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Supreme Judicial Court
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One Pemberton Square
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Re: Comments on Proposed Revisions to the Massachusetts Rules of Professional Conduct

Dear Attorney Berenson,

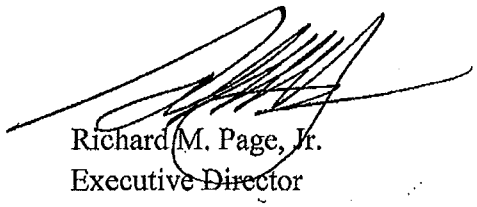
On behalf of the Boston Bar Association (BBA), I thank you for the opportunity to comment on the proposed revisions to the Massachusetts Rules of Professional Conduct (MRPC), and for granting the BBA an extension in order for us to submit these comments. The BBA appreciates and recognizes the importance of the effort put forth by the Supreme Judicial Court's Standing Committee on the Rules of Professional Conduct (SJC Committee) to review and recommend changes to the MRPC 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 SJC Committee's 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 Proposed Revisions were reviewed and discussed for several weeks by the BBA's Ethics Committee. The comments generated by the Ethics Committee were then submitted to all BBA Sections for consideration and further comments, and through that process, additional comments were generated by the Bankruptcy Law Section Steering Committee. In addition, the Criminal Law Section Steering Committee reviewed the Proposed Revisions, but was unable to reach consensus on any of the issues. Their silence should not be construed as disagreement or approval of the rules in any way. All of these comments were reviewed by the BBA Council, which approved the submission of a comment summary to the SJC Committee.

Please note that the enclosed document does not constitute or reflect a position of the BBA as a whole, but rather summarizes the comments received from the Ethics Committee and Bankruptcy Law Section. We offer these comments with the hope that they may be useful to the SJC Committee as it considers the proposed revisions to the MRPC.

Thank you for providing members of the bar with an opportunity to weigh in on these important proposed changes, and please feel free to contact me should you have any questions or concerns.

Very truly yours,



Richard M. Page, Jr.
Executive Director

Comments of the Boston Bar Association's Ethics Committee and Bankruptcy Law Section on the Proposed Revisions to the Massachusetts Rules of Professional Conduct (2/20/14)

In response to an invitation for comments from the Supreme Judicial Court's Standing Committee on the Rules of Professional Conduct, the Boston Bar Association's Ethics Committee, Criminal Law and Bankruptcy Law Sections have reviewed the Proposed Revised Massachusetts Rules of Professional Conduct. The Criminal Law Steering Committee reviewed the Proposed Revisions, but was unable to reach consensus on any singular issue. The majority of comments are from the Ethics Committee alone. The Bankruptcy Law Section had comments on the proposed amendments to Rule 1.15. Together, they offer the following specific comments:

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 an intimate personal relationship raises concerns, particularly acute if the relationship is sexual, about conflicts of interest and impairment of judgment.

The Ethics Committee supports the inclusion of a new comment, and agrees that the flat prohibition as in Model Rule 1.8(j) may be an overbroad response to a complex, if serious, problem. The Ethics Committee appreciates 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, the Ethics Committee would welcome further consideration of how the Massachusetts rules should address this concern.

The Ethics Committee notes 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 the Ethics Committee's 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 expenses 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."

The Ethics Committee and Bankruptcy Law Section agree that 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.

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

The Bankruptcy Law Section feels the exception is appropriate where substantive law leaves no other choice such as in some areas of bankruptcy law, and therefore prefers the language proposed by the Standing Advisory Committee without change.

The Ethics Committee and Bankruptcy Law Section concur that 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). Both the Ethics Committee and Bankruptcy Law Section 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 substantial work to be performed over a period of time.

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 in the cases cited therein. The Court in *Mance* held that when an attorney receives a flat fee at the outset of representation, 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.

There may be situations where it is appropriate and consistent with the Rules for lawyer and client to expressly agree that the advance payment of a flat fee may be considered the property of the attorney on receipt. This might be the case where the fee is small or the engagement of short duration such 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 is appropriate. One example might be a situation 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.

The Ethics Committee also recognizes 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 jeopardize the lawyer's position and thus impede clients in finding counsel. The Bankruptcy Law Section points out that in connection with the representation of debtors in all Chapter 7 Bankruptcy cases, and in some chapter 11 cases, it is common and essential that up-front flat fees be treated as the lawyer's property and be 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. The Bankruptcy Code provides that counsel for a debtor (as compared with counsel for a debtor-in-possession in most chapter 11 cases) cannot be paid from funds of a debtor's estate for Bankruptcy-related services, even if the work is performed post-filing. The Supreme Court has confirmed that that is indeed the law. *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004)

The Bankruptcy Section prefers the language proposed by the Standing Advisory Committee. However, if this Court rejects that recommendation, the Bankruptcy Law Section would not oppose the language as described below. The Ethics Committee believes the language below adequately addresses the Bankruptcy Section's concern by permitting lawyers and clients (with informed consent) to agree to treat flat fees as fully earned up front.

The Ethics Committee submits that a more appropriate comment to the proposed amended Rule 1.15 would conform closely to the recommendations of the 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. It proposes language along the following lines:

> Unless the lawyer and client expressly agree 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). 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.

> Lawyers and clients may, however, expressly agree that a flat or fixed fee shall be treated as the lawyer's property from the outset of the representation if the lawyer obtains informed consent from the client. In order to obtain such consent, the lawyer should explain to the client that the lawyer's treatment of the flat or fixed fee as the lawyer's property does not affect the client's right to claim a refund if the undertaking for which the fee was paid is not fully performed by the lawyer.

While the Rules do not mandate a writing, one member of the BBA's Executive Committee suggested that as a matter of prudence for both the lawyer's and client's protection, these disclosures should be in writing. In response to that suggestion, the following language was proposed:

> This firm is charging you a [fixed] [flat] fee for this matter, on the condition that the entire fee will be paid in advance, is property of the firm on receipt, and will not be placed in a trust account. However, if the firm's representation of you ends before the completion of the matter for which you have paid the fee, then you will have a right to claim a refund for all or part of the fee, depending on how close to completion the matter is at the time the firm's representation ends.

This proposed language does not represent the view of either the Ethics Committee or Bankruptcy Law Section, but instead is responsive to the concerns raised by the BBA's Executive Committee.

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." The Ethics Committee generally supports the adoption of Rule 1.18, but agrees 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 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.) The Ethics Committee agrees 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, the Ethics Committee believes lawyers should not be in a position to use information gained from prospective clients against those prospective clients in the future. The Ethics Committee

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. . . ."

The Ethics Committee believes 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

The Ethics Committee believes that the time has come to alter the flat prohibition on post-verdict communications with jurors. The Ethics Committee believes 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. The Ethics Committee supports 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.

The Ethics Committee recognizes that adoption of the Model Rule may not immediately 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. The Ethics Committee nevertheless hopes 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

The Ethics Committee agrees with and supports 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, the Ethics Committee is 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.

The Ethics Committee is 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 it susceptible to abuse in theory, the Ethics Committee is 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, the Ethics Committee opposes deleting Rule 8.4(h).