

Amendments to the Rules of Professional Conduct on Harassment, Discrimination and Maintaining Competence and Compliance with the Rules

1. Amendments to Comments to Rule 1.2: Add new Comment 1A to Rule 1.2 immediately after Comment 1 to read as follows:

[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. Amendments to Rule 3.4 and its comments:

(a) Delete paragraph (i) to Rule 3.4, insert the word "or" at the end of paragraph (g)(3) of Rule 3.4, and replace "; or" at the end of paragraph (h) of Rule 3.4 with a period.

(b) Add new Comment 3A to Rule 3.4 immediately after Comment 3 to read as follows:

[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.

(c) Delete Comment 7 to Rule 3.4.

3. Amendments to Rule 4.4: Replace Rule 4.4(a) and Comment 1 with revised Rule 4.4(a) and Comments 1, 1A and 1B as follows:

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 based on race, sex, marital status, religion, national origin, disability, age, sexual orientation or gender identity against such a person. This clause (3) does not preclude legitimate advice or advocacy otherwise consistent with these Rules.

No change to paragraph (b)

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: aggressive physical conduct that would cause a reasonable person to feel threatened or the threat to use same; following a person (or causing another to follow a person) in or about a public place or places; communicating to or about such other person any lewd, lascivious or threatening words, 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 intended 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.

No change to comment 2.

4. Amendments to Comments to Rule 5.1: Add new Comment 3A to Rule 5.1 immediately after Comment 3 to read as follows:

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.

Amendments to the Rules of Professional Conduct re Sexual Relations with Clients

1. Amendments to Rule 1.8: Add new Rule 1.8(j) and Comment 17, and revise Rule 1.8(k) and Comment 20 as follows:

- (j) (1) A lawyer shall not:
 - (a) 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
 - (b) 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.
- (2) In addition, in domestic relations matters, a lawyer shall not enter into sexual relations with a client during the course of the lawyer's representation of the client. Rule 1.8(j)(2) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.
- (k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (j)(1) that applies to any one of them shall apply to all of them.

Client-Lawyer Sexual Relationships

[17] 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)(a) 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)(1)(b) 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. Because domestic relations matters entail a heightened risk of exploitation of the client, paragraph (j)(2) prohibits lawyers from entering into sexual relations with domestic relations clients during the course of the representation even if the sexual relationship is consensual and prejudice to the client is not immediately apparent. 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.

[20] Under paragraph (k) a prohibition on conduct by an individual lawyer in paragraphs (a) through (j)(1) 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. The prohibition in (j)(2) is personal.

2. Revise Comment 12 and add new Comment 12A to Rule 1.7.

[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.

3. Add new definition of Sexual Relations in Rule 1.0:

Rule 1.0

(___) “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.

PROPOSED REVISION OF MASSACHUSETTS ADVERTISING RULES

Replace Current Rules 7.1-7.5 with Revised Rules 7.1-7.3

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.

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(c), 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.

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(j).

[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 U.S. 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 U.S. 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.

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).

Amendments to Preamble and Scope of the Rules of Professional Conduct

Revise the Preamble and Scope to read as follows:

PREAMBLE AND SCOPE

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.

[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.

Amendments to the Rules of Professional Conduct re Client Files

1. Revise paragraph (c) of Rule 1.15A to read as follows:

(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.

2. Add the following new paragraph (g) to Rule 1.15A and renumber current paragraph (g) as (h):

(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.

3. Add the following new Comment 8 to Rule 1.15A and renumber current Comments 8 and 9 as Comments 9 and 10:

[8] For a lawyer to rely on an agreement in writing of the client as an alternative for the files 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.

**Amendments to the Rules of Professional Conduct to
Move the Definition of the Term “Confidential Information” to Rule 1.6(a)**

1. Rule 1.6(a) would be revised to read as follows:

- (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 legal community or in the trade, field or profession to which the information relates.

2. Comment 3A to Rule 1.6 would be revised to read as follows:

[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.

3. Rule 1.0 would be revised to insert the following new Rule 1.0(c) and the subsequent paragraphs of Rule 1.0 would be renumbered. All cross references to such Rules affected by the renumbering would be corrected.

- (c) “Confidential information” is defined in Rule 1.6(a).