) to comply with a condition of probation or diversion to an alternative educational, remedial, or rehabilitative program shall constitute misconduct and shall be grounds for appropriate discipline.

(2)

Failure to comply with (a) or (b) of subsection (1) or failure to file an answer as required by section 8(3) of this rule or to appear at a hearing before a hearing committee, special hearing officer, or panel of the Board shall result in the entry of an order of administrative suspension upon the bar counsel's filing with this court of a petition for administrative suspension which sets forth the violation of this section and an affidavit of the bar counsel affirming that the lawyer was served with the request for information, the subpoena, the petition for discipline, or the notice of hearing in accordance with the provisions of section 21 of this rule; that the lawyer was afforded a reasonable period of time for compliance with the request for information or the subpoena, or to answer the petition, or with reasonable notice of the hearing and had failed to comply, to answer, or to appear; and that the request for information, subpoena, petition, or notice of hearing was accompanied by a statement advising the respondent-lawyer that failure to comply with the request for information or subpoena, or to answer timely the petition, or to appear at the hearing would result in administrative suspension without further hearing.

(3)

Any suspension under the provisions of subsection (2) above shall be effective fourteen days after entry, unless otherwise ordered by the court, and the suspended lawyer shall be subject to the provisions of sections 17(3) and 17(4) of this rule. If not reinstated within fourteen days after entry, the lawyer shall become subject to the other provisions of section 17 of this rule. The time periods for complying with sections 17(1), 17(5), and 17(6) shall begin upon the effective date of the order. As a condition precedent to reinstatement, such lawyer shall file with the court with a copy to the Board and to the Bar Counsel an affidavit stating the extent to which he or she has complied with subsection (1) of this section and with the applicable provisions of section 17 of this rule. The lawyer shall also as a condition of reinstatement pay all expenses incurred by the Office of Bar Counsel and the Board in obtaining compliance with this section and in seeking suspension, including an administrative fee of one hundred dollars.

Section 4. Types of Discipline.

Discipline of lawyers may be (a) by disbarment, resignation pursuant to section 15 of this rule, or suspension by this court; (b) by public reprimand by the Board; or (c) by admonition by the bar counsel.

Section 5. The Board of Bar Overseers.

(1)

This court shall appoint a Board of Bar Overseers (Board) to act, as provided in this Chapter Four, with respect to the conduct and discipline of lawyers and in such matters as may be referred to the Board by any court or by any judge or justice. The Board shall consist of such number of members as the court may determine from time to time. The court, by order, shall request the submission of nominations to fill vacancies in such manner as it may determine. The Massachusetts Bar Association and each county bar association (including, for the purposes of this section, the Boston Bar Association as the bar association for Suffolk County) may submit to this court in writing the names of two nominees for each vacancy in the Board. Any lawyer may submit in writing the names of nominees. The court may, but need not, make appointments to the Board from the nominees so submitted and, in making appointments, shall give appropriate consideration to a reasonable geographical distribution of appointees among disciplinary districts. The court shall from time to time designate one member of the Board as Chair and another as Vice Chair. The Vice Chair shall perform the duties of the Chair in the Chair's absence or incapacity to act.

(2)

Appointments to the Board shall be for a term of four years. No member shall be appointed to more than two consecutive full terms but (a) a member appointed for less than a full term (originally or to fill a vacancy) may serve two full terms in addition to such part of a full term, and (b) a former member shall again be eligible for appointment after a lapse of one or more years. A member whose term has expired shall continue in office until a successor is appointed and, in any event, shall continue to serve on any hearing or appeal panel to which he or she has been appointed until the panel completes its duties and may be recalled to serve on the panel in the event of a remand by the Board or the court.

(3)

The Board of Bar Overseers

(a) may consider and investigate the conduct of any lawyer within this court's jurisdiction either on its own motion or upon complaint by any person;
(b) shall appoint a chief Bar Counsel (the Bar Counsel) who shall, with the concurrence of the Board, hire such assistants to the Bar Counsel as may be required, all to serve at the pleasure of the court, the appointment of the Bar Counsel to be with the approval of the court; and may employ and compensate such other persons as may be required or appropriate in the performance of the Board's duties;
(c) shall appoint one or more hearing committees, each committee to consist of three or more individuals, to perform such functions as may be assigned by the Board with reference to charges of misconduct; provided, however, that each hearing committee shall be chaired by a lawyer and no hearing committee shall consist of more than one nonlawyer;
(d) may appoint a special hearing officer, who shall be a lawyer, to hear charges of misconduct when, in view of the anticipated length of the hearing or for other reasons, the Board

determines that a speedy and just disposition would be better accomplished by such appointment than by referring the matter to a hearing committee or panel of the Board;

(e) may, through its Chair, refer charges to an appropriate hearing committee, to a special hearing officer, or to a hearing panel of the Board;

(f) shall review, and may revise, the findings of fact, conclusions of law, and recommendations of hearing committees, special hearing officers, or hearing panels. The Board in its discretion may refer an appeal taken pursuant to section 8(5) of this rule to a panel of its own members for its recommendation;

(g) may issue a public reprimand to lawyers for misconduct, and in any case where disbarment or suspension of a lawyer is to be sought or recommended, or where the Bar Counsel or the Respondent-lawyer appeals pursuant to section 8(6) of this rule, shall file an Information with this court;

(h) with the approval of this court, may adopt and publish rules of procedure and other regulations not inconsistent with this rule;

(i) may lease office space and make contracts and arrangements for the performance of administrative and similar services required or appropriate in the performance of the Board's duties;

(j) may, but need not, consult with local bar associations in the several counties and their officers concerning any appointments which it is herein authorized to make;

(k) may invest or direct the investment of the fees or any portion thereof, paid pursuant to Rule 4:03, section (1), and may cause funds to be deposited in any bank, banking institution, savings bank, or federally insured savings and loan association in this Commonwealth provided, however, that the Board shall have no obligation to cause these fees or any portion thereof to be invested; and

(l) may perform other acts necessary or proper in the performance of the Board's duties.

(4)

For any action requiring a vote of the Board, the Board shall act only with the concurrence of a majority of the Board who are present and voting, provided, however, that a quorum shall be present. A quorum shall consist of a majority of the Board, including members who are recused or abstain.

Section 6. Hearing Committees.

(1)

Hearing committee members shall be appointed for a term of three years, and no member shall serve for more than two successive three-year terms. A member whose term has expired shall continue in office until a successor is appointed, and, in any event, shall continue to serve on any committee to which he or she has been appointed until the committee completes its duties and may be recalled to serve on the committee in the event of a remand by the Board or the court. A former member may be again appointed after the expiration of one year from his or her last service.

(2)

The Board shall designate one member of each committee, who shall be a lawyer, to serve as chair. The committee shall act only with a concurrence of a majority of its members who are present, provided, however, that two members shall constitute a quorum.

(3)

Hearing committees

(a) shall conduct hearings on formal charges of misconduct upon reference by the Board or its chair, and
(b) may recommend that the matter be concluded by dismissal, admonition, public reprimand, suspension, or disbarment.

(4)

If a special hearing officer is appointed to hear disciplinary charges, that officer shall perform all the duties imposed upon a hearing committee by this rule or by the rules of the Board. Unless otherwise provided herein, the words "hearing committee" used throughout this rule shall also mean a special hearing officer or hearing panel.

Section 7. The Bar Counsel.

The Bar Counsel

(1) shall investigate all matters involving alleged misconduct by a lawyer coming to his or her attention from any source, except matters involving alleged misconduct by the Bar Counsel, assistant Bar Counsel, or any member of the Board, which shall be forwarded to the Board for investigation and disposition, provided that Bar Counsel need not entertain any allegation that Bar Counsel in his or her discretion determines to be frivolous, to fall outside the Board's jurisdiction, or to involve conduct that does not warrant further action;
(2) shall dispose of all matters involving alleged misconduct by a lawyer in accordance with this rule and any rules and regulations issued by the Board for his or her guidance which may provide
    (a) that Bar Counsel need not pursue or may close a complaint whenever the matter complained of is frivolous, falls outside the jurisdiction of the Board, or involves allegations of misconduct that do not warrant further action,
    (b) for adjustment of complaints found by the Bar Counsel to be of a minor character by informal conference, admonition, or by diversion to an alternative educational, remedial, or rehabilitative program, and
    (c) for disposition by recommending to the Board the institution of formal proceedings in which the Bar Counsel seeks public discipline, but, except as to a complaint that is closed by Bar Counsel or that Bar Counsel determines need not be pursued, no disposition shall be recommended or undertaken by the Bar Counsel until the accused lawyer shall have been afforded opportunity to state his or her position with respect to the allegations against him or her;

(3) shall prosecute all disciplinary proceedings before hearing committees, special hearing officers, the Board, and this court;

(4) shall appear, with full rights to participate as a party, at hearings conducted with respect to petitions for reinstatement by suspended or disbarred lawyers, lawyers who have resigned, or lawyers on disability inactive status;

(5) shall maintain permanent records of all matters presented to him or her and the disposition thereof, except that

  (a) the Bar Counsel may maintain records in electronic form, unless another rule or applicable law requires that a particular document be preserved in paper form for legal effectiveness;

  (b) the Bar Counsel may destroy the paper records of a complaint against a lawyer six years after the date of the lawyer's death;

  (c) the Bar Counsel may destroy the paper records of a complaint against a lawyer six years after an admonition has been vacated, and the complaint which gave rise to it is dismissed, pursuant to SJC Rule 4.01, section 8(2)(d);

  (d) the Bar Counsel may destroy the paper records of a complaint against a lawyer fifteen years after the final disposition of a matter that has resulted in public discipline (specifically, the lawyer's suspension or disbarment, the lawyer's resignation pursuant to section 15 of this rule, or the imposition of a public reprimand against the lawyer);

  (e) the Board may provide by rule for the expunction of the paper and electronic records of a complaint against a lawyer which has been docketed solely on account of a report made by a financial institution that has dishonored an instrument presented against a lawyer's trust account when the instrument was dishonored solely due to the error of the financial institution; and

  (f) the Bar Counsel shall destroy and expunge the paper and electronic records of a complaint against a lawyer which has been closed and not subsequently reopened within six-years of the date of closing unless a complaint has been filed in the intervening six-year period. In the event a complaint is so filed or reopened, the records shall not be destroyed and expunged until the expiration of six years from the date on which all complaints have been closed and not reopened and all complaints have been dismissed and not reopened;

(6) shall, with the concurrence of the Board, hire such assistants to the Bar Counsel as may be required; and

(7) may delegate any duties or functions to a duly appointed assistant acting under his or her general supervision.

Section 8. Procedure.

(1) Investigation.

In accordance with any rules and regulations of the Board, investigations (whether upon complaint or otherwise) shall be conducted by the Bar Counsel, except as otherwise provided by section 7(1) of this rule. Following completion of any investigation, or of a determination pursuant to section

7(1) that an investigation is not warranted, the Bar Counsel shall take further action, which may include, among others,

(a) closing or declining to pursue a complaint and informing the complainant in writing of the reasons for not investigating a complaint or for closing the file and of the complainant's right to request review by a member of the Board;
(b) closing a matter after adjustment, informal conference, or diversion to an alternative educational, remedial, or rehabilitative program;
(c) recommending to the Board that
    (i) an admonition of the lawyer be administered;
    (ii) formal proceedings be instituted; or
    (iii) public discipline be imposed by agreement.

Except in the case of a recommendation that public discipline be imposed by agreement, a designated Board member may approve, reject, or modify the recommended action, but the Bar Counsel may appeal to the Board Chair from any modification or rejection of a recommendation that an admonition be administered, or that formal proceedings be instituted. The Board Chair may approve or modify the recommended action. A recommendation that formal discipline be imposed by agreement shall be submitted directly to the full Board.

(2) Admonition.

(a)

On appeal by Bar Counsel pursuant to subsection (1), the decision of the Board Chair to approve, modify, or reject the recommendation of an admonition shall be final.

(b)

If an admonition is approved by either the designated Board member or the Board Chair on appeal, the Bar Counsel shall make service of the admonition on the Respondent-lawyer together with a summary of the basis for the admonition. Bar Counsel shall also provide written notice to the Respondent-lawyer of the right to demand in writing within fourteen days of the date of service that the admonition be vacated and a hearing provided; the requirement that the Respondent-lawyer submit with the demand a written statement of objections to the factual allegations and disciplinary violations set forth in the summary and all matters in mitigation; that failure of the Respondent-lawyer to demand within fourteen days after service that the admonition be vacated and to submit a statement of objections constitutes consent to the admonition; and that failure to set forth matters in mitigation constitutes a waiver of the right to present evidence in mitigation at the hearing.

(c)

In the event of a demand that the admonition be vacated, the matter shall be disposed of in accordance with the procedure set forth in section 8(4) and Section 2.12 of the Rules of the Board of Bar Overseers for expedited hearings.

(d)

Eight years after the administration of an admonition, it shall be vacated, and the complaint which gave rise to it dismissed, unless during such period another complaint has resulted in the imposition of discipline or is then pending.

(3) Formal Proceedings.

(a)

As to matters for which formal proceedings have been approved pursuant to section 8(1) of this rule, disciplinary proceedings shall be instituted by the Bar Counsel's filing a petition for discipline with the Board setting forth specific charges of alleged misconduct. A copy of the petition shall be served, together with a notice from the Board, setting a time for answer which shall not be less than twenty days after such service upon the Respondent-lawyer and advising the Respondent-lawyer that the failure to file an answer shall be grounds for administrative suspension pursuant to section 3(2) of this rule. The Respondent-lawyer shall file his or her answer with the Board and serve a copy thereof on the Bar Counsel. In the event the Respondent-lawyer fails to file a timely answer to the petition, the charges shall be deemed admitted. Averments in the petition are admitted when not denied in the answer.

(b)

The matter shall be assigned to a hearing committee, to a special hearing officer, or to the Board or a panel of the Board, and the Board shall give notice to the Bar Counsel, and to the Respondent-lawyer's counsel, if any, and, if not, to the Respondent-lawyer of the date and place set for hearing. The notice of hearing shall be served at least fifteen days in advance thereof. The notice shall advise the Respondent-lawyer that the failure to appear for hearing will be grounds for administrative suspension pursuant to section 3(2) of this rule.

(c)

In the event the Respondent-lawyer files an answer admitting the charges and does not request the opportunity to be heard in mitigation, the Bar Counsel and the Respondent-lawyer may jointly recommend to the Board that the Respondent-lawyer receive a public reprimand or a suspension. If the Board accepts a joint recommendation for a public reprimand, it shall issue such reprimand. If the Board accepts a joint recommendation for suspension, the Board shall file with the clerk of this court for Suffolk County an Information, together with the record of its proceedings. If the parties do not make such a joint recommendation, or if the Board rejects such recommendation, the matter shall be assigned to an appropriate hearing committee, to a special hearing officer, or to the Board or a panel of the Board, for hearing. A tie vote of the Board on such a recommendation shall constitute a rejection of the recommendation.

(d)

The hearing committee, special hearing officer, or panel of the Board shall file promptly with the Board a written report containing its findings of fact, conclusions of law, and recommendations, together with a record of the proceedings before it.

(4) Expedited Hearing.

(a)

When the Respondent-lawyer has requested a hearing within fourteen days of service of an admonition in accordance with the requirements of section 8(2) of this rule and Section 2.12 of the Rules of the Board of Bar Overseers, Bar Counsel shall file the admonition summary with the Board, along with the Respondent-lawyer's demand for hearing and statement of objections and matters in mitigation, if any, and the matter shall be assigned to a special hearing officer. After hearing, the special hearing officer shall file with the Board a report containing his or her written findings of fact and conclusions of law, and shall recommend that: (1) the Respondent-lawyer receive an admonition, (2) the charges be dismissed, or (3) the matter warrants a more substantial sanction than admonition and should be remanded for formal proceedings in accordance with section 8(3) of this rule.

(b)

Respondent-lawyer and Bar Counsel shall have the right to seek review by the Board of the decision by the special hearing officer in accordance with the procedure set forth in subsection (5)(a) of this rule, but any such review shall be on the briefs only and there shall be no oral argument. In the event the Board determines that the matter shall be remanded for formal proceedings, it shall assign the matter to a hearing committee or special hearing officer other than the one who heard the case initially. The Board's decision shall otherwise be final and there shall be no right by either Bar Counsel or the Respondent-lawyer to demand after conclusion of an expedited hearing that an Information be filed.

(5) Review by the Board.

(a)

Upon receipt of a hearing committee's, special hearing officer's, or hearing panel's report after formal proceedings, if there is objection by the Respondent-lawyer or by the Bar Counsel to the findings and recommendations, the Board shall set dates for submission of briefs and for any further hearing which the Board in its discretion deems necessary. The Board shall review, and may revise, the findings of fact, conclusions of law and recommendation of the hearing committee, special hearing officer, or hearing panel, paying due respect to the role of the hearing committee, the special hearing officer, or the panel as the sole judge of the credibility of the testimony presented at the hearing.

(b)

In the event that the Board determines that the proceedings should be dismissed, it shall so notify the Respondent-lawyer.

(c)

In the event that the Board determines that the proceedings should be concluded by admonition or public reprimand, it shall so notify the Respondent-lawyer.

(6) Review by the Supreme Judicial Court.

The Board shall file an Information whenever it shall determine that formal proceedings should be concluded by suspension or disbarment; or whenever either the Bar Counsel or the Respondent-lawyer objects to having formal proceedings concluded by dismissal, admonition or by public reprimand, by filing a written demand with the Board for the filing of an Information within twenty days after the date of the notice of the Board's action, which time limit shall be jurisdictional. The subsidiary facts found by the Board and contained in its report filed with the Information shall be upheld if supported by substantial evidence, upon consideration of the record, or such portions as may be cited by the parties.

(7) Disbarment by Consent.

A lawyer accused of professional misconduct who does not wish to contest the charges may waive the foregoing provisions of this section and consent to the entry of a judgment of disbarment. Upon satisfying itself that the lawyer has given such consent freely and voluntarily, with full awareness of the implications of consenting to disbarment, and has acknowledged under oath that the material facts upon which the charges are based are true or can be proved by a preponderance of the evidence, the court may enter a judgment disbarring the lawyer from the practice of law.

Section 9. Immunity.

(1)

Complaints submitted to the Board or to the bar counsel shall be confidential and absolutely privileged. The complainant shall be immune from civil liability based upon his or her complaint; provided, however, that such immunity from suit shall apply only to communications to the Board or the bar counsel and shall not apply to public disclosure of information contained in or relating to the complaint.

(2)

The complainant and each witness giving sworn testimony or otherwise communicating with the Board or the bar counsel during the course of any investigation or proceedings under this rule shall be immune from civil liability based on any such testimony or communications; provided, however, that such immunity from suit shall apply only to testimony given or communications made to the Board or the bar counsel and shall not apply to public disclosure of information attested to or communicated during the course of the investigation or proceedings.

(3)

The Board, members of the Board and its staff, members of hearing committees, special hearing officers, and the bar counsel and members of his or her staff shall be immune from liability for any conduct in the course of their official duties.

Section 10. Refusal of Complainant to Proceed; Compromise; or Restitution.

Abatement of an investigation into the conduct of a lawyer or other related proceedings shall not be required by the unwillingness or neglect of the complainant to cooperate in the investigation, or by any settlement, compromise or restitution. A lawyer shall not, as a condition of settlement, compromise or restitution, require the complainant to refrain from filing a complaint, to withdraw the complaint, or to fail to cooperate with the bar counsel.

Section 11. Matters Involving Related Pending Civil, Criminal, or Administrative Proceedings.

The investigation or prosecution of complaints involving material allegations which are substantially similar to the material allegations of pending criminal, civil, administrative, or bar disciplinary proceedings in this or another jurisdiction shall not be deferred unless the Board or a single member designated by the Chair, in its discretion, or the court, for good cause shown, shall authorize such deferment, as to which either the court or the Board may impose conditions. The acquittal of the Respondent-lawyer on criminal charges, or a verdict, judgment, or ruling in the lawyer's favor in civil, administrative, or bar disciplinary proceedings shall not require abatement of a disciplinary investigation predicated upon the same or substantially similar material allegations.

Section 12. Lawyers Convicted of Crimes.

(1)

The term "conviction" shall include any guilty verdict or finding of guilt and any admission to or finding of sufficient facts and any plea of guilty or nolo contendere which has been accepted by the court, whether or not sentence has been imposed.

(2)

A conviction of a lawyer for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that lawyer based upon the conviction.

(3)

The term "serious crime" shall include (a) any felony, and (b) any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy, or solicitation of another, to commit a "serious crime."

(4)

Upon the filing with this court of a certificate establishing a lawyer's conviction of a serious crime, this court shall enter an order to show cause why the lawyer should not be immediately suspended from the practice of law, regardless of the pendency of an appeal, pending final disposition of any

disciplinary proceeding commenced upon such conviction. The court or a justice, after affording the lawyer opportunity to be heard, may make such order of suspension or restriction as protection of the public may make appropriate. The court shall also refer the matter to the Board to take appropriate action, which may include investigation by the bar counsel or the institution of a formal proceeding. A disciplinary proceeding so instituted need not be brought to hearing until all appeals from the conviction are concluded.

(5)

Upon receipt of a notice of a conviction of a lawyer for a crime not constituting a serious crime, this court may refer the matter to the Board to take appropriate action, which may include investigation by the bar counsel or the institution of a formal proceeding. This court need make no reference with respect to convictions for minor offenses.

(6)

A lawyer suspended under the provisions of subsection (4) above will be reinstated immediately upon the filing of a certificate that the underlying conviction for a serious crime has been reversed or set aside, but the reinstatement need not terminate any formal proceedings then pending against the lawyer.

(7)

The clerk of any court within the Commonwealth in which a lawyer is convicted shall transmit a certificate thereof to this court and to the Board within ten days of said conviction.

(8)

Within ten days of a lawyer's conviction of a crime, as defined in subsection 12(1) of this rule, the lawyer shall notify the bar counsel of the conviction.

(9)

Upon being advised that a lawyer has been convicted of (a) a crime within this Commonwealth and that no certificate has been filed under subsection (7) above, or (b) a crime in another jurisdiction, the bar counsel shall obtain a certificate of the conviction and transmit it or a copy to the court and to the Board.

Section 12A. Lawyer Constituting Threat of Harm to Clients.

Upon the filing with this court of a petition by the bar counsel alleging facts showing that a lawyer poses a threat of substantial harm to clients or prospective clients, or that the lawyer's whereabouts are unknown, this court shall enter an order to show cause why the lawyer should not be immediately suspended from the practice of law pending final disposition of any disciplinary proceeding commenced by the bar counsel. The court or a justice, after affording the lawyer opportunity to be heard, may make such order of suspension or restriction as protection of the public may make appropriate. In the interest of justice, the court, upon application of the lawyer, may terminate such suspension at any time after affording the bar counsel an opportunity to be heard.

Section 13. Disability Inactive Status.

(1) Involuntary Commitment, Adjudication of Incompetence, or Transfer to Disability Inactive Status.

Where a lawyer has been judicially declared incompetent or committed to a mental hospital after a judicial hearing, or where a lawyer has been placed by court order under guardianship or conservatorship, or where a lawyer has been transferred to disability inactive status in another jurisdiction, the court, upon proper proof of the fact, shall enter an order transferring the lawyer to disability inactive status. A copy of such order shall be served, in the manner the court may direct, upon the lawyer, his or her guardian or conservator, and the director of the institution to which the lawyer is committed.

(2) Investigation of Incapacity.

The bar counsel shall investigate information that a lawyer's physical or mental condition may adversely affect his or her ability to practice law, except information involving the physical or mental condition of the bar counsel, assistant bar counsel, or any member of the Board, which shall be forwarded to the Board for investigation and disposition. In the event that the lawyer admits that he or she is incapacitated, the court may, upon petition of the bar counsel, enter an order placing the lawyer on disability inactive status, accepting the lawyer's resignation, or temporarily suspending the lawyer from the practice of law. With the approval of the Board chair or a member of the Board designated by the chair, the bar counsel may initiate formal proceedings pursuant to subsection (4) of this section to determine whether the lawyer shall be transferred to disability inactive status.

(3) Inability to Assist in Defense.

If during the course of a disciplinary investigation or proceeding under this rule the respondent-lawyer alleges an inability to assist in the defense due to mental or physical incapacity, the court, upon petition by the bar counsel or the respondent-lawyer, shall immediately transfer the respondent-lawyer to disability inactive status until further order of the court. If the bar counsel contests the respondent-lawyer's allegation, then a determination shall be made concerning the incapacity pursuant to subsection (4) of this section.

(4) Proceedings to Determine Incapacity.

(a)

Proceedings to adjudicate contested allegations of disability or incapacity shall be held before a hearing committee, special hearing officer, or a panel of the Board and shall be commenced upon petition by the bar counsel. The proceedings shall be conducted in the same manner as disciplinary hearings and shall be open to the public as provided in section 20.

(b)

The court, Board, hearing committee, special hearing officer, or hearing panel may require the examination of the respondent-lawyer by qualified medical experts designated by them.

(c)
The court or the Board may appoint a lawyer to represent the respondent-lawyer if the lawyer is without adequate representation.

(d)
The hearing committee, special hearing officer, or panel of the Board shall report promptly to the Board its findings and recommendations, together with a record of the proceedings before it. The lawyer and the bar counsel shall have the rights of appeal provided for in section 8 of this rule. The Board shall file an Information with the clerk of this court for Suffolk County together with its recommendation and the record of the proceedings before it.

(e)
If, after hearing and upon due consideration of the record including the recommendation of the Board as provided in subsection (6) of section 8 of this rule, the court concludes that the respondent is incapacitated from continuing to practice law, it shall enter an order transferring the respondent to disability inactive status until further order of the court.

(f)
Disciplinary proceedings shall not be stayed unless the court finds that the respondent-lawyer is so incapacitated by reason of mental or physical infirmity that he or she is incapable of assisting in his or her defense as provided in subsection (3) of this section. If the court determines the respondent-lawyer's claim of incapacity to defend to be invalid, the disciplinary investigation or proceedings shall resume, and the court shall immediately temporarily suspend the respondent-lawyer from the practice of law pending final disposition of the matter. The court may direct that the expense of the independent examinations be paid by the lawyer.

(5) Public Notice of Transfer to Disability Inactive Status.
The Board shall cause a notice of transfer to disability inactive status to be published in the same manner as a disciplinary sanction imposed under section 8 of this rule is published.

(6) Reinstatement from Disability Inactive Status.
(a)
Reinstatements from disability inactive status shall be subject to the provisions of section 18 of this rule except as herein provided.

(b)
A lawyer shall be entitled to petition for transfer to active status from disability inactive status once a year or at such intervals as this court may direct in the order transferring the respondent to disability inactive status or any modifications thereof.

(c)
The Board, upon referral from the court, may direct an examination of the lawyer by qualified medical experts designated by the Board.

(d)

Where a lawyer placed on disability inactive status under subsection (1) of this section has been judicially declared to be competent or returned to active status by the other jurisdiction, this court, after hearing, may dispense with referring the matter to the Board pursuant to subsection (5) of section 18 for the taking of further evidence that his or her disability has been removed and may immediately direct the lawyer's reinstatement to active status upon such terms as are deemed proper and advisable.

(e)

A lawyer seeking reinstatement under this section shall have the burden of demonstrating that his or her physical or mental condition does not adversely affect the lawyer's ability to practice law and that he or she has the competency and learning in law required for admission to practice.

(7) Waiver of Privilege.

A lawyer who files for reinstatement pursuant to the provisions of subsection (6) of this section or who alleges incapacity to defend himself or herself in a disciplinary investigation or proceedings pursuant to the provisions of subsection (3) shall be required to disclose the name of each medical provider, hospital, or other institution by whom or in which the lawyer has been examined or treated since the time of transfer to disability inactive status or during the period of the alleged incapacity. The lawyer shall furnish to this court and to the bar counsel written consent to the release of information and records relating to the disability upon request by the court or Board, court- or Board-appointed medical experts, or the bar counsel.

Section 14. Appointment of Commissioner to Protect Clients' Interests When Lawyer Disappears or Dies, or Is Placed on Disability Inactive Status.

(1)

Whenever a lawyer is placed on disability inactive status, or disappears or dies, and no partner, executor, or other responsible party capable of conducting the lawyer's affairs is known to exist, this court, after giving the bar counsel an opportunity to be heard and upon proper proof of the fact, may appoint a lawyer or lawyers as commissioner to make an inventory of the files of the inactive, disappearing, or deceased lawyer and to take appropriate action to protect the interests of clients of the inactive, disappearing, or deceased lawyer, as well as such lawyer's interest.

(2)

The commissioner so appointed shall not disclose any information contained in any files listed in such inventory without the consent of the client to whom such file relates except as necessary to carry out the order of this court to make such inventory. The commissioner shall be reimbursed for reasonable expenses and may be awarded fair compensation. The commissioner's expenses and fees shall be paid by the lawyer unless otherwise ordered by the court.

Section 15. Resignations by Lawyers under Disciplinary Investigation.

(1)

A lawyer who is the subject of an investigation under this Chapter Four may reach an agreement with Bar Counsel on the language of an affidavit of resignation, which shall be filed with the Board along with a recommendation from Bar Counsel (including information sufficient to explain the recommendation) as to whether the facts admitted would typically result in disbarment or if they would typically result in a lesser public sanction. In the alternative, a lawyer may submit a resignation by delivering to the Board an affidavit stating that the lawyer desires to resign and serve it on Bar Counsel, who shall within fourteen (14) days, or such further time as may be allowed by a Board member, file a response. In either event, the affidavit shall state that:

(a) the resignation is freely and voluntarily rendered; the lawyer is not being subjected to coercion or duress and is fully aware of the implications of submitting the resignation;
(b) the lawyer is aware that there is currently pending an investigation into allegations that the lawyer has been guilty of misconduct, the nature of which shall be specifically set forth;
(c) the lawyer acknowledges that the material facts, or specified material portions of them, upon which the complaint is predicated are true or can be proved by a preponderance of the evidence; and
(d) the lawyer waives the right to hearing as provided by this rule.

(2)

Upon receipt of the required affidavit, the Board shall file it, together with its recommendation thereon, with this court which may enter an order.

(3)

All proceedings under this section shall be public as provided in section 20 of this rule.

(4)

Any lawyer whose resignation under this section has been accepted must comply with the provisions of section 17 of this rule regarding notice.

Section 16. Reciprocal Discipline.

(1)

Upon receipt of a certified copy of an order that a lawyer admitted to practice in this Commonwealth has been suspended or disbarred from the practice of law in another jurisdiction (including any federal court and any state or federal administrative body or tribunal) or has resigned during the pendency of a disciplinary investigation or proceeding, this court shall issue a notice directed to the respondent-lawyer containing: (a) a copy of the order from the other jurisdiction; and (b) an order directing that the respondent-lawyer inform the court within thirty days from service of the notice of any claim that the imposition of the identical or other discipline in this

Commonwealth would be unwarranted and the reasons therefor. The bar counsel shall cause this notice to be served on the respondent-lawyer in accordance with this rule.

(2)

In the event that the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in the Commonwealth may (but need not) be deferred.

(3)

Upon the expiration of thirty days from service of the notice under subsection (1) above, the court, after hearing, may enter such order as the facts brought to its attention may justify. The judgment of suspension or disbarment shall be conclusive evidence of the misconduct unless the bar counsel or the respondent-lawyer establishes, or the court concludes, that the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard or there was significant infirmity of proof establishing the misconduct. The court may impose the identical discipline unless (a) imposition of the same discipline would result in grave injustice; (b) the misconduct established does not justify the same discipline in this Commonwealth; or (c) the misconduct established is not adequately sanctioned by the same discipline in this Commonwealth.

(4)

Upon receipt of a certified copy of an order that a lawyer admitted to practice in this Commonwealth has been subjected to public discipline other than suspension or disbarment in another jurisdiction (including any federal court and any state or federal administrative body or tribunal), the Board and the clerk of this court for Suffolk County shall file it and make it available to the public to the extent that the record of any other public disciplinary proceeding would be made available.

(5)

A final adjudication in another jurisdiction that a lawyer has been guilty of misconduct or an admission in connection with a resignation in another jurisdiction may be treated as establishing the misconduct for purposes of a disciplinary proceeding in the Commonwealth.

(6)

A lawyer subject to public or private discipline in another jurisdiction (including any federal court and any state or federal administrative body or tribunal), or whose right to practice law has otherwise been curtailed or limited in such other jurisdiction, shall provide certified copies of the order imposing such discipline or other disposition to the Board and to the bar counsel within ten days of the issuance of such order.

(7)

A lawyer admitted to practice in this Commonwealth who is denied admission to the bar of another jurisdiction (including any federal court and any state or federal administrative body or tribunal), for reasons other than failure to pass the bar examination, shall provide certified copies of any such decision, notice or order to the Board and the bar counsel within ten days of its issuance.

Section 17. Action by Attorneys after Disbarment, Suspension, Resignation or Transfer to Disability Inactive Status.

(1)

In every case where a lawyer has been disbarred, suspended, temporarily suspended, or placed on disability inactive status, or where a lawyer has resigned pursuant to the provisions of section 15 of this rule, the lawyer shall, within fourteen days of the date of entry of the disbarment, suspension, temporary suspension, transfer to disability inactive status, or resignation, take the following actions:

(a) file a notice of withdrawal as of the effective date thereof with every court, agency, or tribunal before which a matter is pending, together with a copy of the notices sent pursuant to paragraphs (c) and (d) of this subsection, the client's or clients' place of residence, and the case caption and docket number of the client's or clients' proceedings;
(b) resign as of the effective date thereof all appointments as guardian, executor, administrator, trustee, attorney-in-fact, or other fiduciary, attaching to the resignation a copy of the notices sent to the wards, heirs, or beneficiaries pursuant to paragraphs (c) and (d) of this subsection, the place of residence of the wards, heirs, or beneficiaries, and the case caption and docket number of the proceedings, if any;
(c) provide notice to all clients and to all wards, heirs, and beneficiaries that the lawyer has resigned or that the lawyer has been disbarred, suspended, temporarily suspended, or transferred to disability inactive status; that he or she is disqualified from acting as a lawyer after the effective date thereof; and that, if not represented by co-counsel, the client, ward, heir, or beneficiary should act promptly to substitute another lawyer or fiduciary or to seek legal advice elsewhere, calling attention to any urgency arising from the circumstances of the case;
(d) provide notice to counsel for all parties (or, in the absence of counsel, the parties) in pending matters that the lawyer has resigned, been disbarred, suspended, or transferred to disability inactive status and, as a consequence, is disqualified from acting as a lawyer after the effective date thereof;
(e) make available to all clients being represented in pending matters any papers or other property to which they are entitled, calling attention to any urgency for obtaining the papers or other property;
(f) refund any part of any fees paid in advance that have not been earned;
(g) close every IOLTA, client, trust or other fiduciary account and properly disburse or otherwise transfer all client and fiduciary funds in his or her possession, custody or control.
(h) give such other notice of the court's action as the court may direct in the public interest.

Unless otherwise ordered by the court, all notices required by this section shall be served by certified mail, return receipt requested, in a form approved by the Board.

(2)

Whenever the court deems it necessary, it may appoint a commissioner to take appropriate action in lieu of, or in addition to, the action directed in subsection (1) of this section. The appointment of the commissioner shall be at the expense of the lawyer unless otherwise ordered by the court.

(3)

Orders imposing temporary suspension shall be immediate and forthwith; orders imposing administrative suspension shall be effective as set forth in section 3(3); and orders imposing disbarment or term or indefinite suspension or accepting the resignation of the lawyer or placing a lawyer on disability inactive status shall be effective thirty days after entry, unless otherwise ordered by the court. After entry of such order, the lawyer shall not accept any new retainer or engage as lawyer for another in any new case or matter of any nature. During the period between the entry date of the order and its effective date, however, the lawyer may wind up and complete, on behalf of any client, all matters which were pending on the entry date.

(4)

The Board shall promptly transmit a copy of the order of temporary suspension, administrative suspension, term or indefinite suspension, disbarment, resignation or transfer to disability inactive status to the clerk of each court in the Commonwealth, state or federal, in which it has reason to believe the disciplined lawyer has been engaged in practice.

(5)

Within twenty-one days after the entry date of the disbarment, suspension, temporary suspension, resignation, or disability inactive status order, the lawyer shall file with the Office of the Bar Counsel an affidavit certifying that the lawyer has fully complied with the provisions of the order and with bar disciplinary rules. Appended to the affidavit of compliance shall be

(a) a copy of each form of notice, the names and addresses of the clients, wards, heirs, beneficiaries, attorneys, courts and agencies to which notices were sent, and all return receipts or returned mail received up to the date of the affidavit. Supplemental affidavits shall be filed covering subsequent return receipts and returned mail. Such names and addresses of clients shall remain confidential unless otherwise requested in writing by the lawyer or ordered by the court.
(b) a schedule showing the location, title and account number of every bank account designated as an IOLTA, client, trust or other fiduciary account and of every account in which the lawyer holds or held as of the entry date of the order any client, trust or fiduciary funds;
(c) a schedule describing the lawyer's disposition of all client and fiduciary funds in the lawyer's possession, custody or control as of the entry date of the order or thereafter;
(d) such proof of the proper distribution of such funds and the closing of such accounts as has been requested by the bar counsel, including copies of checks and other instruments;
(e) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice;

(f) the residence or other street address where communications to the lawyer may thereafter be directed.

The lawyer shall retain copies of all notices sent and shall maintain complete records of the steps taken to comply with the notice provisions of this rule.

(6)

Within twenty-one days after the entry date of the disbarment, suspension, temporary suspension, resignation, or disability inactive status order, the lawyer shall file with the clerk of this court for Suffolk County:

(a) a copy of the affidavit of compliance required by subsection 5, above.
(b) a list of all other state, federal and administrative jurisdictions to which the lawyer is admitted to practice;
(c) the residence or other street address where communications to the lawyer may thereafter be directed.

(7)

Except as provided in section 18(3) of this rule, no lawyer who is disbarred or suspended, or who has resigned or been placed on disability inactive status under the provisions of this rule shall engage in legal or paralegal work, and no lawyer or law firm shall knowingly employ or otherwise engage, directly or indirectly, in any capacity, a person who is suspended or disbarred by any court or has resigned due to allegations of misconduct or who has been placed on disability inactive status.

(8)

Any lawyer who is disbarred, suspended for a definite or an indefinite period, or who has resigned and who is found by the court to have violated the provisions of this rule by engaging in legal or unauthorized paralegal work prior to reinstatement under this rule may not be reinstated until after the expiration of a specified term determined by the court after a finding that the lawyer has violated the provisions of this rule. A lawyer on disability inactive status who knowingly violates the provisions of this rule by engaging in legal or paralegal work shall be removed from disability inactive status and temporarily suspended pending the outcome of the disciplinary investigation and proceedings.

Section 18. Reinstatement.

(1) Eligibility for Reinstatement – Short-term suspensions.

(a)

A lawyer who has been suspended for six months or less pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension by filing with the court and serving upon the Bar Counsel an affidavit stating that the lawyer (i) has fully complied with the requirements of the suspension order, (ii) has paid any required fees and costs, and (iii) has repaid the Clients' Security Board any funds awarded on account of the lawyer's misconduct.

(b)

A lawyer who has been suspended for more than six months but not more than one year pursuant to disciplinary proceedings shall be reinstated at the end of the period of suspension by filing with the court and serving upon the Bar Counsel an affidavit stating that the lawyer (i) has fully complied with the requirements of the suspension order, (ii) has taken the Multi-State Professional Responsibility Examination during the period of suspension and received a passing grade as established by the Board of Bar Examiners, (iii) has paid any required fees and costs, and (iv) has repaid the Clients' Security Board any funds awarded on account of the lawyer's misconduct.

(c)

Reinstatement under this subsection (1) will be effective automatically ten days after the filing of the affidavit unless the Bar Counsel, prior to the expiration of the ten-day period, files a notice of objections with the court. In such instances, the court shall hold a hearing to determine if the filing of a petition for reinstatement and a reinstatement hearing as provided elsewhere in this section 18 shall be required.

(d)

The right to automatic reinstatement under this subsection (1) shall not apply to any lawyer who fails to file the required affidavit within six months after the original term of suspension has expired. In such a case the lawyer must file a petition for reinstatement under paragraph (2) of this section.

(2) Eligibility for Reinstatement – Disbarment, Resignation, and Long-term Suspensions.

(a)

Except as the court by order may direct, a lawyer who has been disbarred, or whose resignation has been allowed under section 15 of this rule, may not petition for reinstatement until three months prior to the expiration of at least eight years from the effective date of the order of disbarment or allowance of resignation.

(b)

Except as the court by order may direct, a lawyer who has been suspended for an indefinite period may not petition for reinstatement until the expiration of at least three months prior to five years from the effective date of the order of suspension.

(c)

Except as the court by order may direct, a lawyer who has been suspended for a specific period of more than one year may not petition for reinstatement until three months prior to the expiration of the period specified in the order of suspension.

(3) Employment as Paralegal.

At any time after the expiration of the period of suspension specified in an order of suspension, or after the expiration of four years in a case in which an indefinite suspension has been ordered, or after the expiration of seven years in a case in which disbarment has been ordered or a resignation has been allowed under section 15 of this rule, a lawyer may move for leave to engage in

employment as a paralegal. When the term of suspension or disbarment or resignation has been extended pursuant to the provisions of section 17(8) of this rule, the lawyer may not petition to be employed as a paralegal until the expiration of the extended term. The court may allow such motion subject to whatever conditions it deems necessary to protect the public interest, the integrity and standing of the bar, and the administration of justice.

(4) Petitions for Reinstatement.

Petitions for reinstatement required under this section 18 and those required under section 13 of this rule shall be filed with the clerk of this court for Suffolk County and

(a) shall state whether the petitioner has complied with all the terms and conditions of the order imposing suspension or disbarment, accepting a resignation, or placing the petitioner on disability inactive status, as the case may be;
(b) shall state whether the petitioner has paid any costs assessed by the court under section 23 of this rule;
(c) shall state the extent to which the petitioner has made restitution to, or otherwise made whole, all clients or others injured by the petitioner's misconduct;
(d) shall state whether the petitioner has repaid the Clients' Security Board any funds awarded on account of the petitioner's misconduct;
(e) shall state that the petitioner has taken the Multi-State Professional Responsibility Examination after entry of the order of suspension, disbarment, or acceptance of resignation, and has received a passing grade as established by the Board of Bar Examiners;
(f) shall state that the petitioner has posted with the Board any bond it has required under paragraph 6 of this section 18; and
(g) shall state that the petitioner has filed with the Board and served upon the Bar Counsel copies of the petition and the completed questionnaire required by the Board under its rules.

(5) Procedure on Petitions for Reinstatement.

The clerk shall transmit a copy of the petition for reinstatement to the Board within three days after filing. Except with the written consent of the Board or the Bar Counsel, no hearing upon the merits of such a petition shall be held prior to the expiration of the full term of suspension, indefinite suspension, disbarment, or resignation pursuant to section 15 of this rule and in no event earlier than sixty days after transmittal of the petition to the Board or such further time as the court may allow to permit reasonable consideration of the petition by the Board. Upon receipt of such a petition the Board may hear the petition itself or may refer it to an appropriate hearing committee, to a special hearing officer, or to a panel of the Board designated by the Chair. On any petition the Board, the hearing committee, special hearing officer, or panel shall promptly hear the petitioner who shall have the burden of demonstrating that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this Commonwealth, and that his or her resumption of the practice of law will not be detrimental to the integrity and standing of the bar, the administration of justice, or to the public interest. On any petition referred, the hearing committee, special hearing officer, or panel shall transmit to the Board its findings and recommendations, together with any record. The Board shall file the Board's recommendations and

findings with the court, together with any record. The subsidiary facts found by the Board shall be upheld if supported by substantial evidence, upon consideration of the record, or such portions as may be cited by the parties.

(6) Costs and Expenses.

The court in its discretion may direct that the petitioning lawyer pay all necessary expenses incurred in connection with a petition for reinstatement, and the Board may require the posting of a reasonable bond to cover such expenses before acting on any petition assigned for hearing under this section 18.

(7) Waiver of Hearing.

The court may, on motion of the Bar Counsel, assented to by the Board and the petitioner, waive hearing under this section and allow the petition for reinstatement.

(8) Further Petitions for Reinstatement.

Except as the court by order may direct, no lawyer shall be permitted to reapply for reinstatement or readmission within one year following the final disposition of an adverse judgment upon a petition for reinstatement or readmission.

Section 19. Expenses.

The salary of the bar counsel, the bar counsel's expenses, the expenses of the Board, hearing committees, and special hearing officers, and other expenses incurred in the administration of this rule, may be paid by the Board out of the funds collected under the provisions of Rule 4:03, or, where the court deems that appropriate, from state funds as the court may order. The Board shall annually obtain an independent audit by a certified public accountant of the funds entrusted to it and their disposition, and shall file a copy of such audit with this court.

Section 20. Confidentiality and Public Proceedings.

(1)

Except as the court shall otherwise order or as otherwise provided in this rule, the Board and the bar counsel shall keep confidential all information to this court involving allegations of misconduct by a lawyer and all information that a lawyer's physical or mental condition may adversely affect his or her ability to practice law until the occurrence of one of the following events:

(a) Submission of a resignation pursuant to section 15 of this rule.
(b) Submission of a recommendation that formal discipline be imposed by agreement
(c) Service upon the respondent-lawyer of a petition for discipline instituting formal charges against the lawyer or of a petition seeking to place the lawyer on disability inactive status.

This section shall not prevent the members of the Board or the bar counsel from disclosing such information as they deem necessary to carry out their duties under this rule.

(2)

Notwithstanding subsection (1) of this section, the bar counsel or the Board may disclose the pendency, subject matter, and status of an investigation if:

(a) the respondent-lawyer has formally waived confidentiality or made the matter public;
(b) the investigation is predicated upon a conviction of the respondent-lawyer for a serious crime as defined in section 12 herein;
(c) the investigation is based upon allegations that have become generally known to the public; or
(d) there is a need to notify another person or organization in order to protect the public, the administration of justice, or the legal profession.

(3)

Upon the submission of an affidavit of resignation pursuant to section 15 of this rule or upon the submission of a stipulation between the bar counsel and the respondent-lawyer which recommends public discipline or after the service upon the respondent-lawyer of a petition for discipline instituting formal disciplinary charges or of a petition seeking to place the lawyer on disability inactive status, the proceedings are open to the public except for:

(a) deliberations of the hearing committee, the special hearing officer, the hearing panel, the appeal panel, the Board, or this court;
(b) information with respect to which the Board has issued a protective order under subsection (4) hereof;
(c) information with respect to which this court has issued a protective order on appeal from a Board decision denying such order under subsection (4) hereof; or
(d) further proceedings following the recommendation by a hearing committee, a special hearing officer, a hearing panel, or an appeal panel, or following an order of the Board or this court, that an admonition be imposed or that a petition for discipline be dismissed. In such event, the record shall be sealed and the proceedings shall be closed until and unless the Board or this court orders otherwise.

(4)

In order to protect the interests of a complainant, witness, third party, or respondent-lawyer, the Board may, upon application of the bar counsel or any affected person and for good cause shown, issue a protective order prohibiting the public disclosure of specific information otherwise privileged or confidential and direct that the proceedings be conducted so as to implement the order, including requiring that the hearing be conducted in such a way as to preserve the confidentiality of the information that is the subject of the application. If bar discipline or other professional discipline has been imposed on the respondent-lawyer on a prior occasion, in this Commonwealth or elsewhere, the fact that the discipline imposed is or has been confidential shall not constitute good cause for the issuance of a protective order. The bar counsel or any affected person may appeal from an order granting or denying an application for a protective order by filing a notice of appeal with the clerk of this court for Suffolk County within seven days after the date of the notice of the Board's action, which time limit shall be jurisdictional. The pendency of such an

appeal shall not be grounds to stay proceedings before a hearing committee, a special hearing officer, or any panel of the Board.

(5)

The provisions of this section shall not be construed to prohibit the Board from notifying a complainant concerning the Board's disposition of the complaint and the reasons therefor, or to deny access to relevant information to the Clients' Security Board, or to authorized agencies investigating the qualifications of judicial candidates, or to other jurisdictions investigating qualifications for admission to practice or considering reciprocal disciplinary action, or to law enforcement agencies investigating qualifications for government employment where discipline under this Chapter Four has been imposed, or, except as the court may direct, where the proceedings are pending and the Board in its discretion believes disclosure is warranted. In addition, the clerk of this court for Suffolk County shall transmit notice of all public discipline imposed by this court to the National Discipline Data Bank maintained by the American Bar Association.

(6)

When an investigation by the bar counsel or the Board concerns allegations of a serious crime as defined in section 12 herein, or disciplinary charges in another jurisdiction, the bar counsel or the Board may disclose information not otherwise public under this rule to the appropriate agency responsible for criminal or disciplinary enforcement and exchange such information with such agency during the course of its investigation of the same lawyer. When requested by an appropriate disciplinary agency investigating disciplinary charges in another jurisdiction, the bar counsel or the Board may also disclose the existence of any prior discipline.

Section 21. Service.

Any notice or pleading required to be served under this Chapter Four may be served upon the respondent lawyer in hand, by email to the email address associated with the lawyer's registration statement filed with the board, or by addressing it by certified, registered or first class mail to the address furnished in the last registration statement filed by the respondent lawyer in accordance with Rule 4:02, except that the Petition for Discipline may not be served by email. Service by mail is complete upon mailing. Further regulations concerning service will be established under the Rules of the Board of Bar Overseers.

Section 22. Subpoena Power.

(1)

Upon request by the bar counsel or a respondent-lawyer for testimony or the production of evidence at a hearing, or upon request by the bar counsel for testimony or the production of evidence at any stage of an investigation, witnesses may be summoned by subpoenas issued at the direction of a Board member, the chair of a hearing committee, or a special hearing officer. Witnesses shall be examined under oath or affirmation. Testimony may be taken by a hearing committee, a special hearing officer, or a hearing panel outside the Commonwealth if the ends of justice so require. Where appropriate, testimony may be taken within or without the

Commonwealth by deposition or by Commission. So far as practicable a stenographic, electronic, or videotape record shall be made and preserved for a reasonable time.

(2)

Whenever a subpoena is sought in this state pursuant to the law of another jurisdiction for use in lawyer discipline or disability proceedings, and where the issuance of a subpoena has been duly approved under the law of the other jurisdiction, a member of the Board may issue a subpoena as provided in this section to compel the attendance of witnesses and production of documents.

Section 23. Costs.

The court, in its discretion, may direct that a respondent-lawyer pay the costs incurred in connection with the processing of a disciplinary proceeding and information, as well as the costs incurred by the bar counsel and the Board in attempting to gain information from the respondent-lawyer in connection with the processing of a complaint against said lawyer.

Section 24. Restitution.

The court or the Board, in its discretion, may order a respondent-lawyer to make restitution to those persons financially injured by his or her conduct and to reimburse the Clients' Security Fund for any payments made on account of misappropriation.

Rule History

Amended effective September 1, 2009; March 29, 2022, effective June 1, 2022; amended October 3, 2024, effective December 1, 2024.

4:02 Periodic Registration of Attorneys.

(1) Registration Statement Required.

Every attorney admitted to, or engaging in, the practice of law in this Commonwealth, within three months of becoming subject to this chapter and annually thereafter, shall file with the Board a registration statement setting forth his or her current residence and office addresses, and a business email address, and such other information as this court may from time to time direct, including the date of his or her admission to the bar of this court and of each admission to practice in each other jurisdiction, including each Federal court and each administrative body. The statement shall disclose whether the attorney is in good standing in each such jurisdiction, and, if not in good standing in any jurisdiction, it shall contain an explanation of the circumstances. To complete registration, every attorney shall also be required to complete a demographic and law practice survey approved by the Supreme Judicial Court. The Board may adopt rules and regulations establishing a system of staggered annual registrations, and in order to implement such a system may provide for a transition period during which different attorneys may be required to file registration statements at different times and with different expiration dates, so that thereafter all annual registrations will not expire on the same date. In addition to such registration statement,

every attorney shall file a supplemental statement of any change in the information previously submitted, including residential address, office address, and business email address, within fourteen days of such change. Within twenty days of the receipt of a registration statement or supplement thereto filed by an attorney, the Board shall acknowledge receipt thereof in order to enable the attorney on request to demonstrate compliance with the requirement of this rule.

(1A) Foreign Legal Consultants.

Every person licensed to practice in this Commonwealth as a foreign legal consultant pursuant to Rule 3:05, within three months of becoming subject to this chapter and annually thereafter, shall file with the Board a registration statement setting forth his or her current residence and office addresses, and a business email address, and such other information as this court may from time to time direct, including the date of his or her license to practice as a foreign legal consultant and of each admission to practice in each other jurisdiction including each foreign court. The original statement and each annual statement shall provide a document establishing that the foreign legal consultant is in good standing in each such jurisdiction, and, if not in good standing in any jurisdiction, it shall contain an explanation of the circumstances. In addition to such registration statement, every foreign legal consultant shall file a supplemental statement of any change in the information previously submitted, including residential address, office address, and business email address, within fourteen days of such change. Foreign legal consultants shall be subject to the provisions of Rule 4:03 and subsections (2), (3), (4), and (5) of this Rule.

(2) Designation of IOLTA Account.

Each attorney shall, as part of the annual filing required by subsection (1) of this rule and on forms provided by the Board for this purpose, specify the name, account number and depository of his or her IOLTA account. The Board shall transmit information regarding attorneys' IOLTA accounts to the Supreme Judicial Court and to the IOLTA Committee established by the Court.

(2A) Professional Liability Insurance Disclosure.

(a)

Each attorney shall, as part of the annual filing required by subsection (1) of this rule and on forms provided by the Board for this purpose, certify whether he or she is currently covered by professional liability insurance and provide the following additional information concerning such insurance: the name and address of the carrier, the policy number, and the start and end dates of the policy. Each attorney currently registered as active in the practice of law in this Commonwealth who reports being covered by professional liability insurance shall notify the Board in writing within thirty days if the insurance policy providing coverage lapses or terminates for any reason without immediate renewal or replacement with substitute coverage.

(b)

The foregoing shall be certified by each attorney in such form as may be prescribed by the Board. The information submitted pursuant to this subsection will be made available to the public by such means as may be designated by the Board.

(c)

Any attorney who fails to comply with this subsection may, upon petition filed by the bar counsel or the Board, be suspended from the practice of law until such time as the attorney complies. Supplying false information or failure to notify the Board of lapse or termination of insurance coverage as required by this subsection shall subject the attorney to appropriate disciplinary action.

(3) Failure to file.

Any attorney who fails to file the statement or any supplement thereto in accordance with the requirements of subsections (1), (1A), (2), and (2A) above shall be subject to suspension in accordance with the procedures set forth in Rule 4:03.

(4) Inactive Status.

(a)

Any attorney may advise the Board in writing that he or she desires to assume inactive status and to discontinue the practice of law in this Commonwealth. Upon the filing of such notice, the attorney shall continue to file annual registration statements for as long as he or she remains on inactive status, but shall no longer be eligible to practice law in this Commonwealth, except to provide pro bono publico legal services in accordance with Rule 4:02(8)(a). Any inactive attorney shall pay the fee imposed pursuant to Rule 4:03 for inactive attorneys.

(b)

Upon the filing of a notice that he or she wishes to assume inactive status, an attorney shall be removed from the rolls of those classified as active until and unless he or she requests reinstatement to the active rolls and pays for the year of reinstatement the fee imposed pursuant to Rule 4:03 for active attorneys.

(5) Retirement.

(a)

Any attorney may advise the Board in writing that he or she desires to retire from the bar and to discontinue the practice of law in this Commonwealth. Upon the filing of such notice, the attorney shall no longer be eligible to practice law in this Commonwealth but shall continue to file registration statements for three years thereafter in order that he or she can be located in the event complaints are made about his or her conduct while he or she was engaged in practice in this Commonwealth. A retired attorney may provide pro bono publico legal services in accordance with Rule 4:02(8)(b). A retired attorney providing such services shall file annual registration statements as provided in that Rule. Any retired attorney will be relieved from the payment of the fees imposed pursuant to Rule 4:03.

(b)

Upon the filing of a notice that he or she wishes to retire from the bar, an attorney shall be removed from the rolls of those classified as active until and unless he or she requests reinstatement to the active rolls and pays the fee imposed pursuant to Rule 4:03 for active attorneys for each of the years during which he or she was retired from the bar.

(6) Judicial Status.

(a)

Any attorney who sits as a judge of any state or Federal court may advise the Board in writing that he or she is a sitting judge and desires to discontinue the practice of law in this Commonwealth. Upon the filing of such a notice, the attorney will be placed on judicial status and will be relieved from the payment of the fees imposed pursuant to Rule 4:03.

(b)

Upon the filing of a notice that he or she has left the bench and wishes to be reinstated to the active rolls and upon payment for the year of reinstatement of the fee imposed pursuant to Rule 4:03 for active attorneys, an attorney on judicial status shall be so reinstated.

(7) Clerk Status.

(a)

Any "clerk magistrate," as defined in Canon 1 of Supreme Judicial Court Rule 3:12, and any Federal clerk of court, chief deputy clerk and deputy clerk may advise the Board in writing that he or she is a clerk. Upon the filing of such a notice, the attorney will be placed on clerk status and will be relieved from the payment of the fees imposed pursuant to Rule 4:03.

(b)

Upon the filing of a notice that he or she is no longer a clerk and wishes to be reinstated to the active rolls and upon payment for the year of reinstatement of the fee imposed pursuant to Rule 4:03 for active attorneys, an attorney on clerk status shall be so reinstated.

(8) Pro Bono Status.

(a)

Any attorney admitted to the practice of law in the Commonwealth who has assumed inactive status in accordance with Rule 4:02(4) but who wishes to provide pro bono publico legal services without compensation or expectation of compensation as described in Rule 6.1 of the Massachusetts Rules of Professional Conduct (S.J.C. Rule 3:07) may advise the Board by filing an appropriate annual registration statement that he or she will limit his or her legal practice to providing pro bono publico legal services under the auspices of an approved legal services organization, as defined below. The annual registration statement shall indicate whether the attorney is, or was at the time he or she assumed inactive status, the subject of any pending

grievance or disciplinary charge and shall be signed by an authorized representative of the approved legal services organization under whose auspices the attorney will provide services. Unless the Board of Bar Overseers objects, the attorney may begin providing pro bono services after filing such a statement.

(b)

Any attorney admitted to the practice of law in the Commonwealth who has retired from the bar and discontinued the practice of law in this Commonwealth in accordance with Rule 4:02(5) may advise the Board by filing an appropriate annual registration statement that he or she will limit his or her legal practice to providing pro bono publico legal services without compensation or expectation of compensation as described in Rule 6.1 of the Massachusetts Rules of Professional Conduct (S.J.C. Rule 3:07) under the auspices of an approved legal services organization, as defined below. The annual registration statement shall indicate whether the attorney is, or was at the time he or she retired, the subject of any pending grievance or disciplinary charge and shall be signed by an authorized representative of an approved legal services organization under whose auspices the attorney will provide services. Unless the Board of Bar Overseers objects, the attorney may begin providing pro bono services after filing such a statement.

(c)

For purposes of this Rule, an approved legal services organization shall include a pro bono publico legal services program sponsored by a court annexed program, a bar association, a Massachusetts law school, or a not for profit organization that provides legal services to persons of limited means and that receives funding from the federal Legal Services Corporation, the Massachusetts Legal Assistance Corporation, the Massachusetts Bar Foundation, the Boston Bar Foundation, or the Women's Bar Foundation, and in addition, shall include any not for profit legal services organization designated as an approved legal services organization after petition to the Supreme Judicial Court.

(9) In-House Counsel Status

(a)

Any attorney who is admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, and who wishes to engage in the practice of law as in-house counsel in the Commonwealth of Massachusetts shall advise the Board by (i) filing an appropriate annual registration statement that he or she will limit legal practice in Massachusetts to engaging in the practice of law as in-house counsel, and (ii) identifying the organization on whose behalf the legal services are provided. The initial annual registration statement shall be accompanied by a certificate of good standing from each jurisdiction in which the attorney is licensed to practice law. The initial annual registration statement and all later annual registration statements shall disclose whether the attorney is in good standing in each jurisdiction to which he or she is admitted, and, if not in good standing in any jurisdiction, it shall contain an explanation of the circumstances. The initial annual registration statement and all later annual registration statements shall be signed by an authorized representative of the organization on whose behalf the attorney seeks to engage in the practice of law as in-house counsel. Unless the Board of Bar Overseers objects, after filing such initial statement the attorney may engage in the

practice of law as in-house counsel in the Commonwealth of Massachusetts as described in the filing under this Rule.

(b)

As used in this section 9, "to engage in the practice of law as in-house counsel" means to provide on behalf of a single organization (including, for attorneys admitted in a United States jurisdiction, a governmental entity) or its organizational affiliates any legal services that constitute the practice of law. Notwithstanding this limitation, in-house counsel who are admitted in another United States jurisdiction may provide pro bono publico legal services without compensation or expectation of compensation as described in Rule 6.1 of the Massachusetts Rules of Professional Conduct (S.J.C. Rule 3:07) under the auspices of either (1) an approved legal services organization (as defined in paragraph (8)(c) above), or (2) a lawyer admitted to practice and in good standing in the Commonwealth of Massachusetts.

(c)

Any attorney registered under this section who changes or terminates his or her employment shall be required to file a supplemental statement of change in information under Rule 4:02(1) regardless of whether he or she wishes to continue to engage in the practice of law in the Commonwealth of Massachusetts as in-house counsel for another organization.

(d)

Nothing in this section shall be deemed to affect any definition, limitation or explanation under rule, by decision, or otherwise, of what constitutes engaging in the practice of law in this Commonwealth, as used in section 4:02(1).

(e)

Nothing in this section permits an attorney registered under this section to provide services for which the forum requires pro hac vice admission.

(f)

As used in this section, "organization" does not include a corporation, partnership, limited liability company or other entity that itself engages in the practice of law by providing legal services to others.

(10) Use of Information.

(a)

Residential addresses disclosed on registration statements, except those designated as the registrant's place of business, shall be treated as confidential and shall be used by the Board and by Bar Counsel only for the purpose of communicating with registrants or otherwise in the course of the business of the Board or Bar Counsel. Other than in the course of such business, neither the Board nor Bar Counsel shall disclose any such residential address to any third party unless directed to do so by order of this Court for Suffolk County.

(b)

Demographic and law practice survey data disclosed on the demographic and law practice survey shall be treated as confidential and used solely to develop services and programs to aid lawyers.

(11) Use by courts of attorneys' business physical and electronic mailing addresses.

On a regular basis, the courts will access the data base of the board to obtain attorneys' business physical and electronic mailing addresses. The courts may use the attorneys' business physical and electronic mailing addresses for the courts' business purposes.

(12) Active duty military status.

Any attorney admitted to practice law in the Commonwealth who is currently on active duty in any branch of the United States Armed Forces but who is not serving as an attorney in the military may advise the Board in writing and under oath of the attorney's status in the military. Upon the filing of such notice, the attorney will be placed on active duty military status and will be relieved from the payment of fees imposed pursuant to Rule 4:03 for any registration cycle during which, in whole or in part, the attorney maintains such status.

Rule History

Amended June 2011, effective September 1, 2011; January 30, 2013, effective March 1, 2013; January 30, 2014, effective July 1, 2014; January 25, 2017, effective February 1, 2017; October 29, 2020, effective November 1, 2020; March 29, 2022, effective June 1, 2022.

4:03 Periodic Assessment of Attorneys.

(1)

(a)

Every attorney required to register in accordance with Rule 4:02, other than a retired attorney, sitting judge, clerk-magistrate as defined in Canon 1 of Supreme Judicial Court Rule 3:12, Federal clerk of court, chief deputy clerk and deputy clerk, or suspended attorney, shall pay an annual fee as established by the court from time to time, which shall be paid to the Board with the registration statement required under Rule 4:02. The fee so paid subject to any applicable orders of this court shall be used to defray the costs of attorney registration and disciplinary enforcement, to provide funds for the operation of the Clients' Security Board and Fund established under Rule 4:04, to provide funds for the operation of the Massachusetts lawyers assistance programs provided by Lawyers Concerned for Lawyers, Inc. (LCL), and for such other purposes as the Board, with the approval of the court, from time to time shall determine.

(b)

The registration statement required under Rule 4:02 shall provide for a voluntary annual fee of $51, or such amount as established by the court from time to time, for use in the administration of justice and provision of civil legal services to those who cannot afford them. The registration statement shall further provide that any attorney who does not wish to pay the voluntary fee under this subsection shall so indicate and shall not be required to make the payment. An attorney's decision as to whether to pay this voluntary fee shall be confidential.

(c)

The Board shall remit, at least quarterly, to the IOLTA Committee the fees collected under subsection (b), which shall disburse the fees in the same manner as other IOLTA funds are disbursed in accordance with Rule 1.15(g)(4) and (5) of Rule 3:07, Supreme Judicial Court Rules of Professional Conduct. The Massachusetts Legal Assistance Corporation and other designated charitable entities receiving these funds shall describe their distribution of these funds for use in the administration of justice and provision of civil legal services to those who cannot afford them in the annual report required under Rule 1.15(g)(6) of Rule 3:07.

(2)

To any attorney who, without permission from the Board, fails to pay the fee required under subsection (1) above within thirty days, the Board shall mail a letter by first-class mail to the addresses furnished on the last registration statement filed as required by Rule 4:02, notifying the attorney of his or her failure to pay the required fee and that, if within fifteen days from the date of the mailing of the letter the attorney shall fail to pay the fee, there shall be added to the fee a late assessment of fifty dollars. If within forty-five days from the date of the mailing of the letter, he or she shall fail to pay the fee, the Board shall mail a certified or registered letter to the last known business address and a letter by first-class mail to the last known residential address, notifying the attorney of his or her failure to pay, and shall file a petition for the attorney's suspension with the Clerk of this court for Suffolk County.

(3)

Any order suspending an attorney under the provisions of subsection 2 above shall be effective fourteen days after entry, unless otherwise ordered by the court, and shall become subject to the provisions of Rule 4:01, Sections 17(3) and 17(4). If not reinstated within fourteen days after entry, the lawyer shall become subject to the other provisions of said Section 17. The time periods for complying with Rule 4:01, Sections 17 (1), 17(5), and 17(6), shall begin upon the effective date of the order. As a condition precedent to reinstatement, such attorney shall file with the Board an affidavit stating the extent to which he or she has complied with applicable provisions of Rule 4:01, Section 17, and shall pay all arrears due from the date of the last payment to the date of his or her request for reinstatement, including the late assessment of fifty dollars required under subsection (2) above, and shall also pay to the Board a penalty of one hundred dollars.

Rule History

Amended June 29, 2010, effective September 1, 2010; amended March 29, 2022, effective June 1, 2022.

4:04 Clients' Security Board and Fund.

Section 1.

The full court shall appoint a Clients' Security Board (Board). This Board shall consist of seven members of the Massachusetts bar to serve as public trustees to receive, hold, manage, and distribute the funds allocated to the Board from the annual fees assessed under Rule 4:03(1)(a). The Board shall hold such funds in trust as the Clients' Security Fund (Fund). The purpose of the Fund is to discharge, as far as practicable and in a reasonable manner, the collective professional responsibility of the members of the Massachusetts bar for actual losses caused by the theft of client funds or property by attorneys, acting either as attorneys or as fiduciaries (except to the extent to which such losses are otherwise reimbursed).

Section 2.

(A)

The Massachusetts Bar Association, each county bar association (including the Boston Bar Association as the county bar association for Suffolk County) and other appropriate organizations may submit to the full court not more than three nominees for each vacancy on the Board. The full court shall select from these nominees or from any other members of the bar a person to fill each vacancy, and shall designate a Chair and a Vice Chair to act in the absence of the Chair.

(B)

All terms (except to fill an unexpired term) shall be for five years. No member shall serve more than two consecutive full terms, in addition to any term of less than five years, either by original appointment or to complete an unexpired term. A member shall be eligible, however, for reappointment for further terms after a lapse of one or more years. A member whose term has expired shall continue in office until the full court appoints a successor.

Section 3.

The Chair or a majority of the members may call meetings of the Board. The Board shall meet at least quarterly, upon reasonable notice to the Board members. A majority of members shall constitute a quorum. A majority of the members present at a duly constituted meeting may exercise any powers held by the Board.

Section 4.

The Board, members of the Board, and the staff of the Board shall be immune from liability for any conduct in the course of their official duties.

Rule History

Amended October 1, 1998, effective November 2, 1998; June 26, 2019, effective September 1, 2019.

4:05 Claims by Clients for Reimbursement of Losses.

Section 1.

The Board may consider a client's claim for reimbursement of losses caused by an attorney who had been a member of the Massachusetts bar and who has been disbarred, suspended, has resigned from the bar, or has died. The Board may allow or deny such claims in whole or in part to the extent that funds are available and in accordance with all applicable rules and principles, especially the provisions of this Chapter Four.

Section 2.

All reimbursements shall be a matter of grace, not right, and no client, beneficiary, employer, organization, or other person shall have any right or interest in the Fund. No decision to allow or deny reimbursement shall be subject to judicial review in a court of either appellate or original jurisdiction.

Section 3.

In exercising its discretion whether to allow any claim for reimbursement from the Fund, the Board shall attempt to establish fair, reasonable, and consistent principles for the allowance and denial of claims. To the extent possible, the Board shall attempt to fully reimburse claimants for their actual losses consistent with the Board's role as public trustee of the Fund and considering the following and other factors as the Board may deem appropriate and relevant:

(A) The amounts available and likely to become available to the Fund for payment of claims;
(B) The size and number of claims likely to be presented in the future;
(C) The amount of the claimant's loss as compared with the amount of the losses sustained by other claimants who may merit reimbursement from the Fund;
(D) The unreimbursed amounts of claims recognized by the Board as meriting reimbursement but for which complete reimbursement has not been made;
(E) The degree of hardship suffered by the claimant as compared with that suffered by other claimants; and
(F) Any negligence or conduct of the claimant that may have contributed to the loss.

Section 4.

The Board may require any claimant, as a condition of any payment from the Fund, to execute such instruments, to take such action, and to enter into such agreements as the Board may direct,

including assignments, subrogation agreements, trust agreements, and promises to cooperate with the Board in making and prosecuting claims or charges against any person.

Section 5.

The Board may issue a subpoena requiring the attendance and testimony of a witness, including the disbarred or suspended attorney, to appear before the Board or its counsel at a specified date and time. The subpoena shall specify any evidence relating to the Board investigation that the witness shall produce to the Board, including but not limited to books, records, correspondence, or documents. The Board may record testimony electronically or otherwise. The Board shall use the recording for its own administrative purposes.

Section 6.

The Board shall keep confidential all claim forms, proceedings, investigations, claimants' and respondents' financial information, and reports involving specific claims received and payments made from the Fund. The Board and its staff shall maintain the confidentiality of the claim forms, investigations, and proceedings. This provision shall not be construed to:

(A) deny relevant information to the Board of Bar Overseers, to a court or investigative agency of proper jurisdiction, to an authorized agency investigating the qualifications of a judicial candidate, or applicant for governmental employment;
(B) prohibit the release of statistical or summary information that does not disclose the identity of the parties; or
(C) prohibit the release of publicity in a manner that is consistent with the provisions of this section.

Rule History

Adopted June 3, 1974, effective September 1, 1974; amended effective September 14, 1977; amended effective April 15, 1996; amended December 11, 2003, effective January 1, 2004; amended June 26, 2019, effective September 1, 2019.

4:06 Miscellaneous Powers and Duties of Clients' Security Board.

Section 1.

In addition to other powers the Board may:

(A) adopt, with the approval of this court, rules that are consistent with these rules;
(B) enforce, in its discretion, claims for restitution arising by subrogation, assignment, or otherwise;
(C) invest or direct the investment of the Fund, or any portion thereof, in such investments as the Board may deem appropriate, and may cause funds to be deposited in any bank,

banking institution, savings bank, or federally insured savings and loan association in this Commonwealth provided, however, that the Board shall have no obligation to cause the Fund or any portion thereof to be invested;

(D) employ and compensate consultants, agents, legal counsel, and employees;

(E) enter into contracts for goods and services as are necessary for the Board to carry out its duties;

(F) obtain surety bond or insurance coverage useful or appropriate in providing protections to clients of attorneys;

(G) assign for administrative purposes its duties under subsections (D) and (E) to the Executive Director of the Board of Bar Overseers, in accordance with the Board's written directions, which the Board may amend or rescind at any time;

(H) sue in the name of the Board without joining any or all of its individual members; and

(I) perform other acts necessary or proper for the efficient administration of the Fund.

Section 2.

The Board shall authorize disbursement of money from the Fund only after issuing a written order pursuant to this Chapter Four.

Section 3.

At least once each year, and at such additional times as the court may order, the Board shall file with this court a written report of its administration of the Fund. The written report shall include a list of any material written contracts into which the Board entered, including the name of the contracting party, the amount of the contract, the beginning and end date of the contract, and the scope of work to be accomplished.

Section 4.

The Board shall annually, and at such other times as this court may direct, obtain an independent audit by a certified public accountant of funds received and paid out in connection with the administration of the Fund. The Fund shall pay the cost of any such audit.

Rule History

Adopted June 3, 1974, effective September 1, 1974; amended effective November 2, 1998; amended June 26, 2019, effective September 1, 2019.

4:07 Lawyers Concerned for Lawyers Fund and Oversight Committee.

Section 1.

Lawyers Concerned for Lawyers, Inc. (LCL) provides programs to assist lawyers, judges, other legal professionals and law students who may be impaired in their ability to function as a result of the

disease of addiction, including but not limited to alcoholism or other chemical dependency. In addition, LCL provides assessment and referral services with respect to other psychological, emotional and physical impairments that might interfere with an individual's capacity to function as a lawyer. The Board shall bill and collect the portion of the annual registration fee designated by the court for LCL to provide funds for the operation of the lawyers assistance programs and, upon receipt, shall hold the funds collected in trust as a separate fund for LCL. The court shall appoint an LCL Oversight Committee (hereinafter the Committee) to oversee the appropriate use of the fund so set apart for the operation of LCL. The court shall appoint to the Committee a representative from LCL, a present or former member of the Board of Bar Overseers, a present or former member of the Clients' Security Board, and three or more members of the Massachusetts bar.

Section 2.

(1)

The Committee, as initially constituted, shall consist of such members as the court may determine, to be selected by the court as soon as reasonably practicable after the adoption of this rule. Thereafter the court, by order, shall request the submission of nominations to fill vacancies in such manner as it may determine. LCL, the Board of Bar Overseers, the Clients' Security Board, the Massachusetts Bar Association, and each county bar association (including the Boston Bar Association as the bar association for Suffolk County) may nominate a person to fill a vacancy in the Committee. Any attorney may also submit in writing the names of nominees. The court may, but need not, make appointments to the Committee from the nominees so submitted. The court shall from time to time designate one member of the Committee as Chair and another as Vice Chair to act in the absence, for any cause, of the Chair.

(2)

When the Committee is first selected, approximately one-third of the members shall be appointed for a term of three years, one-third for a term of two years, and one-third for a term of one year. Subsequent appointments to the Committee shall be for a term of four years. No member shall be appointed to more than two consecutive full terms but (a) a member appointed for less than a full term (originally or to fill a vacancy) may serve two consecutive full terms in addition to such part of a full term, and (b) a former member shall again be eligible for appointment after a lapse or at least of one year. The Committee shall act only with the concurrence of a majority of the members who are present provided, however, that a quorum shall be constituted of a majority of the Committee. A member whose term has expired shall continue in office until a successor is appointed.

Section 3.

(1)

LCL shall annually, and at such additional times as the court may order, cause to be performed an independent audit of its books by a certified public accountant. Further, LCL shall annually, and at such additional times as the court may order, file with the court a written report of its operations. Copies of such audit and report will be furnished to the Committee.

(2)

At least annually, LCL shall prepare and submit to the Committee for approval a budget of its financial requirements for the period covered by such budget. Upon approval of such budget, the Committee shall authorize in writing disbursement for such period from the funds held by the Board for LCL's account. Pursuant to such authority, disbursement shall be made at such times and in such manner as LCL may from time to time request of the Board in writing.

Section 4.

Members of LCL and its staff shall be immune from liability for any good faith conduct in the course of their official duties.

Section 5.

Pursuant to the provisions of Mass. R. Prof. C. 1.6(c) (Rule 3:07), a lawyer participating in an LCL program to provide lawyer assistance, as defined in Mass. R. Prof. C. 1.6(c), may require a person acting under the lawyer's supervision or control to sign a non-disclosure form approved by the Supreme Judicial Court.

Rule History

Adopted effective February 1, 1993; amended effective November 15, 1995; amended effective January 1, 1997; amended June 9, 1997, effective January 1, 1998.

4:08 Interpretation of Chapter Four of These Rules.

Section 1.

The Board of Bar Overseers or the Clients' Security Board may request this court for an interpretation of any portion of this Chapter Four, and for advice and instructions as to their powers and duties. Either of these boards may submit to the court suggestions or proposals for revisions, modifications, or improvement of this Chapter Four, including proposals for affording protection to clients by surety bonds, group insurance of attorneys, or other means of insurance or indemnity coverage.

Section 2.

Except where powers are expressly given to the full court, or the context indicates clearly that the full court alone is to have the power, the powers of this court may be exercised by a justice, subject to any appropriate review.

Rule History

Renumbered Rule 4:08, effective February 1, 1993; amended June 26, 2019, effective September 1, 2019.

4:09 Amendment, Modification, Repeal.

This court may amend, modify, or repeal this Chapter Four of these rules at any time without prior notice and, in its discretion, may provide for the dissolution and winding up of the Fund.

Rule History

Renumbered Rule 4:09, effective February 1, 1993; amended June 26, 2019, effective September 1, 2019.

Orders of the Supreme Judicial Court

(Ordered alphabetically)

Agreement Between the Supreme Judicial Court and the State Archivist

(Adopted January 17, 1984)

ORDERED: That any papers, records, exhibits and artifacts which have been filed or deposited in or which are located in any court of the Commonwealth may be moved to the State Archives at Columbia Point in Boston, Massachusetts provided that the Administrative Assistant (G.L. c. 211, § 3A) to the Supreme Judicial Court approves. G.L. c. 221, § 27A. The State Archivist shall be the custodian of all court papers, records, exhibits and artifacts maintained at the State Archives. The Supreme Judicial Court shall retain control of such papers, records, exhibits and artifacts under such conditions as shall be agreed to by the State Archivist and the Supreme Judicial Court.

Pursuant to the provisions of the order of the Supreme Judicial Court dated January 17, 1984, the State Archivist and the Administrative Assistant to the Supreme Judicial Court hereby agree to the following terms and conditions with respect to all judicial papers, records, exhibits and artifacts to be moved to the State Archives at Columbia Point in Boston, Massachusetts:

(1)

Consistent with the Separation of Powers Clause (Article 30) of the Constitution of the Commonwealth, there shall be a separate judicial archives located within the space occupied by the State Archives. The Supreme Judicial Court acting through the Administrative Assistant to the Supreme Judicial Court, and the Judicial Records Committee of the Supreme Judicial Court, shall

maintain control of all court papers, records, exhibits and artifacts moved to the State Archives. The State Archivist, as a member ex officio of the Judicial Records Committee of the Supreme Judicial Court, shall be the physical custodian of all court papers, records, exhibits and artifacts stored at the State Archives.

(2)

Subject to appropriation, there shall be a curator of judicial records at the State Archives who shall be responsible for the administration of the judicial archives. The curator of judicial records shall be an employee of the Office of the Secretary of the Commonwealth. The job description of the curator of judicial records shall be subject to the approval of the Supreme Judicial Court.

In addition to the curator of judicial records, employees of the State Archivist shall be authorized to administer the judicial archives in a manner consistent with the policies established by the Supreme Judicial Court.

The State Archivist shall periodically report to the Administrative Assistant to the Supreme Judicial Court.

(3)

The procedures for processing judicial records for entry into the State Archives shall be established by the Supreme Judicial Court in consultation with the State Archivist.

Upon the completion of construction of the State Archives and Records Center at Columbia Point, the State Archivist shall designate a single location in the State Archives portion of the building consisting of approximately 12,000 cubic feet of shelving space to be occupied by the judicial archives. The space shall be discrete and continuous. It shall be distinct from the non-judicial archival collections with adequate access to the public research room of the State Archives. If at some time in the future additional space is necessary for expansion of the judicial archives, the State Archivist shall make reasonable attempts to designate such additional space as may be necessary consistent with the need to maintain a separate judicial collection. To the extent possible, the State Archivist shall attempt to designate the additional space at a single location with discrete and continuous shelving as close to the initial judicial archives space as is feasible.

(4)

The judicial archives initially shall consist of the following records:--(1) pre-1860 records of the predecessors of the Superior Court; (2) pre-1860 Supreme Judicial Court records and records of special courts such as admiralty; (3) cases of unique historical interest (e.g. the Sacco-Vanzetti records). Some of these records will be treated in the Supreme Judicial Court records preservation laboratory in the Suffolk County Courthouse prior to deposit in the State Archives. Other records will first be shipped to the State Archives to be stored prior to later treatment either in the Supreme Judicial Court laboratory or in the laboratory of the State Archives.

There shall be no prohibition on maintaining closed shelved materials in the judicial archives. Such materials, if any, shall be closed by direction of the Supreme Judicial Court.

The facilities of the State Archives, including the fumigation laboratory and special treatment facilities, shall be open to the judicial archives, subject to the control of the State Archivist.

However, all conservation procedures performed on judicial records shall be subject to the approval of the Administrative Assistant to the Supreme Judicial Court. Endangered judicial records which cannot be treated in a timely fashion in the Supreme Judicial Court laboratory shall be given status in the State Archives laboratory consistent with the status given endangered non-judicial records.

(5)

The State Archives shall maintain all judicial records in its custody with the same care and security as is provided for other archival documents held at the State Archives.

(6)

This agreement may be amended by written agreement of the State Archivist and the Administrative Assistant to the Supreme Judicial Court. The Secretary of the Commonwealth and the Chief Justice of the Supreme Judicial Court shall be notified of any proposed amendment to the agreement prior to the effective date of the amendment. The Secretary of the Commonwealth and the Supreme Judicial Court may prohibit or nullify any such change in the agreement or may otherwise jointly revise the terms of the agreement.

Amount-in-controversy requirement under G.L. c. 218, § 19 and G.L. c. 212, § 3

(Adopted effective January 1, 2020)

Under G.L. c. 218, § 19, civil actions for money damages may proceed in the District and Boston Municipal Court departments "only if there is no reasonable likelihood that recovery by the plaintiff will exceed $25,000, or an amount ordered from time to time by the supreme judicial court." The Court hereby exercises its authority to order that the amount be increased from $25,000 to $50,000.

Under G.L. c. 212, § 3, a reciprocal $25,000 amount requirement applies to civil actions for money damages commenced in the Superior Court. Under this statute, such actions may proceed in the Superior Court "only if there is no reasonable likelihood that recovery by the plaintiff will be less than or equal to $25,000 or an amount ordered from time to time by the supreme judicial court." The Court hereby exercises its authority to order that this amount also be increased from $25,000 to $50,000.

This Order shall be effective on January 1, 2020, and applicable to civil actions for money damages commenced on or after that date.

Appeals from convictions of murder in the first degree

(Adopted August 6, 2019, effective September 4, 2019)

General Laws c. 278, § 33E, is intended to provide defendants with a comprehensive review of their convictions and to ensure that their appeals are finally adjudicated without undue delay. The dual goals of rendering justice and achieving finality are documented in the statute's legislative history.

After a direct appeal from a conviction of murder in the first degree has been entered in the Supreme Judicial Court, the statute requires motions for a new trial to be filed in the Supreme Judicial Court. The court has, in the past, typically stayed the direct appeal for an indefinite time while a defendant investigates, prepares, and files a new trial motion, and thereafter until the motion has been heard and decided, typically after referral by this court to the Superior Court.

Consequently, direct appeals of convictions of murder in the first degree have sometimes remained on this court's docket for five, ten, fifteen, or more years. So that direct appeals and any appeals from the rulings on the new trial motions may be heard and decided without undue delay, this ORDER sets forth the following protocol:

(a) Special master or single justice

The court shall appoint a special master to oversee the progress of first degree murder appeals and motions for a new trial and to implement and enforce the terms of this Order. Alternatively, the court may designate one of the Justices to perform that role. All references in this Order to "the special master" shall mean either the special master or any Justice who has been designated by the court for these purposes.

(b) Time for filing motions for a new trial

In any case in which the defendant contemplates filing a motion for a new trial in this court after the direct appeal has been entered and having the ruling on that motion considered in conjunction with the direct appeal, the defendant must file the motion as soon as reasonably practicable, but no later than eighteen months after the entry of the direct appeal. Extensions may be granted by the special master, on a case-by-case basis, based on a substantial showing of need. Review of the denial of a motion for a new trial filed within eighteen months or within the period of any authorized extension will be considered with the direct appeal. Review of the denial of a motion for a new trial filed after eighteen months (or after the extended deadline) will not presumptively be considered with the direct appeal.

(c) Status conferences

An initial status conference with counsel for the defendant and counsel for the Commonwealth shall be held before the special master within six months of the date of entry of the direct appeal. Further status conferences presumptively shall be held at nine, twelve, and fifteen months after the

direct appeal has been entered, or at such other intervals as determined by the special master. The special master, in consultation with the clerk, will set the specific dates for these conferences.

(1)

Within four months after entry of the direct appeal, the defendant shall file a status report stating whether all transcripts necessary for review under G. L. c. 278, § 33E, have been received by the clerk for the full court.

(2)

At the six-month status conference, the defendant's counsel will be required to report whether the defendant does or does not intend to file a motion for a new trial. If no motion will be filed, the briefing schedule for the direct appeal will begin to run and will follow the time periods set forth in Mass. R. A. P. 19 (c) (1).

(3)

Unless the defendant will not be filing a motion for a new trial, at each status conference following the filing of the four-month status report, the defendant's counsel shall report on (i) the progress that has been made in investigating and pursuing the motion for a new trial; (ii) the next steps that are planned; and (iii) any difficulties that have been encountered or axe anticipated that might affect the timely filing of the motion for a new trial. The report may be given orally, unless the special master requires it to be in writing.

(4)

At the twelve-month status conference, if a motion for a new trial has not been filed, the defendant's counsel shall report whether a motion for a new trial will be filed. If counsel reports that a motion will be filed, counsel will then have up to six additional months to file the motion. If no motion will be filed, the briefing schedule for the direct appeal will begin to run and will follow the time periods set forth in Mass. R. A. P. 19 (c) (1).

(5)

If, at any point after the initial status conference, it becomes apparent to counsel that a motion for a new trial will not be filed, counsel shall so advise the clerk and counsel for the Commonwealth immediately, in which case the briefing schedule for the direct appeal will begin to run and will follow the time periods set forth in Mass. R. A. P. 19 (c) (1).

(6)

The special master may adjust the schedule for these periodic status conferences, and the time for the ultimate filing of a motion for a new trial, on a case-by-case basis.

(d) Action on motions

When a motion for a new trial is filed during the pendency of a direct appeal, G. L. c. 278, § 33E, authorizes the Supreme Judicial Court either to rule on the motion or to remand it to the Superior Court for hearing and determination there. If a motion is timely filed in accordance with this Order

and is remanded to the Superior Court, the Supreme Judicial Court, in the absence of extraordinary circumstances, will not require briefs to be filed for the direct appeal until the motion has been decided in the Superior Court.

(e) Time for filing briefs

As stated in paragraph (b) above, the denial of a motion for a new trial filed within eighteen months or within the period of any authorized extension will be considered with the direct appeal. When a motion for a new trial has been decided in the Superior Court, after the appeal from the ruling on the motion is entered in this court, the time for filing briefs addressing both the direct appeal and the ruling on the new trial motion (in a situation where the motion has been denied), or for filing briefs on the new trial ruling alone (in a situation where the motion has been allowed), will be set by the clerk as required by Mass. R. A. P. 19 (c) (2); presumptively, the briefing schedule will be ninety days for the appellant's brief, ninety days thereafter for the appellee's brief, and thirty days for any reply brief.

(f) Changes of counsel

If, during the pendency of an appeal, new counsel is appointed or has been retained to represent the defendant, counsel shall file a notice of appearance in this court immediately. The deadlines previously set forth in this Order and by the special master shall remain in effect despite the change in counsel, but the special master may adjust the time for status conferences and for the filing of briefs and new trial motions for good cause.

(g) Review after eighteen months

This Order will be reviewed by the court eighteen months from the date of this Order.

This Order shall be effective on September 4, 2019, and applicable to appeals entered on or after that date.

Applications For Stays Pending U.S. Supreme Court Consideration Of Applications For Certiorari

(Effective July 1, 1988)

Pursuant to Mass. R.A.P. 15(c), applications for stays pending the United States Supreme Court's consideration of applications for writs of certiorari shall be considered upon the filing of a motion with the Clerk of the Supreme Judicial Court for the Commonwealth. Reasonable notice of the motion shall be given to all parties. The motion may be decided with or without a hearing by the panel whose decision is sought to be reviewed. At its discretion, the court may order a hearing by a single justice who was a member of that panel either for the justice's recommendation or decision. Relief available under this order, or denial of such relief, may be conditioned on such reasonable

terms as the panel or single justice may impose, including appropriate conditions for the security of the adverse party.

Applications to a Single Justice Pursuant to Mass.R.Crim.P. 15(a)(2)

(Adopted effective February 1, 1997; amended June 8, 2016, effective August 1, 2016)

(a) Contents of Application.

An application to a single justice for leave to appeal an order determining a motion to suppress evidence prior to trial pursuant to Mass. R. Crim. P. 15(a)(2) shall contain the following information and supporting documents: (1) the docket number of the trial court case and current docket sheet; (2) the findings and rulings by the trial court; (3) a brief memorandum of law, including an explanation of how the administration of justice would be facilitated by the grant of leave to appeal; (4) an estimate of the length of the trial; (5) the scheduled trial date or next scheduled trial court event; (6) an affirmative representation whether the application and notice of appeal are timely under Mass. R. Crim. P. 15(b)(1); (7) if the application or notice of appeal is untimely, a motion to enlarge the time for filing with a supporting affidavit setting forth in meaningful detail the reasons for the delay; and (8) in an application by the Commonwealth, a statement whether the Commonwealth has a viable case without the suppressed evidence, and the strength of that case, if viable. A transcript shall not accompany the application unless oral findings and rulings were placed on the record by the trial court. The caption of the case shall remain the same as in the trial court.

(b) Time for Filing Notice of Appeal and Application.

A notice of appeal shall be filed in the trial court and an application for leave to appeal under Mass. R. Crim. P. 15(a)(2) shall be filed in the Supreme Judicial Court for the County of Suffolk within the time prescribed by Mass. R. Crim. P. 15(b)(1).

(c) Time for Filing Opposition.

Within fourteen days after the date of entry of the application for leave to appeal, or within such time as the single justice may direct, the other party or parties to the case may, but need not, file and serve a brief memorandum in opposition setting forth reasons why the application should not be granted. If the other party or parties determine not to file an opposition, a notice shall be served and filed within the time provided in this paragraph stating that no such opposition will be filed.

(d) Filing by Mail.

The application for leave to appeal and any opposition shall be docketed on the date of receipt and shall be deemed timely filed if (i) received within the time fixed for filing or (ii) accompanied by an affidavit signed by counsel of record attesting that the day of mailing was within the time fixed for filing.

(e) Service.

One copy of the application and supporting documents and one copy of each memorandum in opposition shall be served on all parties in the case, the chief of the appellate department for the prosecuting office, and any other interested parties. A certificate of service shall be filed for all documents setting forth the method of service and the names, addresses, telephone numbers, and e-mail addresses if any of all those upon whom service has been made.

(f) Hearing.

The single justice will consider the application on the papers submitted pursuant to this order unless he or she otherwise orders.

Authority of Appellate Clerks to Make Microforms of Transcripts in Their Custody

(Adopted July 28, 1987)

It is hereby authorized that the clerks of the appellate courts may make microform copies of transcripts in their custody. Such microform copies shall be made in accordance with standards and procedures established by the Chief Justice of the Supreme Judicial Court.

After the completion of a microform copy which accurately reproduces the transcript and forms a durable medium for its retention, the clerk may destroy the original transcript in the regular course of business.

Dismissals of Appeals and Reports Pending in the Supreme Judicial Court for Lack of Prosecution

(Adopted May 17, 1988, effective July 1, 1988)

It is ORDERED that, except in cases in which there has been a conviction of first degree murder, whenever the clerk of this court (clerk) shall not have received the brief and appendix of an appellant (including in that term a party treated as an appellant under Rule 5 of the Massachusetts Rules of Appellate Procedure (Rules)) within the time required or permitted by Rules 11(g), 13(a), 18(a) and 19(a) (unless said time shall previously have been enlarged or unless, in the case of an appendix, the filing shall have been deferred or dispensed with under Rule 18(c) or (f)), the clerk shall send a copy of this order by first class mail to the attorney of record for such appellant (and to such appellant at his last known address in a criminal case or if he is not represented by such an attorney in a civil case) and to all other parties or to their attorneys of record, together with notice in writing that the appeal of such appellant or the report, as the case may be, will be dismissed as to him for lack of prosecution unless, within twenty-one days of the date of such notice in a civil case

or within thirty days of the date of such notice in a criminal case, the clerk shall receive (a) a motion by such appellant to enlarge to a date certain set forth therein the time for serving and filing such brief and appendix and (b) an affidavit of such appellant (or his attorney) which shall set forth all the facts which such appellant wishes to have considered by the single justice of this court, who will act on such motion in accordance with the provisions of Rule 15(b) and (c). If no such motion and affidavit are received by the clerk within such period, the clerk shall forthwith dismiss such appeal or report for lack of prosecution and shall note such dismissal on the docket. The clerk shall take like action whenever a particular appellant has failed to serve and file his brief or appendix (when an appendix is required) within an enlargement of time previously granted. The sending of every notice required by this order shall be noted on the docket. Unless a dismissal shall have been vacated by a single justice within twenty-one days from the docketing thereof, the clerk shall notify the clerk of the trial court that the appeal or report has been dismissed as to the particular appellant for lack of prosecution. A dismissal in a criminal case may be vacated by a single justice of this court after the expiration of said twenty-one days upon a showing of the existence of a meritorious case.

Electronic Filing Pilot Projects

(Effective February 25, 2015)

To advance efficiency in the Massachusetts courts and thereby better serve the public and the bar, the Justices hereby authorize the trial and appellate courts to conduct pilot projects on electronic filing and electronic service of court documents. The attached Interim Massachusetts Electronic Filing Rules that will govern the pilot projects are also approved. Therefore,

It is ordered that:

1. Electronic filing pilot projects are hereby authorized for the trial and appellate courts. Trial court pilot courts shall be approved by the Chief Justice of the Trial Court and the Court Administrator. The Justices of the appellate courts shall approve the pilot projects in those courts.
2. The attached Interim Massachusetts Electronic Filing Rules are approved for use in the pilot projects. These rules shall remain in effect throughout the pilot projects, unless otherwise ordered by this Court. The rules may be amended by order of this Court.
3. If there is any conflict between the Interim Massachusetts Electronic Filing Rules and the Massachusetts Rules of Appellate Procedure, the Massachusetts Rules of Civil Procedure, or the rules of any appellate court or trial court department, the terms of the Interim Massachusetts Electronic Filing Rules shall govern the pilot projects.
4. Each pilot court shall issue an order describing the scope of its pilot project and any additional requirements that are not set forth in the Interim Massachusetts Electronic Filing Rules.
5. The pilot projects shall begin in March, 2015, or as soon after as practicable and shall continue until further order of the Court.

Matters Not Disposed of in the County Court for More Than Three Months

(Adopted February 8, 1972; amended April 5, 2007)

1.

It is ordered that in February, May, August and November of each year there shall be a call, in the county court (single justice session), of all petitions and suits which have remained for more than three months upon the docket of the county court, without final disposition. The clerk of the Supreme Judicial Court for Suffolk County shall, without further order of the court, prepare lists for such calls, and shall give seasonable and appropriate notice by mail to all interested parties or their attorneys of record. The notice in each case shall state that the matter is being called for dismissal or other appropriate order, and that failure of a party or his attorney to answer may result in dismissal of the matter.

2.

A copy of this order shall be filed with the clerk of the Supreme Judicial Court for Suffolk County.

Matters Pending in the Supreme Judicial Court for More Than Six Months Without Activity

(Adopted May 17, 1988, effective July 1, 1988)

It is ORDERED that in January and July of each year there shall be a call of all cases pending in the Supreme Judicial Court for the Commonwealth (other than cases which are ready for hearing or have been argued, but including cases in which a stay of appellate proceedings has been ordered) in which there has been no activity reflected on the docket (other than clerk's requests for status) for more than six months. For purposes of this standing order, ready for hearing shall mean that the appellant's brief and, if any is required, appendix, have been filed and no stay of appellate proceedings has been ordered. The clerk of the Supreme Judicial Court for the Commonwealth shall, after consultation with the single justice who will be sitting in January or July regarding cases which appropriately might be excluded from such calls, prepare lists for such calls, and shall give seasonable and appropriate notice by mail to all interested parties or their attorneys of record. The notice in each case shall state that the matter is being called for dismissal or other appropriate order, and that failure of a party or his attorney to answer may result in dismissal of the matter. A copy of this order shall be included with the notice.

Order Entered in Commonwealth v. Dwyer, 448 Mass. 122 (2006)

(Effective November 30, 2007)

In an Order entered on December 29, 2006, this Court approved five model notices and orders for use in all criminal cases in which a defendant seeks pretrial inspection of records of third parties that may be statutorily privileged. The Court also invited the Standing Advisory Committee (committee) on the Rules of Criminal Procedure to review the model forms and to propose any revisions to them.

On consideration of the committee's recommendations, it is hereby ordered that the five model notices and forms approved on December 29, 2006 are superseded and replaced by the six forms attached to the Order, titled as follows:

1. **Notice of a Hearing Regarding the Release of Records** [to replace form titled "Commonwealth's Notice Accompanying Summons to Record Holder and Third-Party Subject of Hearing on Defendant's Motion Under Rule 17(a)(2) of the Massachusetts Rules of Criminal Procedure, 378 Mass. 885 (1979)"];
2. **Notice Accompanying Court-Ordered Summons for Non-Privileged Records** [to replace form titled "Notice Accompanying Summons to Keeper of Records"];
3. **Notice Accompanying Court-Ordered Summons for Presumptively Privileged Records** [to replace form titled "Notice Accompanying Summons to Keeper of Records"]
4. **Protective Order for Defense Counsel** [to replace form titled "Protective Order for Defense Counsel" issued on December 29, 2006]
5. **Order Allowing Access to Privileged Records by Persons Other than Counsel** [to replace form titled "Order Allowing Access to Privileged Documents by Persons Other than Defense Counsel" issued on December 29, 2006]
6. **Protective Order for Prosecuting Attorney** [new form]

The content of the forms may not be altered without the prior approval of the Supreme Judicial Court. The Court may from time to time amend these forms upon recommendation of the committee or otherwise.

Procedure for Judges Seeking a Determination Concerning Attorney's Fees for Representation in a Matter Before the Commission on Judicial Conduct

(Added October 8, 2015, effective January 1, 2016)

Where a judge retains legal representation due to a matter before the Commission on Judicial Conduct, the Supreme Judicial Court may authorize the payment of reasonable attorneys' fees by the Commonwealth, or authorize the judge to accept free or discounted legal fees, in the following circumstances:

1. "With the approval of the Supreme Judicial Court, a judge shall be entitled to the payment of reasonable attorneys' fees by the Commonwealth in any case where the matter is dismissed by the commission at any stage after the filing of a sworn complaint or statement of charges, where the Supreme Judicial Court determines despite a commission recommendation for discipline that no sanction is justified, or where the Supreme Judicial Court determines that justice will be served by the payment of such fees." G. L. c. 211C, § 7(15). See S.J.C. Rule 3:09, Code of Judicial Conduct, Rule 3.13, Comment [11A].
2. "A judge may accept free or discounted legal representation due to a matter before the Commission on Judicial Conduct upon a determination by the Supreme Judicial Court that such representation would serve the public interest." See S.J.C. Rule 3:09, Code of Judicial Conduct, Rule 3.13, Comment [11B].

A judge seeking a determination under paragraph 1 or 2 shall file an application, supported by affidavit, with the clerk of the Supreme Judicial Court for the Commonwealth, setting forth with particularity the reasons why the Court should make the requested determination. The application may be accompanied by a motion to impound. The clerk shall transmit the application to the Justices, and shall notify the judge of their determination. A judge awarded payment of reasonable attorneys' fees or permitted to accept free or discounted legal services shall publicly report in the manner required under Rule 3.15 of the Code of Judicial Conduct.

Protection of Personal Information

(Effective January 7, 2010)

Introduction.

Massachusetts General Laws c. 93H provides that the judicial branch shall adopt rules or regulations to safeguard certain nonpublic personal information relating to residents of the Commonwealth, the improper or inadvertent disclosure of which could create a substantial risk of identity theft or fraud. This Order governs the security and confidentiality of personal information as defined by c. 93H in the Judicial Branch. It is designed to safeguard the personal information of all individuals, including nonresidents. It shall apply to the appellate courts, trial courts, court administrative offices and court affiliates, which shall be in compliance by September 1, 2010.

Definition.

Under G. L. c. 93H, personal information consists of a resident's "first name and last name, or first initial and last name, in combination with any one or more of the following data elements that relate to such resident:

a. Social Security number;

b. driver's license number or state-issued identification card number;
c. financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident's financial account.

Chapter 93H provides that personal information "shall not include information that is lawfully obtained from publicly available information, or from federal, state or local government records lawfully made available to the general public."

Information Security Program.

Each appellate court, the Trial Court and any court affiliate that owns, stores or maintains personal information about an individual shall develop, implement, maintain and monitor a comprehensive, written information security program applicable to any records containing such personal information. The information security program shall govern the collection, use, dissemination, storage, retention and destruction of personal information. The program shall ensure that courts and court affiliates collect the minimum quantity of personal information reasonably needed to accomplish the legitimate purpose for which the information is collected; securely store and protect the information against unauthorized access, destruction, use, modification, disclosure or loss; provide access to and disseminate the information only to those who reasonably require the information to perform their duties; and destroy the information as soon as it is no longer needed or required to be maintained. Such information security program shall contain administrative, technical, and physical safeguards to ensure the security and confidentiality of such records.

Every information security program shall include:

(1) A requirement for notice to the Chief Justice for Administration and Management in the case of a trial court, and to the appropriate Chief Justice in the case of an appellate court, in the event of any incident involving a breach of security[Note 1] of personal information.
(2) Regular monitoring to ensure that the information security program is operating in a manner reasonably calculated to prevent unauthorized access to or unauthorized use of personal information; and upgrading information safeguards as necessary to limit risks.
(3) A regular review, at least annually, of the scope of the security measures. Such review also must be conducted whenever there is an incident involving a breach of security and when there is a material change in business practices that may reasonably implicate the security or integrity of records containing personal information.
(4) Documentation of responsive actions taken in connection with any incident involving a breach of security, and actions taken, if any, to make changes in practices relating to protection of personal information.

[Note 1] G. L. c. 93H defines breach of security as "the unauthorized acquisition or unauthorized use of unencrypted data or, encrypted electronic data and the confidential process or key that is capable of compromising the security, confidentiality, or integrity of personal information, maintained by a person or agency that creates a substantial risk of identity theft or fraud against a resident of the commonwealth. A good faith but unauthorized acquisition of personal information by a person or agency, or employee or agent thereof, for the lawful purposes of such person or agency, is not a breach of security unless the personal information is used in an unauthorized manner or subject to further unauthorized disclosure."

Departmental reviews.

Each appellate court, court department and court entity shall review the type of personal information it collects and maintains with the goal of identifying any personal information that need not be collected or maintained. Each department will report the results of this review to the Chief Justice for Administration and Management, or, in the case of the appellate courts and affiliated agencies, to the Chief Justice of the Supreme Judicial Court, within six months.

Computer systems.

If personal information is stored electronically, the information security program shall include provisions that relate to the protection of personal information stored or maintained in electronic form. Such provisions shall be developed with the Courts' Chief Information Officers.

Contracts.

All contracts entered into by the Judicial Branch shall contain provisions requiring contractors to notify the court of any incident involving a breach of security of personal information, and to certify that they have read this Order, that they have reviewed and will comply with all information security programs and policies that apply to the work they will be performing, that they will communicate these provisions to and enforce them against their subcontractors, and that they will implement and maintain any other reasonable and appropriate security procedures and practices necessary to protect personal information to which they are given access as part of the contract from unauthorized access, destruction, use, modification, disclosure or loss.

Record of Proceedings in the Supreme Judicial Court of Suffolk County

(Adopted August 18, 1976)

Unless a justice shall otherwise direct, all proceedings in the Supreme Judicial Court for the county of Suffolk shall be recorded electronically, subject to the availability and functioning of the appropriate recording devices. Cassette or similar tape recordings of the original recording shall be available to counsel through the clerk's office on the payment of a reasonable fee and notice of the making of such request to all parties.

If a transcript of the proceedings is required by statute or is requested by a justice, unless an official stenographer has been appointed, a transcript of the proceedings shall be made under the direction of the clerk and certified by him.

A certified copy of any transcript prepared under the direction of the clerk shall be available to counsel on the payment of a reasonable fee. In his discretion, a justice of the court may order a party or parties to bear the cost of the preparation of a transcript for use of the court.

Sampling of case records pursuant to section 6 of Supreme Judicial Court Rule 1:11, Rule Relative to the Disposal of Court Papers and Records, G.L. c. 221, §27A, as amended

(Adopted September 26, 2018, effective October 1, 2018; amended effective May 19, 2022)

This Order Repeals and Replaces the Order Re: Sampling of Case Records Pursuant to Section 6 of Supreme Judicial Court Rule 1:11, Rule Relative to the Disposal of Court Papers and Records G.L. c. 221, §27A issued on September 26, 2018 and effective on October 1, 2018.

Case records not required to be retained pursuant to S.J.C. Rule 1:11 may be destroyed after they are sampled pursuant to this Order, which sets forth the sampling requirements for case records in all departments of the Trial Court.

All case record samples retained pursuant to this Order shall be stamped so as to be clearly visible on the front, "SAMPLED". All containers for such case records shall be labeled so as to be clearly visible on the front, "SAMPLED - SEE SELECTION CRITERIA IN CLERK'S OFFICE." Copies of the selection criteria shall be available on the court's website, in the storage area containing records, in the clerk's office, and in the State Archives.

Boston Municipal Court, District Court, Housing Court and Juvenile Court.

Case records under the custody of the clerks of these departments not required to be retained pursuant to S.J.C. Rule 1:11 may be destroyed as long as the following samples are retained:

Minor violation records:[2] a random selection of 20 case records for each type of case record for each year of case records to be destroyed.

All other records: a systematic sample of case records consisting of

- 5% (docket numbers ending in "00," "20," "40," "60 " and "80") of case records for the period from 1800 to 1969, and
- 2% (docket numbers ending in "00" and "50") of case records starting in 1970.[3]

[2] Section 2 of Rule 1:11 defines "minor violation records" as "case records, other than dockets, filed in or relating to a proceeding involving civil motor vehicle infractions, parking, littering, bicycles, pedestrians, municipal dog control, the decriminalized disposition of violations of municipal ordinances or by-laws or other decriminalized regulatory offenses."

[3] If a case included within the samples has no papers but has a card indicating that it was filed separately or was sent to the Superior Court, the card shall be retained as part of the sampled file.

Land Court.

Case records under the custody of the recorder of the Land Court not required to be retained pursuant to S.J.C. Rule 1:11 may be destroyed as long as the following samples are retained:

Case records from proceedings to foreclose a mortgage pursuant to the federal Servicemembers Civil Relief Act may be destroyed ten years after final disposition of the case as long as a random sample of twenty case records is retained for each year of records to be destroyed.

All other records: a systematic sample of case records in all permit sessions and miscellaneous cases within the jurisdiction of the Land Court consisting of

- 5% (docket numbers ending in "00," "20," "40," "60' "and "80") of case records for the period prior to 1970, and
- 2% (docket numbers ending in "00" and "50") of case records starting in 1970.

Probate and Family Court [Reserved]

Superior Court.

Case records under the custody of the clerks of the Superior Court not required to be retained pursuant to S.J.C. Rule 1:11 may be selectively retained as long as the following are retained:

In Barnstable, Dukes, Essex and Nantucket counties: all case records filed before 2000. Starting in 2000, a systematic sample of case records consisting of

- 2% (docket numbers ending in "00" and "50").

In Berkshire, Franklin and Hampshire counties, a systematic sample of case records consisting of

- 10% (docket numbers ending in "0") of case records for the period from 1860 to 1968, and
- 2% (docket numbers ending in "00" and "50") of case records starting in 1969.

In all other counties,[4] a systematic sample of case records consisting of

- 20% (docket numbers ending in "0" and "5") of case records from 1860 to 1889,
- 10% (docket numbers ending in "0") of case records from 1890 to 1919,
- 5% (docket numbers ending in "00 " "20 " "40" "60" and "80") of case records from 1920 to 1969, and
- 2% (docket numbers ending in "00" and "50") starting in 1970.

[4] In the period when law and equity files are separate, a 30% (docket numbers ending in "3", "6", and "9") sample of equity files shall be retained for the following years:
  - Bristol County: entered 1897 - June 30, 1974; and
  - Middlesex and Suffolk Counties: entered 1892 to June 30, 1974.

Time Within Which Cases May Be Determined by the Appellate Courts

(Adopted October 2, 1978; amended January 24, 1983)

WHEREAS the Chief Justice and the Justices of the Supreme Judicial Court recognize the necessity for reasonably expeditious disposition of appealed cases, and appreciate the Court's duty of public accountability in this matter; and

WHEREAS the Justices of the Appeals Court have expressed their agreement with those views by adopting today such portions of this order as relate to the Appeals Court,

Now therefore it is ordered:

The following standards are adopted as administrative goals establishing a time within which cases can be expected to be determined by the appellate courts of Massachusetts. Variation from the 130-day standard set out in paragraph 2 should be permitted by vote of the quorum when necessary to accommodate special problems in individual cases. Docket entries will be made as to any such action.

1. Oral argument, or the decision conference in cases not orally argued, should be held promptly after the appellee's brief is filed or should have been filed. Cases in which the appellee's brief is due on or before February 1 should be heard or made the subject of a decision conference during that court year. (Court year: September 1 through August 31.)
2. Cases should be decided within 130 days after argument or after submission without argument.
3. Paragraphs one and two shall be applicable in the Supreme Judicial Court forthwith, and paragraph two shall be applicable in the Appeals Court for all cases argued or submitted for decision after the date of this order. Paragraph one shall be applicable in the Appeals Court as soon as possible after the additional justices authorized by St. 1978, c. 478, § 104 links to PDF file, have assumed their duties, with a tentative goal of full applicability not later than the close of the 1979-1980 court year.

William A. Hinton State Laboratory Institute

(Effective November 9, 2012)

This Order is issued to facilitate the handling of matters related to allegations of misconduct at the William A. Hinton State Laboratory Institute. To further the expeditious handling of such matters, and notwithstanding any provisions to the contrary in any Rule of Court or Standing Order, it is hereby ORDERED that a Chief Justice of a Trial Court Department may assign for all purposes, including disposition, any post conviction motion in which a party seeks relief based on alleged misconduct at the Hinton State Laboratory to any judge of that Trial Court Department. The

assigned judge may reassign the motion to the original trial judge where the interests of justice require.

This Order is effective immediately and shall remain in effect until further Order of this Court.