

Supplemental Report of the Standing Advisory Committee on the Rules of Professional Conduct

May 14, 2014

This supplemental report discusses additional proposed changes to the Standing Advisory Committee's Proposed Draft of the Massachusetts Rules of Professional Conduct since its proposal dated July 1, 2013 was published for public comment. These additional proposed changes are identified in the document titled Standing Advisory Committee's Proposed Draft of the Massachusetts Rules of Professional Conduct revised as of May 14, 2014.

The Committee carefully considered the thirteen comments received, with a particular focus on comments that advanced new arguments. In many instances, the comments received endorsed the Committee's proposal and, in several instances, supported the dissenting minority positions. All comments received from public or private organizations and government officials are posted on the Supreme Judicial Court's website.

1. List of Comments Received

From Public or Private Organizations and Government Officials:

- a. Association of Corporate Counsel
- b. Boston Bar Association
- c. Committee for Public Counsel Services (CPCS)
- d. IOLTA Committee
- e. Mass. Academy of Trial Attorneys
- f. Mass. Association of Criminal Defense Lawyers (MACDL)
- g. Massachusetts Bar Association
- h. Massachusetts Attorney General Martha Coakley
- i. Suffolk County District Attorney Dan Conley
- j. US Attorney (D. Mass) Carmen Ortiz

From Individuals:

- k. Robert M. Buchanan
- l. Henry J. DuLaurence . III
- m. Richard Falk

2. Explanations for Proposed Changes of Substantive Importance.

A. Rule 1.1, Comment [7]. The Committee agreed to add "such as in the context of discovery" to the end of this comment, as discovery is a prominent example of an instance where the parties may have additional obligations beyond the scope of the rules.

B. Rule 1.6. The Committee reconsidered the adequacy of its definition of "confidential information" in Comments 3A and 3B. The current Massachusetts Rule 1.6 differs from ABA Model Rule 1.6 in the definition of the information protected by Rule 1.6. The Model Rules refer throughout to "information relating to the representation." Massachusetts Rule 1.6 refers to a

subset of that information identified as “confidential information.” Comments 3A and 3B to current Massachusetts Rule 1.6 provide some guidance as to the scope of the term “confidential information.” The Committee clarified that “confidential information” consists of any information gained during representation of a client that is protected by the attorney-client privilege, likely to be embarrassing or detrimental to the client if disclosed, or the lawyer has agreed to keep confidential. The Committee also clarified that “confidential information” does not ordinarily include a lawyer’s legal knowledge or legal research, or information that is generally known in the legal community or in the trade, field, or profession to which the information relates. The clarification is similar to the definition of “confidential information” in the New York Rules of Professional Conduct. The Committee additionally eliminated an outdated example.

Consistent with the more explicit statement of the scope of the term “confidential information” in Rule 1.6, other references “information” that are intended to refer to confidential information in the comments to Rule 1.6 and in other places in the rules, as noted below, were clarified by the addition of the word “confidential” before the word “information.”

C. Rule 1.8, Comment 5. The Committee determined that the example contained in the model comment did not describe confidential information. The Committee revised this comment to eliminate the example and focus attention on the prohibition on disadvantageous use of client confidential information.

D. Rule 1.15. The Committee received a number of comments supporting and opposing the insertion in Comment 2A of the sentence approving the deposit of flat fees in a lawyer’s operating account rather than in the lawyer’s IOLTA or other client funds accounts. The Committee made no change to its proposal in this respect, but recommends that this subject be among those scheduled for oral argument. The committee did add a sentence to Comment 2A to reference the obligation to refund an unearned fee in the event of a discharge under Rule 1.16(d).

The Committee also revised Comment 7 to provide additional clarification regarding the appropriate procedures and forms to use when opening an IOLTA account.

E. Rule 3.1. The Committee believes that “continue” is implicit in Rule 3.1, but agreed to add that word to clarify the rule.

F. Rule 3.8. The Committee agreed to recommend new Comment 1A to clarify that the rule prohibiting a prosecutor from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause does not prohibit a prosecutor from declaring the intention to prosecute as yet uncharged criminal conduct if sufficient evidence is developed through subsequent investigation to support charges. The Committee received a number of other suggestions for changes to Rule 3.8 that it did not adopt, but the Committee also agreed to recommend oral argument on all other matters raised by comments to Rule 3.8.

G. Minor Clarifications and Corrections. The Committee additionally made minor clarifications or revised cross-references to the following:

- 1) References to “confidential information” consistent with the usage in Rule 1.6, as described above were inserted in Comments 2, 5, 6, 7, 9 and 17 to Rule 1.6, Comment

31 to Rule 1.7, the heading to Comment 5 to Rule 1.8, Comments 8, 10 and 11 to Rule 1.10, Comments 6 and 7 to Rule 1.13, Rule 1.14(c) and Comment 8 to Rule 1.14, Rule 1.17(c) and Comment 11 to Rule 1.17, Paragraphs (b) and (c) of Rule 1.18 and Comments 2, 3, 5, and 6 to Rule 1.18, Comment 15 to Rule 3.3, Comment 1 to Rule 4.2, and Comment 2 to Rule 5.3.

- 2) Cross reference corrections were made in Comment 4 to Rule 1.5 and in Comments 3 and 6 to Rule 1.13.
- 3) Rules 12(a) and 1.16(e)(3) were clarified.
- 4) Rule 7.2(b)(2), Comment 6 to Rule 7.2 and Rule 7.3(d) were clarified for proper and consistent references to lawyer referral services and qualified legal assistance organizations.

H. Deferral of Consideration of Rule 5.5 Revisions. The Committee was asked to consider expanding Rule 5.5 to permit employers to hire foreign in-house lawyers not admitted in any U.S. jurisdiction on the same terms as they currently may hire in-house lawyers with licenses from other states, but the Committee decided that this proposal goes beyond the scope of the revisions it proposed and that these changes should be considered, if the court agrees, after the current revisions have been addressed.

3. Oral Argument

The Committee plans to meet with the Justices to identify those topics where oral argument may be most useful to the Court. As noted above, the Committee's recommendations for oral argument will include Rule 1.15 on the subject of flat fees and Rule 3.8 on the comments requesting changes to this rule that the Committee did not adopt.