Memorandum

To: BBA Executive Committee Date: 1/14/2014

From: BBA Ethics Committee

Re: Changes to the Model Rules of Professional Conduct Proposed by SJC Standing Advisory Committee on the Massachusetts Rules of Professional Conduct

We are writing to review for the Executive Committee and Council the July 1, 2013 Report of the Supreme Judicial Court Standing Advisory Committee on the Rules of Professional Conduct, and to propose certain comments on the Report.

The Report memorializes the Standing Advisory Committee's general review and recommendations for changes to the Massachusetts Rules of Professional Conduct in view of comprehensive revisions to the ABA Model Rules of Professional Conduct in 2002, and additional revisions in 2012 and 2013 targeted to changes in law practice resulting from globalization and the profession's increasing use of technology. The report is thorough and thoughtful, and disagreements about important aspects of the Rules and proposed changes are identified clearly, with majority and minority positions set out in detail.

The Executive Summary to the Standing Advisory Committee's Report summarizes most of the important changes to the Rules that are being proposed, as well as areas where Rules will deviate from the Model Rules and where there was dissent within the Committee. The most significant areas of disagreement concerned the following issues:

1. The advisability of proposed amendments to Rule 1.6 expanding the circumstances in which disclosure of client confidential information is permissible to prevent, mitigate or rectify criminal or fraudulent conduct, beyond what the corresponding ABA Model Rule would permit.

2. The Standing Advisory Committee proposes to conform Rule 1.8(b) and 1.9(c)(1) to the Model Rule, with the effect that the rule will no longer contain an express prohibition against the use of client confidential information for the lawyer's advantage.

3. The Standing Advisory Committee's recommendation that the SJC retain the current scheme in Rule 1.10 regarding imputation of conflicts when a lawyer moves to a firm representing a party in a matter adverse to a client of the lawyer's prior firm. The current Massachusetts Rule prohibits the new firm from avoiding imputation of the lateral's former-client conflict (and thus requires the new firm to withdraw) unless (i) the former client consents; (ii) the lateral has no confidential information of the former client that is material to the matter; or (iii) the lawyer had neither substantial

involvement nor substantial material client information regarding the matter, and is subject to a screening restriction at the new firm. In contrast, the corresponding ABA Model Rule, adopted with significant dissent in a close vote, permits the lawyer's new firm to continue with the matter without consent of the lateral's former client by implementing a screening restriction, regardless of the lateral's level of involvement at his old firm on behalf of the former client.

4. The Standing Advisory Committee proposes adoption of ABA Model Rule 1.18. Unlike the current Massachusetts Rule, the Model Rule expressly addresses lawyers' duties when prospective clients divulge information in discussions preliminary to engagement, but where no attorney-client relationship develops thereafter. The Rule would prohibit the lawyer from representing an adverse party in the same or substantially related matter only if the information received from the first prospective client "could be significantly harmful" to that person in the matter. Dissenters argue for a slightly different formulation, such that adverse representation would be permitted only if the information received "could not be used to the disadvantage" of the person in the matter.

5. The Standing Advisory Committee recommends retaining the requirement in Rule 3.8 that a prosecutor seek judicial approval before issuing a subpoena to a lawyer to obtain evidence about the lawyer's client. The ABA Model Rule does not so require.

6. Among the changes to Rule 4.4., the Standing Advisory Committee recommends adding a comment, not found in the Model Rules, stating that a lawyer who learns that he has received (or will receive) documents or electronically stored information produced inadvertently by an adverse party may return or delete the document without reading it, "as a matter of professional judgment ordinarily reserved to the lawyer," *i.e.,* without the client's permission.

7. The Committee recommends deleting the current requirement in Rule 7.2 requiring copies of all advertising material to be retained for two years.

8. The Committee recommends deleting Rule 8.4(h) of the current Rules, the catch-all provision defining professional misconduct to include "any other conduct that adversely reflects on his or her fitness to practice law." This would conform to the Model Rule.

On many of these matters, our Committee did not reach a sufficiently strong consensus to suggest that the BBA weigh in with comments or a position. However, we are proposing that the Council approve and submit the attached statement which, in summary:

- Supports the Standing Advisory Committee's inclusion of a comment to proposed Rule 1.8 relating to intimate and sexual relationships between lawyers and clients. Our committee believes that this comment could be strengthened to provide additional guidance to lawyers, similar to the detailed exposition of the issue in the cognate Model Rule comment, and urges further study including potential inclusion of a Rule on this topic.

- Opposes a portion of proposed Comment 2A to Rule 1.15(b), which suggests that flat fees are generally exempt from the requirement that advance fees be deposited in client funds accounts. We are concerned that such an exemption is overbroad and harmful, but recognize that there are circumstances where such treatment is reasonable (and in some cases possibly essential to securing representation), and therefore permissible with the client's informed consent. We have suggested alternative language for Comment 2A that addresses our concerns while leaving room for alternative arrangements where reasonable.

- Supports the Standing Advisory Committee's recommendation to adopt ABA Model Rule 1.18 addressing duties to prospective clients with whom a lawyer has communicated, but proposes a change to proposed Rule 1.18(c).

- Supports the Standing Advisory Committee's recommendation to adopt ABA Model Rule 3.5 and comments, which would end the current blanket ethical prohibition on communications with jurors after discharge.

- Supports the Standing Advisory Committee's recommendation to delete the current requirement in Rule 7.2 that lawyers retain copies of all advertisements.

- Opposes the Standing Advisory Committee's recommendation to delete Rule 8.4(h)

Comments of the Boston Bar Association

The Boston Bar Association (BBA) respectfully submits the following comments on the July 1, 2013 Report of the Standing Advisory Committee on the Rules of Professional Conduct. These comments have been approved by the BBA's governing Council based on comments and recommendations received from various of our Sections and Committees, including our Professional Ethics Committee.

First, we commend the Standing Advisory Committee on its outstanding work in developing proposals for changes to the Rules, and in articulating important points of disagreement among members of the Committee. The Report reflects and incorporates the substantial work of the ABA Ethics 2000 and Ethics 20/20 Commissions, leading to important revisions to the ABA Model Rules of Professional Conduct and reflecting the evolution of the legal profession since our Massachusetts Rules were adopted more than fifteen years ago.

Reflecting the legal issues facing the clients we serve, the practice of law occurs against a landscape where the lines demarking state borders fade, whether in litigation, transactional, or regulatory practice. It is important in this environment that we strive to conform our rules to those of the other states, and thus to the ABA Model Rules in many instances. The Standing Committee's Report sets forth a road map for the Court to modify the rules in this spirit. The conflicts within the Committee -- as reflected in the majority and dissenting views on important issues such as possible changes to Rule 1.6 (concerning a lawyer's ability to disclose confidential information to prevent harm) and 1.10 (concerning imputed disqualification when lawyers switch firm affiliations) -- reflect divisions within our own membership on these issues.

There are a few matters on which we have more specific comments that we hope will be of assistance to the Court and in any further work of the Committee toward revising the Rules.

I. Sexual Relationships With Clients

ABA Model Rule 1.8(j) treats sexual relations with clients under the rubric of a prohibited transaction. It provides: "[a] lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced." The Standing Advisory Committee advises against adopting the above rule, but also proposes to add a comment to Rule 1.7, regarding conflicts of interest, which would warn that combining a professional lawyer-client relationship with and intimate personal relationship raises concerns, particularly acute if the relationship is sexual, about conflicts of interest and impairment of judgment.

We support the inclusion of a new comment, and agree that the flat prohibition as in Model Rule 1.8(j) may be an overbroad response to a complex, if serious, problem. We appreciate that the decision not to include a flat prohibition in the Massachusetts rules was

originally made many years ago, not in this round of revisions. That said, we would welcome further consideration of how the Massachusetts rules should address this concern.

We note that the Standing Advisory Committee's proposed Comment 12 to our Rule 1.7 is far more abbreviated than the corresponding Comment 17 and the ABA Model Rule. Comment 17, in particular, provides as follows:

> 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 almost always 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. In addition, such a relationship presents a specific danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of actual prejudice to the client.

This comment, in our view, provides better guidance to lawyers regarding the hazards of lawyer-client intimate and sexual relationships, and should be adopted as Comment 12 o MRPC 1.7, except that the last sentence should be changed to read as follows:

> Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, in the great majority of cases initiation of a sexual relationship with a client will involve a conflict regardless of whether the relationship is consensual and regardless of the absence of actual prejudice to the client.

II. Proposed Amendment to Rule 1.15, Comment 2A (Flat Fees)

The Standing Advisory Committee proposes that Rule 1.15(b) be amended to make clear that all advance payments, whether for legal fees or expenses, must be deposited in a trust account, to be withdrawn by the lawyer only as such fees are earned or as expense are incurred. Consistent with the change, there is a proposed new comment, 2A, which would state that fees and expenses paid in advance "can be withdrawn by a lawyer only as fees are earned or expenses are incurred." These changes conform to the substance of ABA Model Rule 1.15(c) and are welcome.

The proposed new Comment 2A, however, would go on to provide as follows:

> "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."

Whether intentionally or not, this passage seems to imply that a lawyer may choose to deposit a client payment into his or her business account merely because the lawyer and client have agreed that the engagement will be performed for a flat fee, even where the fee is paid in advance of the work being performed.

We view this exception for flat fees to be overbroad and unwise. There is nothing in the Standing Advisory Committee's report discussing why this aspect of Comment 2A has been included. There is no such language in Model Rule 1.15 or in the comments on it. We believe that such a rule is at variance with the practice in many other states, some of which make clear either by rule or comment that flat fees must ordinarily be treated as property of the client until earned.

An agreement for fixed fees to be collected after performance of a project, or in parts after meeting agreed milestones, raises no ethical/client protection concerns and a lawyer taking the money in advance to assure later payment is a prudential step and long dealt with in Massachusetts by trust account placement requirements rigorously enforced by Massachusetts Bar Counsel and courts. But the Appeals Court has already held unenforceable as against public policy an agreement to charge a client a so-called "non-refundable retainer" because it improperly locks the client into an initial choice of counsel. *Smith v. Binder*, 20 Mass. App. Ct. 21, 23 n.3 (1985). *See also In re Cooperman*, 633 N.E.2d 1069, 1072 (N.Y. 1994). We see similar problems with an interpretation of Rule 1.15 that would permit lawyers to treat flat fees paid in advance as their own before rendering any service.

Whether a fee is flat, contingent, or based on an hourly rate does not indicate when or whether the fee has been earned, and in the vast majority of situations fees are earned as work is performed. The exceptions to the requirement that lawyers account to clients for advance payments should be narrowly construed. There is significant modern movement away from hourly fees to flat fees in many areas of civil litigation, transactional practice, and trusts and estates. At the same time, lawyer/law firm financial failures are an unfortunate reality, including in criminal defense practice where we understand the flat fee model for the defense of street crimes is common. The comment would seem to invite evasion of a primary purpose of Rule 1.15 – to protect clients against the inability to recover unearned fees deposited in advance – in the usual case where the flat fee covers work to be performed over a period of time, and is not insubstantial.

We do not rule out that there may be occasions when a client might specifically agree, with informed consent, that the advance payment of a flat fee may be considered the property to the attorney on receipt, and this might be viewed as reasonable and thus consistent with the Rules. This might be the case where the fee is so small and the engagement of such short duration that there is little practical consequence to the client, or for other arrangements where the client is sophisticated and the nature of the relationship with the lawyer is such that advance payment can be shown to have value to the client. One example might be situations where a lawyer agrees to handle all of a client's or insurer's cases of a certain type on a flat fee per case, and each flat fee is paid up front, or at pre-arranged intervals.

We also recognize that there may be categories of cases where prohibiting the lawyer and client from agreeing to treat an up-front flat fee as property of the lawyer would impede clients in finding counsel. The Bankruptcy Law Section has advised us that in Chapter 7 Bankruptcy representation, it is common and essential that up-front flat fees be considered earned, and deposited in the lawyer's account rather than as client funds, because substantive bankruptcy laws otherwise treat those funds as an asset of the estate subject to distribution to creditors. We have proposed below an alternative comment that, we believe, leaves room for lawyers and clients to agree to treat flat fees as fully earned up front, in a manner that enables them to address these situations.

The treatment of flat fees was considered at length by the District of Columbia Court of Appeals in *In re Robert W. Mance, III*, 980 A.2d 1196 (D.C. App. 2009), as well as n the cases cited therein. The Court in *Mance* held that when an attorney receives a flat fee at the outset of representations, the payment is an advance on unearned fees and is to be treated as property of the client until earned, unless the client consents to a different arrangement, with informed consent that would include, minimally, the protective benefits of having advance fees held in trust.

In our view, a more appropriate comment to Rule 1.15, with the proposed amendments, would conform closely to the recommendations of the District of Columbia Bar set forth in Ethics Opinion No. 355 (November 2010) published in response to the Court's invitation in *Mance*. *See* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion355.cfm. We would propose something along the following lines:

> Absent the client's informed consent to a different arrangement, a lawyer must deposit a flat or fixed fee paid in advance of legal services in the lawyer's trust account, and shall be subject to all of the provisions of this rule, including paragraphs b(2) and d(2). The lawyer and client may agree concerning how and when the attorney is deemed to have earned some, or all, of the flat fee, which must bear a reasonable relationship to the anticipated course of the representation. In the absence of any agreement with the client regarding milestones by which the lawyer will have earned portions of the fixed fee, the lawyer will have the burden to establish that whatever funds that have been transferred to the lawyer's operating account have been earned.

> A lawyer may place unearned funds in an operating account if the lawyer obtains informed consent from the client. In order to obtain such consent, the lawyer must explain to the client that placement in an operating account does not affect a lawyer's obligation to refund unearned funds if the client terminates the representation. Although the Rules do not mandate a writing, these disclosures should be in writing, as a matter of prudence for both the lawyer's and client's protection.

III. Proposed Change to Rule 1.18

The Standing Advisory Committee proposes to adopt in their entirety ABA Model Rule 1.18 and its comments, which govern "Duties to Prospective Clients." We generally support the adoption of Rule 1.18, but agree with the dissenting members of the Advisory Committee with respect to the first sentence of proposed Rule 1.18(c), which deals with the lawyer subsequently taking on a litigation adverse to the interests of the prospective client. The proposed Massachusetts 1.18(c) states:

> "(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be *significantly harmful* to that person in the matter, except as provided in paragraph (d).

(Emphasis added.) We agree with the dissent that the italicized language would require a lawyer, in order to be in compliance with the rule, to "parse whether the information acquired from the prospective client is merely 'harmful,' as opposed to 'significantly harmful.' Often the distinction between "harmful" and "significantly harmful" cannot be determined at the initial stage of consultation with a prospective client. Further, we believe lawyers should not be in a position to use information gained from prospective clients against those prospective clients in the future. We therefore would recommend, as the dissent does, that Massachusetts replace "significantly harmful" with "used to the disadvantage of", so that the relevant language in Massachusetts 1.18(c) would read:

> "if the lawyer received information from the prospective client that could be *used to the disadvantage* of that person in the matter. . . ."

We believe this would provide a clearer and, therefore, a more workable standard for lawyers in the situation governed by the rule.

IV. Proposed Adoption of Model Rule 3.5 Re: Communications With Jurors

We believe that the time has come to alter the flat prohibition on post-verdict communications with jurors. We believe that lawyers generally should be permitted to contact jurors in a non-coercive way to solicit feedback on their performance, as they are permitted to do in many other jurisdictions. We support the Standing Advisory Committee's recommendation to

adopt the Model Rule, which permits such activity in the absence of a contrary order from the trial judge, subject to restrictions.

We recognize that adoption of the Model Rule may not immediate alter current practice, as the Supreme Judicial Court has ruled that lawyers may not initiate contact with jurors post-verdict, as a matter of law separate and apart from the Rules of Professional Conduct. We nevertheless hope that this change will move the Court to re-examine the issue.

V. Proposed Amendment to Rule 7.2, Deleting Requirement to Retain Advertising Material

We agree with and support the recommendation of the Standing Advisory Committee, following revisions to the ABA Model Rules, that the requirement to retain all advertising for two years be deleted. The definition of lawyer advertising material is broad, and encompasses a vast amount of information posted on social media and lawyer and law firm websites, making strict compliance with the Rule exceptionally burdensome to a large number of lawyers who do not advertise more formally.

VI. Proposed Deletion of Rule 8.4(h) "Catch-All"

The Standing Advisory Committee proposes deleting from the definition of professional misconduct the catch-all phrase in Rule 8.4(h): "any other conduct that adversely reflects on his or her fitness to practice law." Like the Committee, we are concerned with the vagueness of this standard, and that it could, theoretically at least, be applied inconsistently or otherwise improperly to discipline or even disbar an attorney for private, non-criminal conduct, even with little or no connection to the practice of law.

We are more troubled, however, that there may be egregious conduct by an attorney that is not a crime or fraud, does not violate any specific Rule of Professional Conduct, but nevertheless so clearly demonstrates unfitness to practice law that involvement of disciplinary authorities is warranted and beneficial to the profession. The Dissent lists some such circumstances, and others are not difficult to imagine. For example, neither the existing Rules nor the rules proposed by the Committee specifically prohibit a lawyer from engaging in a romantic or sexual relationship with a client. But the Committee's proposed Comments make clear that such relationships are fraught with peril and inadvisable. In a situation where the attorney's performance and judgment are in fact clouded in a manner that is harmful to the client, but not fraudulent, criminal, or in violation of another specific rule, the catch-all may appropriately be invoked. Furthermore, while recognizing that the vagueness of Rule 8.4(h) renders is susceptible to abuse in theory, we are not aware of any reported abuse of this rule in practice. Rather, it appears that the reported cases tend to focus on conduct that warrants discipline.

Accordingly, we opposed deleting Rule 8.4(h).