

8-1-2013

Report of the Standing Advisory Commitee on the Rules of Professional Conduct

Massachusetts Supreme Judicial Court Standing Advisory Committee on the Rules of Professional
Conduct

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Recommended Citation

Massachusetts Supreme Judicial Court Standing Advisory Committee on the Rules of Professional Conduct and R. Michael Cassidy.
"Report of the Standing Advisory Commitee on the Rules of Professional Conduct." (2013): 100-100.

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**Report of the Standing Advisory Committee
On the Rules of Professional Conduct**

July 1, 2013

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Report of the Standing Advisory Committee On the Rules of Professional Conduct

EXECUTIVE SUMMARY

The Court has asked this Committee¹ to examine the current Massachusetts Rules of Professional Conduct (Mass.R.Prof.C.) in light of changes to the American Bar Association's Model Rules of Professional Conduct in the fifteen years since the Court adopted the Massachusetts Rules. During that time, the Model Rules have undergone two major revisions. First, in 2002, the ABA adopted comprehensive amendments proposed by the ABA Ethics 2000 Commission that responded to changes in the profession since the Model Rules' adoption in 1983. Second, in 2012 and early 2013, the ABA adopted significant, but more targeted, amendments proposed by the ABA Commission on Ethics 20/20 that responded to changes in law practice resulting from globalization and the profession's increased use of technology.

The Court has already acted on the Committee's recommended changes to selected portions of the Massachusetts Rules, particularly Rules 1.5, 1.13, 1.14, 6.5, and 8.5. In this Report, we address the remaining portions of the Massachusetts Rules, summarizing and explaining the rationale for our recommendations. The Committee's recommended revisions to the rules accompany this Report, together with copies of the Committee's recommended revisions marked to show changes from the current Massachusetts rules, and to show changes from the Model Rules.

We recommend adoption of many changes proposed by the Ethics 2000 and Ethics 20/20 Commissions. Most of our recommendations are meant to clarify existing law, to improve format or style (*e.g.*, the adoption of Model Rule titles), and to promote consistency with the rules of other jurisdictions that follow the Model Rules. This Report discusses only changes of substantive importance. We do not address provisions of the current Massachusetts Rules and Comments that we propose to leave unchanged, except to explain why we rejected language of the Model Rules that would have altered the substance of our current Rules in an important fashion.

We call the Court's attention specifically to a few issues of particular importance, all of which are described in more detail in the body of this Report.

- We recommend adoption of Model Comments 6 and 7 to Model Rule 1.1 and Model Comments 1–4 to Model Rule 5.3, which give detailed guidance for

¹ The Justices of the Supreme Judicial Court appoint the members of the Standing Advisory Committee on the Rules of Professional Conduct. The Committee is chaired by John L. Whitlock, Edwards Wildman Palmer LLP. The other members are Carol Beck, Committee for Public Counsel Services; Professor R. Michael Cassidy, Boston College Law School; Timothy J. Dacey, Goulston & Storrs, P.C.; Henry C. Dinger, Goodwin Procter LLP; Erin K. Higgins, Conn Kavanaugh Rosenthal Peisch & Ford, LLP; Professor Andrew L. Kaufman, Harvard Law School; Elizabeth Mulvey, Crowe & Mulvey LLP; Professor Andrew M. Perlman, Suffolk University Law School; James B. Re, Sally & Fitch LLP; Regina E. Roman, Sugarman, Rogers, Barshak & Cohen, PC; Professor Constance Rudnick, Massachusetts School of Law; and Massachusetts Bar Counsel Constance V. Vecchione, Office of Bar Counsel. The Committee acknowledges with gratitude the assistance of Barbara Berenson, who acted as liaison to the Court.

safeguarding client interests when outsourcing work relating to client representation.

- We recommend amending Rule 1.6 concerning the obligation to safeguard confidential information to conform our Rules and Comments more closely to the ABA Model Rules. Our recommendations include the adoption of a variation of Model Rules 1.6(b)(2) and 1.6(b)(3), which relate to prevention or rectification of injuries from criminal or fraudulent conduct; Model Rule 1.6(b)(7), which establishes guidelines for discussions between a law firm and a prospective hire to identify potential conflicts of interest; and Model Rule 1.6(b)(4), which confirms that a lawyer may reveal confidential information to secure legal advice about the lawyer's own ethical obligations. Expansions of exceptions to the prohibition on disclosure of confidential information have been controversial in the past, and several members of the committee have dissented from certain aspects of the committee's recommendations. Separate statements addressing the committee's majority views and minority dissents are attached in the appendix to this report.
- We recommend adopting the term "informed consent" as the standard to be met in Rules 1.6, 1.7, 1.9 and elsewhere in the Rules instead of the current "consent after consultation" standard. The ABA reporter's notes state, and the Committee agrees, that "consultation" does not adequately convey the requirement that the client receive full disclosure of the nature and implications of a lawyer's conflict of interest.
- We recommend adopting the requirement that conflicts waivers permitted by Rules 1.7, 1.9, 1.11, and 1.12 be confirmed in writing.
- We recommend maintaining (with some clarification) the approach of current Massachusetts Rule 1.10 with respect to screening of lawyers who change firms instead of adopting the greater latitude for screening that the recently amended Model Rule would permit. On this point the Committee was divided and the arguments for and against this decision are set forth in separate majority and dissenting statements in the appendix to this report.
- We recommend adoption of Model Rule 1.18, which in substance codifies case law relating to the confidentiality obligations of lawyers to prospective clients. Currently, Massachusetts has no counterpart to Model Rule 1.18. Separate statements addressing the committee's majority views and minority dissent are attached in the appendix to this report.
- We recommend adoption of most of the changes made by the ABA to clarify and strengthen the text and Comments to Model Rule 3.3. While each of the recommended changes is small and many of them merely make explicit what was implicit in the former version, taken together they change the face of Rule 3.3 and deserve a close look.

- We highlight for the Court’s attention alternate proposals for Rule 3.5 dealing with communication with jurors; the first proposal, unanimously supported by the Committee, recommends the adoption of Model Rule 3.5.
- We recommend a number of changes in Rule 3.8 regarding the obligations of a prosecutor, including a prohibition against threatening to prosecute a charge not supported by probable cause, and reformulation of prosecutors’ post-conviction responsibilities with respect to newly-discovered exculpatory information. The Committee, although divided, recommends retaining our nonstandard provision requiring prior judicial approval before subpoenaing a lawyer to present evidence in a criminal proceeding about a present or past client. Separate statements of the majority and minority dissenting views are attached in the appendix to this report.
- We recommend adopting Model Rule 4.4(b) and Comment 3 to that Rule, both of which deal with material inadvertently sent to an opponent. A lawyer’s obligation in dealing with such material is a new topic in our Rules. Some members of the Committee opposed the adoption of Comment 3 only; separate statements of the majority and minority dissenting view are attached in the appendix.
- In our recommendations with respect to Rules 5.1 and 5.3, we have followed the practice of New York and New Jersey to impose disciplinary responsibility on law firms as well as individual firm lawyers with respect to observance of the Mass.R.Prof.C. in particular cases.
- We recommend a number of changes in the Rules dealing with advertising and solicitation that are designed to deal with the changes in technology that have occurred since the Court last dealt with these provisions. There is also a substantial change involved in our recommendation that the Court adopt the Model Rules definition of what constitutes a claim of specialization in Rule 7.4(a). Several members of the Committee have dissented from the decision to adopt the Model Rules deletion from Rule 7.2(b) of any requirement to maintain copies of advertising materials. Their dissenting statement is attached in the appendix to this report.
- Finally, there are a few additional recommendations dealing with Rules 1.8(b), 1.9(c)(1), and 8.4(h), that have generated dissenting statements from a few individual members of the Committee that are included, along with statements in support of the majority, in the appendix to this report.

**EXPLANATION OF RECOMMENDATIONS FOR CHANGES TO THE
MASSACHUSETTS RULES AND COMMENTS**

This report discusses proposed changes of substantive importance. To review all proposed changes, please see the document titled Standing Advisory Committee's Proposed Draft of the Massachusetts Rules of Professional Conduct.

Rule 1.0: Terminology

The current Rule 9.1 contains definitions applicable to the Massachusetts Rules. The Committee recommends that these definitions be moved to the beginning of the Rules, renumbered as Rule 1.0, and retitled “Terminology” in order to be consistent with the placement and title of the definitions in the Model Rules.

Rule 1.0(a)–(r). The Committee recommends the adoption of each of the definitions contained in Model Rule 1.0, with the exception of the definition of “screening” in Model Rule 1.0(k). The Committee recommends keeping the Massachusetts nonstandard definition of screening in Rule 1.10, where it is currently found. For purposes of clarity, the Committee also recommends some non-substantive stylistic changes to the Model Rule definitions of the terms “firm,” “fraud,” and “tribunal.”

The Committee’s proposal includes adopting the Model Rule definitions of several terms not presently defined in the Massachusetts Rule, including “confirmed in writing” [Rule 1.0(c)], “informed consent” [Rule 1.0(f)], and “writing” [Rule 1.0(q)]. These new terms are used in the Committee’s proposed revisions to other Massachusetts Rules, including Rules 1.6, 1.7, 1.8 and 1.9. Because the Committee proposes replacing the general concept of client “consent after consultation” with the requirement of “informed consent” throughout the Rules, there is no longer a need to define “consult” and “consultation,” and the Committee recommends eliminating these definitions.

Finally, the Committee recommends retaining several useful definitions presently found in Mass.R.Prof.C. 9.1 that have no counterparts in Model Rule 1.0. These are definitions for the terms “Bar association” [Rule 1.0(a)], “Person” [Rule 1.0(i)], “Qualified Legal Assistance Organization” [Rule 1.0(j)], and “State” [Rule 1.0(n)].

Comments to Rule 1.0

Comments 1–2. The Committee recommends the elimination of current Comments 1 and 2 as either outmoded or as discussing terms that are now dealt with in subsequent specific Rules and Comments rather than in this Rule. In their place, the Committee recommends adoption of Model Code Comments 1–7 as helpful explanations.

Comment 8. The Committee recommends that current Comment 3, explaining the non-standard Massachusetts term “Qualified Legal Assistance Organization,” be renumbered Comment 8, with an additional sentence clarifying that an award of attorneys’ fees that leads to

an operating gain in a fiscal year will not create a “profit” for determining the existence of a Qualified Legal Assistance Organization.

Rule 1.1: Competence

The Committee recommends no change in the text of the Rule.

Comments to Rule 1.1

Comment 5. The Committee recommends revising the Comment to conform to the corresponding Model Comment. A new sentence has been added recognizing that lawyers may enter into agreements with clients that limit the matters for which the lawyer is responsible, and a new cross-reference directs lawyers to Rule 1.2(c) where such agreements are explained in more detail.

Comments 6 and 7. The Committee recommends the adoption of these Model Comments dealing with the responsibilities of lawyers in contracting with other lawyers outside the firm and in coordinating with other lawyers who are providing services to a client in a particular matter. These Comments provide useful guidance on matters not previously covered in our Rules.

Comment 8. The Committee recommends amending our current Comment to reflect language recently added to the Model Comment. The new language emphasizes that a lawyer’s duty of competence requires the lawyer to keep abreast of current developments, including the risks and benefits of new technology. The Committee also recommends eliminating the reference to the informal use of peer review since Massachusetts has not yet established any such system.

Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer

Rule 1.2(c). The Committee recommends adopting the provision of the Model Rules that makes clear that a client must not only consent to any limitation on the scope of a representation, but also that the limitation must be reasonable under the circumstances.

Rule 1.2(e). Rule 1.2(e) currently deals with the lawyer’s obligation to consult with a client when the lawyer knows that the client expects assistance not permitted by the Rules. Following the lead of the Model Rules, the Committee recommends moving the substance of this provision to Rule 1.4 dealing with communication between lawyer and client.

Comments to Rule 1.2

Comment 1. The Committee recommends the substitution of Model Comments 1–3 for current Comment 1. The Model Comments address the allocation of authority between client and lawyer more thoroughly and completely than current Comment 1.

Comment 2. The Committee recommends that current Comment 2 be renumbered Comment 4 and that the reference to “mental disability” be changed to “diminished capacity,” the term currently used in Rule 1.14.

Comment 3. The Committee recommends that current Comment 3 be renumbered Comment 5.

Comment 4. The Committee recommends that current Comment 4 be renumbered Comment 6 and modestly revised to conform to the Model Rules.

Comment 5. The Committee recommends that current Comment 5 be deleted and that Model Rules Comments 7 and 8 be adopted in its place. The Model Comments give lawyers clearer and more helpful guidance concerning agreements to limit the scope of representation. In new Comment 8, the Committee has added a cross-reference to Rule 1.5(b) to remind lawyers of their obligation to confirm the scope of a new engagement in writing.

Comments 6 and 7. The Committee recommends that current Comments 6 and 7 dealing with criminal and fraudulent actions by a client be renumbered Comments 9 and 10 and that these Comments be amended to conform to the Model Rules. The Committee has added a cross-reference to our nonstandard Rule 3.3(e) (which details a special course of action for lawyers in criminal cases) to new Comment 10. In addition, the reference to disaffirming opinions upon withdrawal that formerly appeared in the Comments to Rule 1.6 has been moved to new Comment 10.

Comment 8. The Committee recommends that current Comment 8 be renumbered Comment 11.

Comment 9. The Committee recommends renumbering current Comment 9 as Comment 12 and amending the Comment to make it clear that lawyers must not participate in transactions to effectuate criminal or fraudulent tax avoidance.

The Committee also recommends adoption of a new Comment 13 discussing the lawyer's obligation to consult with a client when the lawyer knows that the client expects assistance that the lawyer is not legally permitted to give.

Rule 1.3: Diligence

The Committee does not recommend any change to Rule 1.3, which includes a sentence concerning zealous representation not contained in the Model Rule.

Comments to Rule 1.3

Comments 1–4. The Committee recommends revising these Comments so that they are nearly identical to the language found in the Comments to Model Rule 1.3. The Model Comments add a little more detail to the text of the Rule and to the text of the current Massachusetts Comments.

Comment 5. The Committee recommends adoption of this new Model Comment. It deals with the obligations of a sole practitioner to do some advance planning to protect clients in the event of the lawyer's death or disability.

Rule 1.4: Communication

Rule 1.4(a). The Committee recommends accepting the new Model Rule subparagraphs (a)(1), (2), and (5) which spell out the basic communication obligations in greater detail than the current Rule.

Comments to Rule 1.4

Comments 1 and 2. The Committee recommends adoption of Model Comments 1–5 to replace portions of current Comments 1 and 2 since the Model Comments explain in more detail the communication obligations prescribed by the text of the Rule while retaining the substance of the current Comments. The Committee also recommends deletion of the last sentence of Model Comment 5, which the Committee considered unnecessarily confusing.

Comments 3–5. The Committee recommends renumbering these Comments as Comments 6–8 and adopting the small changes made in Model Comments 6 and 7.

Rule 1.6: Confidentiality of Information

The paragraphs below highlight the recommendations of the majority of the Committee. However, a number of members of the Committee oppose certain aspects of the Committee’s recommendations, particularly as to the expansion of exceptions to confidentiality. The arguments pro and con are set forth in the appendix to this report.

Rule 1.6(a). The Committee recommends retaining the Massachusetts formulation of the obligation as protecting “confidential” information relating to the representation of a client instead of the overbroad Model Rule formulation that leaves out the word “confidential.” It also recommends small changes in the current Rule to reflect the substitution of the concept of “informed consent” for the previous formulation of “consent after consultation.”

Rule 1.6(b)(1). When the Court adopted the Massachusetts Rules in 1998, Massachusetts permitted disclosure of client confidences to prevent or rectify client crime or fraud more broadly than the corresponding Model Rule. In its 2002 revision to the Model Rules, the ABA followed Massachusetts’ lead in many respects and even broadened the exceptions somewhat. Model Rule 1.6(b)(1) authorizes disclosure of client confidences to the extent reasonably necessary “to prevent reasonably certain death or substantial bodily harm” from an act by anyone, not just the client, without the current Massachusetts condition that the danger must result from a criminal or fraudulent act. The Committee recommends acceptance of the Model Rule formulation, which permits disclosure to prevent serious physical harm to another whether or not the harm will result from a crime or fraud. The Committee also recommends retaining the exception currently recognized in the Massachusetts Rules to disclose confidential information “to prevent the wrongful execution or incarceration of another.”

Rule 1.6(b)(2). Both current Rule 1.6(b)(1) and Model Rule 1.6(b)(2) permit disclosures to the extent reasonably necessary to prevent the commission of a crime or fraud that the lawyer reasonably believes is likely to result in “substantial injury to the financial interests or property of another.” The Committee recommends that the exception apply as to crimes or frauds that will

substantially injure any legally protectable interests, not just “financial” interests. The law protects many important interests — rights to privacy, to vote, to be free from invidious discrimination, etc. — that are not strictly speaking financial interests. The Committee believes the rationale for this exception applies to justify the prevention of criminal or fraudulent activity that would substantially harm these other important interests, as explained in proposed new comment 8A. Model Rule 1.6(b)(2), unlike current Rule 1.6(b)(1), permits disclosure only to prevent a crime or fraud by the client. The Committee believes that the Model Rule is too restrictive in preventing substantial harm to innocent third parties and recommends retaining the current Massachusetts Rule that permits disclosure to prevent the commission of a crime or fraud by anyone.

Rule 1.6(b)(3). Current Rule 1.6 permits disclosure of client confidences to the extent necessary to rectify client fraud in which the lawyer’s services have been used (subject to special rules applicable in criminal cases set forth in Massachusetts Rule 3.3(e)). The 2000 revision to Model Rule 1.6(b)(3) would expand that exception “to *prevent, mitigate* or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from” a client’s crime or fraud in which the client has used the lawyer’s services (*italics added*). The Committee recommends acceptance of the Model Rule version without the limitation to “financial” interests.

Rule 1.6(b)(4). The Model Rules add a new exception to permit a lawyer to disclose client confidences to the extent reasonably necessary to secure advice about the lawyer’s compliance with the rules of professional conduct. While the Committee believes that such an exception is implicit in our current Rules, we agree with the Model Rule formulation that makes the exception explicit and recommend its adoption.

Rule 1.6(b)(5). Both the current Massachusetts Rule and the Model Rules recognize the ability of a lawyer to disclose client confidences to the extent reasonably necessary to establish a claim or defense in a dispute with the client or to defend against charges of misconduct. The Committee recommends no change.

Rule 1.6(b)(6). The Committee proposes no change in the current Rule, which permits disclosure when permitted by the Rules or required by law or court order. While the current Rule is facially broader than Model Rule 1.6(b)(6), the Committee believes the current rule merely makes explicit what is implicit in the Model Rule.

Rule 1.6(b)(7). The Committee recommends adoption of this exception recently proposed by the ABA’s 20/20 Commission and adopted by the ABA. It deals with the very practical problem of the need of a firm to identify potential conflict of interest problems when taking on a new partner or associate. It permits a limited disclosure of confidential information but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Rule 1.6(c). The Committee recommends adoption of this provision of the Model Rules, which imposes, in general terms, an obligation on a lawyer to make reasonable efforts to prevent inadvertent disclosure of, or unauthorized access to, a client’s confidential information. The Rule

thus makes explicit what would otherwise be implicit in the general obligation of competence in maintaining client confidences.

Comments to Rule 1.6

The Comments to ABA Model Rule 1.6 were considerably revised in 2002, including the addition of many entirely new Comments. The Committee recommends that most of the ABA's revised Comments be adopted, replacing or substantially revising the current Comments, except to the extent that the current Comments address nonstandard provisions in our Rule, or the Model Comments address provisions that the Committee does not recommend. The Committee also proposes several additional Comments that either serve to explain the rationale for the differences between the Model Rules and the recommended Massachusetts Rules or to provide more detailed guidance to practitioners in the application of the Rules than is found in the Model Comments. These additions, and the new Comments that reflect substantive changes from current Massachusetts Comments, are summarized below (referring in each instance to the current Massachusetts Comments):

Comments 1–3. The Committee recommends that these Comments be deleted and replaced with a new introductory Comment 1.

Comments 4 and 5. The Committee recommends that these Comments dealing with the fundamental nature of the confidentiality principle and its difference from the attorney-client privilege and the work product doctrine be renumbered Comments 2 and 3, with the additional language of the Model Comment.

Comments 5A and 5B. The Committee recommends that these Comments be renumbered Comments 3A and 3B. These nonstandard Comments set forth the rationale for the limitation of the basic obligation to “confidential” information. The language has been refined from the current Comment, in part because advances in technology have changed our view about the general availability of information and they give examples of information relating to a representation that would not constitute confidential information. These examples include general knowledge about the law or about the structure and operation of an industry in which the client does business. The Comment also clarifies that even information that is a matter of public record — *e.g.*, a client's criminal conviction in a different state long ago — would still be “confidential” if not “generally known” and that there are instances where information may need to be treated as “confidential” even if “generally known.”

Comment 6. The Committee recommends deletion of current Comment 6 and adoption of Model Comment 4 as new Comment 4. This recommended Comment interprets the text of the Rules as permitting a lawyer to discuss issues relating to a representation by the use of hypotheticals, so long as there is no reasonable likelihood that the listener will be able to identify the situation.

Comments 7 and 8. The Committee recommends adoption of these current Comments, which deal with authorized disclosures of confidential information, with minor modifications to conform to the Model Comments, as new Comment 5.

Comment 9. The Committee recommends adoption of Model Comment 6 as a new Comment 6, substantially replacing our current Comment 9, to begin the explanation of the limited situations in which disclosure of confidential information may be permitted. In particular, the Comment deals with the exceptions to the confidentiality duty that turn on certain harms being “reasonably certain.” It explains what that term means, and gives an example of a situation in which substantial physical harm is “reasonably certain.”

Comment 9A. The Committee recommends renumbering this nonstandard Comment as Comment 6A. It attempts to provide guidance to lawyers in deciding whether harm or injury that disclosure of client confidences is meant to prevent or rectify is “substantial.” It clarifies that a situation may present a risk of substantial physical harm even though there may be no physical injury, giving the example of statutory rape.

Comments 10–17. The Committee recommends deletion of these current Comments as covering material dealt with in new Model Comments explaining details relating to the exceptions to the confidentiality rule. The Committee recommends adoption as Comment 7 of Model Rule Comment 7, modified to adapt its explanation to the changes the Committee is recommending in Rule 1.6(b)(2), which deals with the prevention of future crime or fraud. The Committee also recommends adoption as Comment 8 of Model Comment 8 setting forth the operation of Rule 1.6(b)(3) where the lawyer learns of the client’s crime or fraud after it has been committed. It recommends the adoption of a nonstandard Comment 8A, which gives the rationale for not limiting the exceptions in Rule 1.6(b)(2) and (b)(3) to “financial” injuries, and gives examples of non-financial injuries that would justify the disclosure of client confidences without client consent. The Committee recommends the adoption as Comment 9 of Model Comment 9, which states that the confidentiality rules do not bar a lawyer from seeking professional advice to help in complying with the Massachusetts Rules.

Comment 18. The Committee recommends renumbering this Comment as Comment 10 and adopting the Model Rule changes to this Comment, which explains that the confidentiality rules do not bar a lawyer from defending against charges of misconduct.

Comment 19. The Committee recommends renumbering this as Comment 11, deleting the first two sentences and the last sentence of the current Comment because these subjects are covered elsewhere. The Committee also recommends the adoption of Model Comments 12–19 as Massachusetts Comments 12–19.

Model Comment 12 discusses the lawyer’s obligations when “other law” may require disclosure of client confidences. It stresses the obligation to consult with the client as to how, if at all, to assert legal arguments against any required disclosure of client confidences. In particular, it clarifies that if such arguments are unsuccessful, the lawyer must consult with the client as to an appeal, but may make the disclosure if review is not sought.

Model Comments 13 and 14 discuss the ramifications of recommended Rule 1.6(b)(7).

Model Comment 15 states more elaborately than current Comment 20 the obligations of a lawyer when ordered to reveal confidential information.

Model Comment 16 cautions lawyers given permission by paragraph (b) to reveal confidential information about the limits of that permission.

Model Comment 17 identifies factors that lawyers may consider in exercising the discretion given to them by Rule 1.6 to disclose client confidences under the various exceptions set forth in Rule 1.6(b). The Committee also recommends moving into this Comment most of the nonstandard language of current Comment 21 that emphasizes that other Rules and other provisions of law permit or require disclosure of confidential information.

Comment 17A. The Committee recommends retaining current Comment 19A with one slight change in language and renumbering it Comment 17A.

Model Comments 18 and 19 discuss the practical steps that lawyers must take to provide reasonable assurances that confidential information is not inadvertently disclosed, including whether “special security precautions” need to be taken. In general, so long as a method of communication (*e.g.*, email) “affords a reasonable expectation of privacy,” special security measures are unnecessary, although communication of exceptionally sensitive information or the client’s own directives may warrant a higher degree of security.

Comment 20. The Committee recommends retaining the current Comment 22 as renumbered Comment 20, with the Model Comment addition of relevant references.

Rule 1.7: Conflicts of Interest: Current Clients

Rule 1.7, in its current form, follows the former Model Rule format by addressing direct adversity between clients in Rule 1.7(a) and other concurrent conflicts of interest, including those caused by third parties and the lawyer’s own interests, in Rule 1.7(b). The ABA’s 2002 revisions include all of these conflicts under Rule 1.7(a), with direct adversity as subparagraph (1) and other conflicts as subparagraph (2). The consent provisions applicable to all concurrent conflicts are moved to Rule 1.7(b). The Committee recommends adopting the revised ABA format.

As part of the Model Rule revisions, Rule 1.7(a)(2) (concurrent conflicts other than direct adversity) is now prefaced by the requirement that there be a “significant risk” that the lawyer’s representation will be affected. The ABA reporter’s notes indicate that no substantive change in the standard was intended.

The Committee recommends that the standard of “informed consent” used in the Model Rules replace “consent after consultation” throughout the Massachusetts Rules. The ABA reporter’s notes state, and the Committee agrees, that “consultation” does not adequately convey the requirement that the client receive full disclosure of the nature and implications of a lawyer’s conflict of interest. The Committee also recommends that the court adopt the further requirement in Model Rule 1.7(b)(4) that the consent be confirmed in writing.

Comments to Rule 1.7

The Comments to Model Rule 1.7 were considerably revised in 2002, including the addition of many entirely new Comments. The Committee is recommending that all but one of the ABA's revisions be adopted, albeit with a few other substantive or stylistic changes.

The result of conforming to the ABA's revisions of the Comments to Rule 1.7 is that many of the existing Comments to our current Rule 1.7, or the principles embodied in these Comments, have been moved or incorporated into different Comments with new numbering. For example, the ABA has adopted, as Model Comments 29–33, the substance of special Massachusetts Comments 12A through 12F. Under the Committee's recommendation, so few of the current Comments would remain that it does not seem sensible to proceed through the current Comments to note what changes have been made. Rather this Report points out the principal ways in which the Committee's recommended exceptions differ from the Model Comments.

Comment 12 on intimate personal relationships with clients. The Model Comment is premised on Model Rule 1.8(j), which the Committee does not recommend for adoption. The Committee therefore recommends a nonstandard Comment that points out the dangers that may exist when a lawyer has a sexual relationship with a client.

Comment 16 on conflicts that are nonconsentable because prohibited by law. The Committee recommends substituting a specific citation to Chapter 268A of the General Laws (our statutory conflict of interest law) for the ABA's general reference to law in "some states."

Comment 23 on conflicts in litigation. The Committee recommends retaining language unique to Massachusetts from our current Comment 7 that warns against representing "more than one person under investigation by law enforcement authorities for the same transaction or series of transactions, including any investigation by a grand jury." Both the Model Comment and our current Comment also advise that "ordinarily" a lawyer should not represent multiple criminal defendants in a case.

The Committee also recommends that two other Comments unique to Massachusetts, 8A and 14A, be deleted. Our special Comment 8A concerns representation of conflicting interests by government lawyers. The Committee recommends that the Comment be replaced with a cross-reference in Comment 34 to section 4 of the Scope section of the Rules, the substance of which is to the same effect as current Comment 8A. Our current Comment 14A deals with conflicts among subclasses in class action lawsuits. Proposed new Comment 25 deals generally with conflicts with unnamed class members.

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

Rule 1.8(a). The Committee recommends conforming the language of Rule 1.8(a) in almost all respects to the Model Rule. As a result, a client would need to be advised in writing of the desirability of seeking the advice of independent counsel concerning a business transaction with the lawyer, and the client's informed consent to the transaction would have to be confirmed in writing.

Rule 1.8(b). The Committee recommends conforming the language of Rule 1.8(b) to the Model Rule, except that a lawyer would be prohibited from disclosing only “confidential” information relating to representation of a client. The Committee believes the Model Rule’s unmodified reference to “information” is too broad, and could preclude an attorney from representing multiple clients in the same industry. A majority of the Committee also believes that the prohibitions in our current Rule 1.8(b) against a lawyer using confidential information for his own benefit, or for the benefit of a third party, were unnecessary and perhaps overly restrictive, and recommends that the Rule and Comment make it clear that a lawyer cannot use confidential information to the disadvantage of a client, regardless of who benefits. Arguments for and against this proposed change are contained in the appendix to this report. Nothing in the Rule affects the obligations imposed on lawyers by other laws, such as the restrictions on securities trading by those in possession of material non-public information.

Rule 1.8(c). The Committee recommends conforming the language of Rule 1.8(c) in almost all respects to the Model Rule, so that the Rule would prohibit not only the preparation of instruments bestowing substantial gifts but also the solicitation of such a gift. The recommended Rule would prohibit only those solicitations made for the benefit of the lawyer or a close family member and contains an exception when the lawyer or other donee is closely related to the client. The recommended Rule also would limit the definition of “closely related” to the list of identified relationships, as opposed to the Model Rule’s more elastic definition.

Rules 1.8(d)–(i). The Committee recommends conforming paragraphs 1.8(d) through 1.8(i) to the Model Rule. This would not effect any substantial change from the current Rule. A lawyer would be required to obtain the client’s informed consent before accepting compensation from a third party under Rule 1.8(f), and obtain the client’s informed consent, confirmed in writing, before entering into an aggregate settlement under Rule 1.8(g). These changes are consistent with the recommended changes to other Rules substituting “informed consent” for the current Rules’ “consent after consultation.” The Committee also recommends deleting the language in our current subparagraph 1.8(i) that prohibits a lawyer in one firm from representing a client adverse to a client represented by a close family member in another firm, and its related comment. This language does not appear in Model Rule 1.8, and the subject matter is covered in our recommended Comment 11 to Rule 1.7, which takes a less restrictive approach.

Rule 1.8(j). The Committee recommends against adopting Model Rule 1.8(j), which attempts to define when a lawyer may engage in a consensual sexual relationship with a client. The subject matter is referred to in recommended Comment 12 to Rule 1.7.

Rule 1.8(k). The Committee recommends adopting Model Rule 1.8(k), which imputes the prohibitions in subparagraphs (a) through (i) to other lawyers in a firm.

Comments to Rule 1.8

Comment 1. The Committee recommends replacing this Comment with the more elaborate discussions about business transactions between lawyer and client in Model Comments 1 through 5.

Comment 1A. The Committee recommends deletion of nonstandard Comment 1A because the Committee recommends modifying our current Rule 1.8(b) to eliminate the ethical prohibition against a lawyer's use of a client's confidential information that does not disadvantage the client.

Comment 2. The Committee recommends replacing current Comment 2 concerning gifts to lawyers with the more elaborate discussion in Model Comments 6 and 7. Comment 7 is rewritten to conform to the language of recommended Rule 1.8(c). The Committee also recommends adopting a modified version of Model Comment 8, which is new to Massachusetts. The Committee believes the Model Rule version of this Comment unduly encourages lawyers to solicit fiduciary appointments.

Comment 3. The Committee recommends renumbering this Comment as Comment 9 and adopting the minor addition to the text of our current Comment. The Committee recommends the adoption of Model Comment 10 explaining the prohibition against a lawyer financing a lawsuit but authorizing the lawyer to advance court costs and litigation expenses.

Comment 4. The Committee recommends replacing this Comment with the more expansive discussion of the payment of legal fees by a third party found in Model Comments 11 and 12. The Committee also recommends adopting Model Comment 13, which is new, with one small stylistic modification. The Comment provides useful guidance to lawyers in resolving issues that may arise in representing multiple clients in connection with negotiating an aggregate settlement of a matter.

Comment 5. The Committee recommends deleting current Comment 5 and replacing it with Model Comments 14 and 15. The Committee also recommends adding a phrase to Model Comment 14 that makes it clear that a fee agreement provision requiring arbitration of a legal malpractice claim must comply with applicable provisions of Rule 1.5(f).

Comment 6. The Committee recommends deleting current Comment 6, the subject matter of which is now dealt with in Comment 11 to Rule 1.7.

Comment 7. The Committee recommends renumbering this Comment as Comment 16. It also recommends adopting the additional language of Model Comment 16, which explains the prohibition against a lawyer acquiring a proprietary interest in litigation and the exceptions to the Rule, and also describes the new recommended language in subsection (i) of the Rule.

The Committee recommends reserving Comments 17–19, as they relate only to Model Rule 1.8(j) which the Committee has recommended that the Court not adopt. The Committee recommends adopting Model Comment 20 as our Comment 20, with the deletion of the reference to Model Rule 1.8(j).

Rule 1.9: Duties to Former Clients

The Committee recommends conforming the language of current Rule 1.9 to the Model Rule, with the following modifications.

Rule 1.9(c)(1) and (c)(2). The Committee recommends retaining the word “confidential” before “information,” consistent with the Committee’s recommendation regarding retaining the current language of Rule 1.6, so that a lawyer is prohibited from disclosing only *confidential* information relating to the representation of the former client. The Committee also recommends omitting the Model Rule’s exception for information that has become “generally known,” because the Committee believes there are circumstances in which confidential information should not be disclosed even if an attorney reasonably could conclude that it is “generally known,” such as by its availability through the internet. The Committee has also, with some disagreement, recommended limiting the prohibition in Rule 1.9(c)(1) against use of confidential information to use “to the disadvantage of the former client,” as provided in the Model Rule. It would eliminate the prohibition of use “to the lawyer’s advantage or to the advantage of a third person” that is contained in the current Massachusetts Rules but not in the Model Rules. The same issue exists with respect to the Committee’s recommendation regarding Rule 1.8(b). The issue is discussed in greater detail in the appendix to this report.

Comments to Rule 1.9

Comments 1 and 2. The Committee recommends conforming these Comments to the Model Comments and adopting Model Comment 3 discussing the meaning of “substantially related” in the Rule as a new Comment 3.

Comment 3. The Committee recommends renumbering our current Comment, which is identical to the Model Comment, as Comment 4.

Comments 4 and 5. The Committee recommends deletion of these current Comments as either redundant or unhelpful.

Comments 6 and 7. The Committee recommends adopting Model Comment 6, which combines the language from current Comments 6 and 7, and numbering the Comment as our Comment 6.

Comment 8. The Committee recommends renumbering this current Comment as Comment 5, with one slight reference change. Our Comment would then be identical to Model Comment 5.

Comment 9. The Committee recommends renumbering this Comment as Comment 7. It is identical to Model Comment 7.

Comment 10. The Committee recommends deleting current Comment 10. The subject matter is covered elsewhere.

Comment 11. The Committee recommends renumbering this Comment as Comment 8 and adopting the changes inserted into Model Comment 8, except that the Committee recommends inserting the word “confidential” before the word “information,” to conform to our recommended change to Rule 1.9(c).

Comments 12 and 13. The Committee recommends renumbering these Comments as Comment 9 and adopting the changes that Model Comment 9 inserted into these two Comments.

Rule 1.10: Imputed Disqualification: General Rule

In 1998 the Supreme Judicial Court adopted a form of Rule 1.10 that provided for a very limited form of screening in the situation where a lawyer moved to a new firm that had or took on a matter that was substantially related to a matter in which the lawyer's former firm represented a client whose interests were materially adverse. The new firm was prohibited from the adverse representation unless the new lawyer had no material confidential information, or unless the new lawyer had neither substantial involvement nor substantial material information relating to the matter, was appropriately screened from the matter, and was not apportioned any part of the fee. In so doing the Supreme Judicial Court rejected a dissenting view on its Advisory Committee that urged adoption of a much broader screening provision.

At the time, the American Bar Association's Model Rules did not contain a screening provision with respect to the lateral movement of lawyers. In 2009, the ABA House of Delegates (after having several times considered but declined to recommend adoption of a much broader screening provision than that contained in our Rule 1.10) by a close vote adopted the current Model Rule 1.10. This Rule removes the prohibition with respect to representation adverse to a client of the migrating lawyer's former firm in a substantially-related matter so long as the new firm complies with specified screening requirements. It does not matter that the migrating lawyer possesses relevant confidential information of the former client. The ABA's revision has continued to be controversial. A number of states have adopted the new Rule or something similar to it; a number of others have rejected it by permitting either no screening or a very limited form of screening in the lateral movement situation. A number of states have taken no action.

This Committee is divided on whether the ABA's approach to lateral screening should be adopted. A majority recommends retaining essentially the current Massachusetts version. The arguments pro and con are set forth in the appendix attached to this report. The Committee, however, was unanimous in concluding that if the limited approach of the current version of Rule 1.10 is retained, it could be improved by making clarifying changes in the wording of the Rule.

Rule 1.10(a). The Committee recommends adopting the Model Rules formulation in removing the imputation of a lawyer's disqualification to the whole firm when "the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." An obvious illustration would be that a whole firm should not be prohibited from representing a client when an individual firm lawyer would be prohibited from representation because of lack of competence in a particular field of law.

Rule 1.10(d). The most important recommended change involves refining the test of the conditions under which the screening will prevent imputed disqualification to focus more precisely on the reason for allowing, or not allowing, the screening. Currently, screening is permitted if the personally disqualified lawyer had neither "substantial involvement nor substantial material information relating to the matter." The Committee's recommended change would permit screening if the personally disqualified lawyer "had neither involvement nor information relating to the matter sufficient to provide a substantial benefit to the new firm's client."

Rule 1.10(f). The Committee recommends adding this paragraph from the Model Rules to clarify that it is Rule 1.11 that governs disqualification of a firm associated with current or former government lawyers.

Comments to Rule 1.10

The Committee recommends retaining the substance and numbering of the current Comments, with minor clarifying changes. New Comment 6A, which deals with personal interest conflicts, is taken from the first two sentences of Model Comment 3.

Rule 1.11: Special Conflicts of Interest For Former and Current Government Officers and Employees

The recommended changes to this Rule are made to conform the Massachusetts Rule to the Model Rule. Thus, with very few exceptions, the proposed Massachusetts Rule and Comments would now follow the Model Rule and Comments. Most provisions of the current Massachusetts Rule are included in the Model Rule, but we recommend reorganizing our Rule to conform to the Model Rule's structure.

Rule 1.11(a). The Committee recommends adoption of the Model Rules language. The important addition is the explicit statement clarifying that former government employees are subject to the restrictions relating to confidential information contained in Rule 1.9(c).

Rule 1.11(b). The Committee recommends the deletion of current paragraph (b) and adoption of the Model Rule language covering imputed disqualification, much of which appears in our current Rule 1.11(a), in order to eliminate the possibility that firms will erroneously rely on imputed disqualification provisions in Rule 1.9 or 1.10.

Rule 1.11(c). The Committee recommends the adoption of the new Model Rule paragraph (c) dealing with "confidential government information." The first and third sentences of the paragraph are identical to the first and third sentences of our current Rule 1.11(b) and the second sentence moves the definition of "confidential government information" from former Rule 1.11(e). Substantively, the language remains the same.

Rule 1.11(d). The Committee recommends the Model Rule modifications that explicitly subject government lawyers to Rules 1.7 and 1.9 and require the waiver of conflict by a government agency to be confirmed in writing.

Comments to Rule 1.11

Comment 1. The Committee recommends the adoption of Model Comment 1, which makes clear that the relevant rules of professional conduct, including Rule 1.7, apply to both present and former government lawyers, including lawyers in private practice retained by the government to represent its interests.

Comments 2–10. The Committee also recommends adoption of Model Comments 2–10, replacing or modifying and renumbering our current Comments with essentially the same language as the Model Comments. In large part, these Comments elaborate the language of the

revised Rule by clarifying that conflicts of interest involving present or former government lawyers are governed by this Rule and not by Rule 1.10.

Rule 1.12: Former Judge, Arbitrator, Mediator Or Other Third-Party Neutral

This Rule covers the conduct of former judges and other individuals engaged in methods of alternative dispute resolution.

Rule 1.12(a). The Committee recommends adoption of the additional coverage in the Model Rule of third-party neutrals other than arbitrators and mediators. The Committee also recommends that the requirement of “consent after consultation” be replaced here, similar to the replacement elsewhere in the Rules, with “informed consent, confirmed in writing.”

Rule 1.12(c). The Committee recommends minor changes in subparagraphs (1) and (2) to strengthen the screening provision in Rule 1.12(c).

Comments to Rule 1.12

Comment 1. The Committee recommends revising the last sentence of the current Comment to reflect Canon 6(A)(2) of our Code of Judicial Conduct concerning the professional activities of a retired judge recalled to active service.

Comments 2–5. The Committee recommends adoption of these new Model Comments that elaborate the purpose and language of the text of the Rule.

Comment 6. The Committee recommends adding a sentence to current Comment 2 to make clear that judicial interns (unpaid lawyers or law students performing similar duties to law clerks) are also included within the term “law clerks.”

Rule 1.15: Safekeeping Property

The Court approved comprehensive revisions to this Rule, effective July 1, 2004. The Committee has not conducted an elaborate review of this Rule. It does, however, recommend three small revisions as follows.

Rule 1.15(b)(1) and (3). The Committee recommends deleting the permission in Rule 1.15(b)(1) to deposit costs and advances in a business account and further recommends the addition of a new Rule 1.15(b)(3) requiring advance payment of both legal fees and expenses in a trust account to be withdrawn as earned or expended.

Rule 1.15(b)(4). The Committee recommends redrafting the former Rule 1.15(b)(3) to read: “All trust property shall be appropriately safeguarded. Trust property other than funds shall be identified as such.” This change makes it clear that not only the client’s funds but also all the client’s personal property are covered by the Rule.

Rule 1.15(e). The Committee recommends amending the Rule by adding a new paragraph 1.15(e)(3), requiring a lawyer opening a new account to give notice to a bank or other depository that an account will hold trust funds. This revision is made in response to footnote 8 of *Go-Best*

Assets Limited v. Citizens Bank of Massachusetts, 463 Mass. 50 (2012). The Committee recommends that the second sentence of 1.15(e)(2) be deleted as unnecessary given the specific procedure set forth in paragraph 1.15(e)(3). The existing subparagraphs (3) through (6) would be renumbered (4) through (7).

Rule 1.15 (f)(4). The Committee recommends the addition of a new paragraph requiring partners in a law firm, upon dissolution, to make reasonable efforts to ensure the maintenance of client trust records.

Comments to Rule 1.15

Comment 2A. The Committee recommends this new Comment to elaborate the recommended changes in the text of Rule 1.15(b). The Comment also deals with the effect of its recommended change in the text on the deposit of flat fees received by lawyers and defines that term.

Comment 6A. The Committee recommends the adoption of this new Comment to make clear that lawyers who represent themselves as fiduciaries must comply with Rule 1.15(d)(2)'s requirement of preparation of contemporaneous bills or accountings to justify payments to themselves.

Comment 7. The Committee recommends the adoption of a new Comment 7 explaining the written notice required by recommended Rule 1.15(e)(3) to be provided to a bank or other depository whenever a lawyer opens a trust account, whether the account is an individual trust account or an IOLTA account, and directs lawyers to the Board of Bar Overseers website for the necessary form. If this recommendation is adopted, subsequent Comments will be renumbered.

Comment 13. The Committee recommends this new Comment relating to Rules 1.15(f) and 1.17(e) to clarify the responsibility of individual partners of a dissolved or sold law firm with respect to maintenance of client trust records.

Rule 1.16: Declining or Terminating Representation

Rule 1.16(b)(4). The Committee recommends adopting the Model Rule's clarifying language that permits withdrawal when the client insists upon "taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." The current language permits withdrawal when the client insists upon "pursuing an objective that the lawyer considers repugnant or imprudent." The Committee believes that focusing on a client's insistence on "taking action" is better than focusing on a client's insistence upon "pursuing an objective" and it also believes that it appropriately sets a higher barrier to withdrawal by focusing on action "with which the lawyer has a fundamental disagreement" as opposed to action that the lawyer considers "imprudent."

Rule 1.16(d). The Committee recommends a small revision to require lawyers to return advances for expenses not incurred as well as fees not earned when withdrawing from representation.

Rule 1.16(e)(3). The Committee recommends that subparagraph (e)(3) be amended to read “all investigatory or discovery documents for which the client has paid the lawyer’s out-of-pocket costs *for which the client is responsible under the fee agreement...*” (recommended language in italics). Such a change would make it clear that a client is not responsible for out-of-pocket costs where a fee agreement provides otherwise.

Comments to Rule 1.16

Comment 1. The Committee recommends adding a second sentence from Model Comment 1, which defines when a representation concludes. The presence of the word “ordinarily” in this sentence adequately covers the exceptions the Committee thought could arise.

Comment 2. The Committee recommends eliminating the last sentence from current Comment 2 since it simply explains that the source of our Rule 1.16(c) is our former DR 2-110(a)(1).

Comment 3. The Committee recommends adding the final five sentences, which are taken from Model Comment 3 with one modification. The Committee recommends modifying the sixth sentence by adding the italicized language and striking the bracketed language as follows: “*If a lawyer’s withdrawal is mandatory under these rules, the lawyer’s statement [that professional considerations require termination of the representation ordinarily should] to that effect should ordinarily be accepted as sufficient.*”

This Comment addresses the sensitive subject of how much information a lawyer must disclose to the court when the withdrawal is occasioned by a client’s demand that the lawyer engage in unprofessional conduct. There was some concern that such language (relating to what a court should or should not require) was outside the scope of the Rules, but the Committee concluded that some standard that gave guidance to the lawyer for disciplinary purposes should be included and that the endorsement of that language by the Supreme Judicial Court would discourage trial judges from requiring further disclosure in most cases.

Comment 5. The Committee recommends retaining current Comment 5 because it finds it to be clearer than the corresponding Model Comment.

Comment 6. The Committee recommends replacing the language referring to incompetency with language reflecting diminished capacity, in line with changes previously made by the Court in Rule 1.14. It also recommends including a reference to “reasonably necessary protective action” in the last sentence of the Comment to reflect the language used in Rule 1.14.

Comment 7. The Committee recommends revising the final sentence of the Comment to reflect the change it recommends with respect to the text of subparagraph (b)(4).

Comment 9. The Committee recommends deleting the second sentence of the Comment, which raises a substantive law question that is beyond the scope of the Rules. It also recommends not adopting the second sentence of the Model Comment, which refers to the substantive law question of a lawyer’s lien on a client’s papers.

Comment 10 refers to the nonstandard provision in paragraph (e) that details the obligations of a lawyer to make materials available to a client or former client.

Rule 1.17: Sale of Law Practice

The Committee recommends changes in the opening paragraph adding “law firms” to the entities permitted to sell a law practice and removing the reference to “legal representative” from both the Rule and Comment 13 as a non-lawyer is not subject to these disciplinary Rules.

Rule 1.17(a) and (b). The Committee recommends that these provisions of the Model Rules, which are currently “reserved,” continue to be “reserved.” They would require the seller to cease practice as a condition of the sale, and sell the entire practice or an entire area of practice. The Committee concluded that they were unnecessary and undesirable restrictions.

Rule 1.17(c). The Committee recommends restructuring the format of the Rule to conform to that of the Model Rule. In addition, the Committee recommends the addition of a phrase to the introduction to paragraph (c) to permit a law firm as well as a lawyer to sell a law practice under the provisions of the Rule. The Committee also recommends retention of the non-standard Massachusetts language “transfer of the representation” rather than transfer of a client’s files. The Committee believes that this more accurately describes the covered conduct.

Rules 1.17(c)(2) and 1.17(d). The Committee recommends deletion of the first part of current Rule 1.17(c)(2), covering obligations with respect to existing fee agreements, and retention of a slightly modified nonstandard 1.17(d), which includes language that permits the purchaser to decline to purchase any particular representation unless that client agrees to pay a fee in excess of that charged by the seller, so long as it does not exceed the purchaser’s standard rate for similar representations. The Committee believes that a purchaser of some or all of a law practice should have this flexibility.

Rule 1.17(e). The Committee recommends adoption of this nonstandard provision requiring the seller to observe the requirements of Rule 1.15 regarding maintenance of property and records.

Comments to Rule 1.17

Comments 2–6. The Committee recommends that these Comments should remain reserved, as the Committee is not recommending adoption of 1.17(a) or (b).

Comments 7–10. The Committee recommends renumbering current Comments 6–9 to coincide with the Model Comments numbers, with small language changes to reflect the changes in the text of the Rule. The Committee recommends altering the grammar of the last sentence in Comment 8 to make clear that the Rule is intended to give guidance to lawyers, not judges, concerning the procedure to be followed.

Comments 11–19. The Committee recommends a few changes in these current nonstandard Comments to reflect changes in the text of the Rule. The changes clarify and explain that in Massachusetts sale of a practice or part of a practice is not limited to the entire practice or an entire substantive area of practice.

Comment 20. The Committee recommends this new nonstandard Comment to explain the new Rule 1.17(e) relating to the requirement of preservation of trust account records.

Rule 1.18: Duties to Prospective Client

Rule 1.18(a)–(d) and Comments 1–9. The Committee recommends the adoption of the entire Model Rule and its Comments. The current Massachusetts Rules do not cover the subject of the responsibility of a lawyer who learns confidential information of a prospective client when an attorney-client relationship does not result from the initial discussions. Court decisions in the Commonwealth, however, make it clear that obligations of confidentiality are imposed upon a lawyer who engages in such a discussion. The Model Rule, whose adoption the majority recommends, provides guidance to lawyers who receive such information of their obligations to the prospective client with respect to such confidential information and provides protection by means of screening for the firm when the disqualified lawyer took appropriate measures to avoid receiving more confidential information than necessary to the representation decision.

Rule 2.1: Advisor

Rule 2.1. The Committee recommends no change in the text of the Rule.

Comments to Rule 2.1

The Committee recommends only one substantive change in the Comments. The Committee recommends amending Comment 5 by adding a reference to the possible need to inform a client about alternate dispute resolution possibilities when a matter is likely to involve litigation.

Rule 2.3: Evaluation for Use by Third Persons

The Committee recommends retaining the substance of current Massachusetts Rules 2.3(a) and (b) governing the evaluation for a third party of a matter affecting a client. In Rule 2.3(a), the Committee recommends replacing the current “consent after consultation” language with “informed consent” and adopting the “impliedly authorized to carry out the representations” standard used elsewhere in the Rules. Current Rule 2.3(b) has been redesignated Rule 2.3(c) to conform to the Model Rules. The Committee also recommends minor stylistic changes in Rule 2.3. The Committee also recommends reserving paragraph (b). Model Rule paragraph (b) requires consent of the client only when the lawyer knows that the proposed opinion will harm the client. The Committee believes that its recommended version of Rule 2.3(a) provides greater protection for the rights of the client and better guidance for the attorney.

Comments to Rule 2.3

Comment 1A. The Committee recommends the adoption of this new nonstandard Comment in place of Model Comment 5. The recommended Comment explains that this Rule does not govern the propriety of providing an evaluation regarding one client for another client. Under those circumstances, Rule 1.7 governs the overall relationship and Rule 1.6 governs the use of confidential information.

Comment 2. The Committee recommends deleting current Comment 2, which deals with giving advice to government agencies about the legality of contemplated government action. The relationship between government lawyers and particular agencies involves matters of substantive law beyond the scope of these Rules.

Comment 5. The Committee recommends adding to our current Comment 5 (to be renumbered Comment 4) a last sentence from the Model Comment cautioning lawyers that restrictions on making false statements are governed by Rule 4.1.

Rule 2.4: Lawyer Serving as Third-Party Neutral

The Committee recommends retaining the Rule and Comments in their current form, except for small stylistic changes.

Rule 3.1: Meritorious Claims and Contentions

Rule 3.1. The Committee recommends adding the Model Rule language that the assertion of a claim must have a basis “in law and fact.”

Comments to Rule 3.1

Comment 2. The Committee recommends adoption of the second sentence of Model Comment 2, which describes the steps a lawyer must take to comply with Rule 3.1.

Comment 3. The Committee recommends modifying current Comment 3 by adding the first sentence of the Model Comment, which provides additional guidance about the relationship between the lawyer’s obligations under Rule 3.1 and the constitutional rights of a defendant in a criminal matter.

Comment 4. The Committee recommends transferring the last two sentences of current Comment 3 to a new Comment 4 to conform to the Model Rules format.

Rule 3.2: Expediting Litigation

The Committee recommends no changes in the text of Rule 3.2.

Comments to Rule 3.2

Comment 1. The Model Comment recognizes that a lawyer may sometimes seek a postponement for personal reasons without running afoul of the Rule. The Committee recommends adding this clarifying language to the Massachusetts Comment.

Rule 3.3: Candor Toward the Tribunal

In 2002, the ABA revised and reorganized Rule 3.3 to clarify and strengthen the lawyer’s duty of candor in presenting evidence and legal argument to a tribunal. The Committee recommends adopting the ABA’s changes to the text of Rule 3.3. With respect to false testimony

by a criminal defendant, however, the Committee recommends retaining the distinctive Massachusetts policy set forth in the current version of Rule 3.3(e).

Rule 3.3(a)(1). The current Massachusetts Rule prohibits a lawyer from knowingly making false statements of material fact or law to a tribunal. The Committee recommends adopting the Model Rule formulation prohibiting *any* knowingly false statement of fact or law. In addition, revised subparagraph (a)(1) makes it clear that a lawyer must correct false statements previously made to a tribunal if they are material.

Rule 3.3(a)(2). The Committee recommends eliminating the present provision regarding disclosures necessary to avoid assisting a client's criminal or fraudulent acts in favor of a broader provision to be incorporated in a new paragraph (b). Subparagraph (a)(3) concerning disclosure of legal authority has been renumbered (a)(2).

Rule 3.3(a)(3). Current Massachusetts Rule 3.3(a)(4), which deals with presenting false evidence to a tribunal and the lawyer's obligation to remedy false evidence, has been renumbered (a)(3). The Committee recommends revising this subparagraph to state explicitly that remedial measures may, if necessary, include disclosure to the tribunal. We also recommend moving the permission to refuse to offer evidence that a lawyer believes but does not know is false, now contained in Rule 3.3(c), to this subparagraph. A phrase has been added to make it clear that such permission does not apply to the testimony of a defendant in a criminal matter.

Rule 3.3(b). This paragraph replaces the current subparagraph (a)(2). The current subparagraph (a)(2) focuses on remedial measures necessary to avoid assisting the client in a criminal or fraudulent act. Model Rule paragraph (b) requires the lawyer to take remedial measures whenever the lawyer knows that any person is engaged, has engaged, or intends to engage in criminal or fraudulent acts relating to a proceeding in which the lawyer is representing a client. Under this subparagraph, a lawyer would be required to take remedial measures if the lawyer discovers that a person other than the lawyer's client is, for example, bribing witnesses or tampering with a jury.

Rule 3.3(c). Current Rule 3.3(b), relating to the duration of the lawyer's duty to take remedial action, has been renumbered 3.3(c). The Committee recommends adding a reference to the duties imposed by new subparagraph (b).

Rule 3.3(d). The Committee recommends one minor stylistic change to Rule 3.3(d), which deals with the lawyer's duty in *ex parte* proceedings.

Rule 3.3(e). Rule 3.3(e), which deals with the duties of criminal defense attorneys, has no counterpart in the Model Rules. The Committee recommends retaining the substance of this paragraph, with minor stylistic changes intended to clarify the lawyer's obligations at different stages of a criminal proceeding.

Comments to Rule 3.3

As part of its 2002 revisions, the ABA also extensively rewrote and reorganized the Comments to Model Rule 3.3. The Committee recommends adoption of most of these revisions, with the exceptions noted below. Because of the extent of the 2002 revisions, the discussion

below follows the number of the Committee's recommended Comments rather than the numbering of the current Comments.

Comment 1. The Committee recommends adoption of this new Comment, which makes it explicit that the duty of candor applies not only in appearances before a tribunal but also in depositions.

Comment 2. The Committee recommends the adoption of this new Comment, which corresponds to Comment 1 in the current Massachusetts Rules. The Comment has been extensively revised for clarity.

Comment 2A. Comment 2A in the current Massachusetts Rule explains what it means to assist a client in committing crime or fraud on a tribunal. Since the reference to assisting a client's crime or fraud has been eliminated from Rule 3.3 in favor of the broader provisions of Rule 3.3(b), the Committee recommends deleting Comment 2A.

Comment 3. Comment 3 is current Comment 2.

Comment 4. Comment 4 is current Comment 3, with two minor changes.

Comment 5. The Committee recommends adoption of the Model Rules version of this Comment, which expands on Comment 4 in the current Massachusetts Rule. The revised Comment makes it clear that a lawyer does not violate Rule 3.3 by offering false evidence for the purpose of demonstrating its falsity, such as when a lawyer calls the opposing party for the purpose of discrediting the opponent's testimony. The Committee has added a cross-reference to paragraph (e) regarding the duties of criminal defense lawyers.

Comment 6. The Committee recommends retaining Comment 5 to the current Massachusetts Rule and renumbering it Comment 6. The Committee does not recommend adoption of Model Rules Comment 6 because in describing what a lawyer must do if the client intends to or has testified falsely, the Model Comment does not distinguish between a lawyer in a civil matter and a lawyer representing the accused in a criminal proceeding. Massachusetts Rule 3.3(e) imposes separate duties on criminal defense lawyers.

Comment 7. The Committee recommends reserving this Comment since the duties of defense counsel in a criminal case are dealt with in Rule 3.3(e) and nonstandard Comments 11A–11E.

Comments 8–10. The Committee recommends adoption of these new Comments, which elaborate on the lawyer's duties with respect to evidence that the lawyer knows or reasonably believes to be false. The Committee has added cross-references to Massachusetts Rule 3.3(e) and to the Comments dealing with 3.3(e).

Comment 11. The Committee recommends the adoption of this Model Comment, which incorporates the substance of current Comment 6.

Comment 11A. This Comment, dealing with obligations of criminal defense counsel under Massachusetts Rule 3.3(e), is virtually the same as Comment 7 to the current Massachusetts Rule.

Comment 11B. This new Comment incorporates the discussion of the Supreme Judicial Court in *Commonwealth v. Mitchell*, 438 Mass. 535 (2003), concerning when a criminal defense lawyer knows that the accused intends to give false testimony for purposes of Rule 3.3(e).

Comment 11C. This Comment contains the substance of current Comment 8.

Comments 11D and 11E. These Comments are virtually identical to current Comments 9 and 10.

Comment 12. The Committee recommends adoption of this new Model Comment, which explains the lawyer's obligations under the new Rule 3.3(b) when the lawyer knows that the lawyer's client or any other person is or has engaged in criminal or fraudulent conduct related to a proceeding. The Comment also gives examples of the types of conduct that require remedial action by the lawyer.

Comment 13. The Committee recommends incorporating the Model Rule modifications of current Comment 13 regarding when a lawyer's remedial obligations terminate. New language has been added to define when a proceeding has concluded and to recognize that obligation to take remedial action applies to false statements by the lawyer as well as false evidence.

Comments 14 and 14A. The Committee recommends no changes in these Comments, which are identical to current Comments 15 and 16.

Comment 15. The Committee recommends adoption of this new Model Comment, which explains the relationship between a lawyer's duty of candor to a tribunal under Rule 3.3 and a lawyer's obligation to withdraw from a representation under Rule 1.16.

Rule 3.4: Fairness to Opposing Party and Counsel

The Committee recommends no changes in Rules 3.4(a)–3.4(d).

Rule 3.4(e). The Massachusetts Rules currently contain two sets of provisions relating to unfair litigation tactics such as alluding to inadmissible evidence and asserting a personal opinion about the credibility of a witness: Rule 3.4(e), which applies to all lawyers, but only when the lawyer is “in trial”; and Rule 3.8(h)–(i), which apply to prosecutors at all stages of a criminal proceeding. The Committee believes that such tactics are offensive at all stages of a proceeding before a tribunal and that there should be a single standard governing all lawyers. The Committee therefore recommends that the phrase “in trial” in Rule 3.4(e) be changed to “before a tribunal” and that Rule 3.8(h)–(i) be eliminated.

Rule 3.4(f). The Committee recommends no change in Rule 3.4(f).

Rule 3.4(g). Massachusetts Rule 3.4(g), which provides guidance regarding compensation of witnesses, is based on the former Disciplinary Rules and has no counterpart in

the text of the Model Rules. The Committee recommends that Rule 3.4(g) be retained. In addition, since preparing to testify sometimes consumes as much or more time and effort than testifying at trial, the Committee recommends that subparagraphs (g)(1) and (2) be amended to recognize explicitly that a lawyer may pay reasonable compensation to a witness for time lost and expenses incurred in preparing to testify.

Rule 3.4(h) and (i). Current Massachusetts Rules 3.4(h), concerning the use of criminal or disciplinary proceedings to gain an advantage in a civil proceeding, and 3.4(i), concerning manifestations of bias before a tribunal, also have no counterparts in the Model Rules. The Committee recommends that both provisions be retained.

Comments to Rule 3.4

Comment 2. The Comment recommends the addition of the final two sentences of the Model Comment in order to provide guidance concerning a lawyer's possession of physical evidence of client crimes.

Comment 3. The Committee recommends adopting a simple cross-reference to the text of Rule 3.4(g) to cover the subject of witness compensation.

Comment 5. The Committee recommends adding a brief reference to the recommended amendment to Rule 3.4(g) clarifying that a witness may be compensated for time lost and expenses incurred in preparing to testify. The Committee also recommends deleting the reference to the former Disciplinary Rules in this Comment. Since the current Rules have been in effect for more than a decade, such cross-references are no longer necessary or helpful.

Comments 6 and 7. The Committee also recommends deleting the cross-references to the former Disciplinary Rules in these Comments.

Rule 3.5: Impartiality and Decorum of the Tribunal

The Committee has presented two alternatives for the Court's consideration.

The Committee recommends, as it did in 2009, that the Massachusetts Rules be amended to conform to the ABA Model Rules, which were amended in 2002 to distinguish between communications during a proceeding and communications after conclusion of a proceeding. The Model Rule focuses on the content of post-verdict juror communications, and prohibits three types of communications, irrespective of whether they are initiated by the lawyer or initiated by the juror. The current Massachusetts Rule, by contrast, prohibits all lawyer-initiated post-verdict contact with jurors unless authorized by court order. Where leave of court is granted, the current Massachusetts Rule further prohibits communications that are intended to harass or embarrass the juror, communications that inquire into the content of juror deliberations, and communications intended to discourage future juror deliberations. While the present Massachusetts Rule embodies existing case law in Massachusetts, *see Commonwealth v. Solis*, 407 Mass. 398 (1990); *Commonwealth v. Fidler*, 377 Mass. 192 (1979), there is a concern that a complete prohibition of non-judicially approved lawyer initiated communications with jurors after a verdict may violate the First Amendment and prevent lawyers from receiving useful

feedback. *See Rapp v. Disciplinary Board of the Hawaii Supreme Court*, 916 F. Supp. 1525 (D. Haw. 1996).

In the event that the Court wishes to retain the Massachusetts distinction between lawyer initiated and non-lawyer initiated post-verdict communications with jurors, the Committee recommends restructuring paragraph (d) to clarify that an inquiry into the deliberative process is not prohibited when communication *on that specific topic* is authorized by the court. The Committee also recommends deleting the words “for good cause shown” in paragraph (d) (presently paragraph (c)) because such a minimal threshold is implicit in any concept of judicial approval.

Rule 3.6: Trial Publicity

Rule 3.6(a). The Committee recommends that paragraph (a) of the current Massachusetts Rule be amended to conform to paragraph (a) in the Model Rule. While these paragraphs are now substantially similar, the Model Rule is clearer. Paragraph (a) in the Massachusetts Rule presently refers to both a reasonable person (with respect to knowledge of the likely dissemination of the communication) and what a lawyer reasonably should know (with respect to the likely impact of the communication). This discrepancy is confusing and unnecessary; the Committee recommends that both clauses of the paragraph be preceded by the single standard “a lawyer knows or reasonably should know.”

Rule 3.6(e). The Committee recommends retaining paragraph (e), which has no counterpart in the Model Rule. This provision allows a lawyer to respond to charges of misconduct publicly made against him. This paragraph may be invoked, for example, where a lawyer is publicly accused of filing a frivolous claim or action.

Comments to Rule 3.6

Comment 7A. The Committee recommends adding this new Comment, which explains that in making statements permitted by Rule 3.6(e), the lawyer must at all times safeguard confidential client information in accordance with Rule 1.6.

Comment 8. The Committee recommends adding this Model Comment, cross-referencing Rule 8(f), which describes the special responsibility of a prosecutor not to make media comments designed to heighten public condemnation of the accused.

Rule 3.7: Lawyer as Witness

The Committee recommends retaining the present Massachusetts attorney-witness rule, which is identical to the Model Rule, except for one minor stylistic change.

Comments to Rule 3.7

The Committee recommends substantial changes in the Comments to the Massachusetts Rule, to track the Model Comments more closely. Some of these changes are recommended for reasons of grammar and syntax. Others are recommended because the Committee believes that

the Model Comments more clearly and forcefully highlight the twin dangers of a lawyer testifying as a witness in a proceeding in which the lawyer is also the attorney of record: confusing the finder of fact and prejudicing the opposing party.

Comment 3. The Committee recommends adding a sentence clarifying that attorneys representing themselves pro se may also testify on their own behalf. This example illustrates one particular circumstance in which disqualification would “work substantial hardship on the client” within the meaning of Rule 3.7(a)(3).

Comments 5–7. The Committee recommends adoption of Model Comments 5–7 because they explain the interrelationship between the attorney-witness rule and the conflict of interest rules more precisely than the current Comments.

Rule 3.8: Special Responsibilities of a Prosecutor

Rule 3.8(a). The Committee recommends that the current Rule be amended to add a prohibition against “threatening to prosecute” a criminal charge that the prosecutor knows is not supported by probable cause to the current prohibition against “prosecuting” such a charge. A similar prohibition is found in Texas Rule of Professional Conduct 3.09(a). The Committee is of the view that a prosecutor who seeks to obtain leverage on a defendant (*e.g.*, to obtain a confession or cooperation against others) by threatening to charge a crime that the prosecutor knows is not supported by probable cause is engaging in a form of misrepresentation.

Rule 3.8(e). The Committee recommends deleting the current subparagraph and moving its content into Rule 3.8(f), where it more properly belongs.

Rule 3.8(e)(2). The Committee recommends that the court retain Rule 3.8(f)(2) (now renumbered), the Massachusetts version of the “attorney subpoena” rule that requires judicial approval before a prosecutor may subpoena an attorney to the grand jury or trial for the purpose of providing evidence about a present or former client. In 1995, the ABA amended subparagraph (2) of Model Rule 3.8(f) to delete its judicial approval requirement, citing in its accompanying report the litigation in federal courts over this controversial restriction. *See, e.g., Baylson v. Disciplinary Board of the State of Pennsylvania*, 975 F.2d 102 (3d Cir. 1992); *Stern v. U.S. District Court for the District of Massachusetts*, 214 F.3d 4 (1st Cir. 2000). Although many states have abandoned their judicial approval requirement following the 1995 amendment to the ABA Model Rule, Massachusetts and Rhode Island have retained this provision. *See* R.I. Rules of Prof'l Conduct R. 3.8(f). A closely-divided Committee recommends that the Court retain Massachusetts Rule 3.8(f)(2) as presently written.

Rule 3.8(h) and (i). The Committee recommends that the current subparagraphs of the Massachusetts rule be deleted, as assertions of personal knowledge or opinion by an attorney are already addressed by Rule 3.4. The Committee was unable to perceive any principled reason why prosecutors should be held to a heightened standard of conduct in this regard. Moreover, as mentioned above, the Committee recommends that Rule 3.4(e) should be amended to delete the words “in trial” and substitute the words “before a tribunal,” to make clear that the prohibition against making statements of personal knowledge of fact or opinion as to the justness of a cause or the credibility of a witness applies at all stages of litigation.

The Committee further recommends that the Court adopt Model Rule 3.8(h) and (i) which deal with a prosecutor's post-trial responsibility with respect to the disclosure of newly discovered exculpatory evidence. These amendments were prompted by the Innocence Project and the increasing capacity of scientific evidence to expose wrongful convictions. The Committee believes that the ABA's approach to a prosecutor's post-conviction responsibilities appropriately balances the state's interests in the finality of judgments and the prosecutor's professional obligation to guard against wrongful convictions.

Comments to Rule 3.8

Comments 6–9. The Committee recommends adoption of Model Comment 6, which spells out the prosecutor's responsibilities with respect to subordinates, especially with respect to extrajudicial statements, and adoption of Model Comments 7–9, which elaborate the prosecutor's responsibility with respect to newly-discovered evidence.

Rule 3.9: Advocate in Nonadjudicative Proceedings

Rule 3.9. The Committee recommends that the Massachusetts Rule regarding candor to the fact finder and fairness to opposing counsel in appearing before non-judicial government boards be amended to track the language of the Model Rule by striking the word "tribunal" after the words "legislative and administrative" and inserting the words "body" and "agency," respectively, in order to more accurately reflect the work of the legislative and executive branches of government. Otherwise the substance of the rule is not changed.

Model Rule 3.9 requires lawyers appearing before non-judicial governmental boards to comply with Rule 3.5, without specifying the particular subsections of Rule 3.5 that apply. The Committee recommends retaining specific cross-references to the applicable provisions of Rule 3.5; the cross-references will correspond to the version of Rule 3.5 adopted by the Court.

Comments to Rule 3.9

Comment 1. The Committee recommends modifying Comment 1 by replacing "should" with "must," which conforms to the Model Comment.

Comment 3. The Committee recommends adopting Model Comment 3 which clarifies the circumstances when Rule 3.9 applies.

Rule 4.1: Truthfulness in Statements to Others

Rule 4.1. The Committee does not recommend any change to the text of the Rule.

Comments to Rule 4.1

Comment 1. The Committee recommends adopting the Model Comment clarification to provide additional guidance concerning what types of statements or half-truths violate the Rule and to refer to the additional prohibitions of dishonest conduct in Rule 8.4.

Comment 2. The Committee recommends adopting the Model Comment’s final sentence, which reminds lawyers of legal obligations that extend beyond the Massachusetts Rules.

Comment 3. The Committee recommends adding the first sentence of the Model Comment to our current Comment. The added language describes the interplay between Rule 1.2(d) and Rule 4.1(b). The Committee recommends deleting the last sentence of the current Comment because it has recommended deleting the special definition of “assisting” in Comment 2A to Rule 3.3.

Comment 4. The Committee recommends adopting this new nonstandard Comment, which explains the relationship between Rule 4.1(b) and Rule 1.6, to which Rule 4.1(b) alludes.

Rule 4.2: Communication with Person Represented By Counsel

Rule 4.2. The Committee recommends making a single minor clarification to the current Rule in order to conform it to the Model Rule.

Comments to Rule 4.2

The Committee recommends adopting the Model Comment numbering.

Comment 1. The Committee recommends adopting this new Comment, which explains the purpose of the Rule.

Comment 2. This Comment is Comment 3 of the current Comment, and the Committee recommends retaining it with the deletion of a few unnecessary words to conform to the Model Comment.

Comment 3. The Committee recommends adopting this new Model Comment, which elaborates the scope of the Rule.

Comment 4. The Committee recommends adopting the Model Comment’s additions to current Comment 1, including its reference to the ability of parties to communicate with one another and a lawyer’s ability to advise a client in connection with such communication, subject to the prohibition in Rule 8.4(a) that would prohibit a lawyer from making a communication forbidden by this Rule through the actions of another. The Committee recommends a reorganization of the sentences of the Model Comment for the sake of clarity and retention of current Comment 1’s reference to the permissibility of sending demands and notices required by laws such as Chapter 93A of the General Laws.

Comment 5. The Committee recommends adoption of the Model Comment’s elaboration of current Comment 2, which deals with communications to and by government lawyers.

Comment 6. The Committee recommends the adoption of the Model Comment, which points out the possibility of seeking a court order in certain situations of uncertainty and the deletion of current Comment 7, which deals with the same subject matter.

Comment 7. Current Comment 4 is a codification of Massachusetts case law relating to communication with employees of an organization in connection with litigation. The Committee recommends its retention as Comment 7 with elaboration to state explicitly that the prohibition does not extend to former employees of the organization.

Comment 8. The Committee recommends adoption of the Model Comment modification of current Comment 5, dealing with the lawyer's knowledge that a person is represented by counsel.

Rule 4.3: Dealing with Unrepresented Person

Rule 4.3. The Committee recommends adoption, for the sake of uniformity, of the stylistic changes contained in the Model Rule, including the melding of our current subparagraphs (a) and (b) into a single paragraph.

Comments to Rule 4.3

Comments 1 and 2. The Committee recommends adopting most of both Model Comments. The proposed revisions would move the substance of all but the first sentence of present Massachusetts Comment 1 to a new Comment 2, and would add to Comment 1 two additional sentences that provide practical guidance to lawyers about how they might avoid a misunderstanding with an unrepresented person concerning the lawyer's role. The Committee recommends that the Court not adopt the third sentence of Model Comment 2 because it seems more confusing than helpful in providing guidance for lawyers.

Rule 4.4: Respect for Rights of Third Persons

Rule 4.4(b). The Committee recommends the adoption of this paragraph, not currently in the Massachusetts Rules. It requires that a lawyer notify the sender of any document or any "electronically stored information" relating to the lawyer's representation of a client that appears to have been sent to the lawyer inadvertently. The issue of what should happen to information inadvertently sent to an opposing party has been hotly contested. This provision only requires that the receiving lawyer notify the sending lawyer of the receipt of the information and treats the ultimate fate of the information as a matter of substantive law to be resolved elsewhere.

Comments to Rule 4.4(b)

Comment 1. The Committee recommends the adoption of the last example of the Model Comment as an additional illustration.

Comment 2. The Committee recommends adoption of the Model Comment, which discusses the obligations imposed by new paragraph (b) of the Rule.

Comment 3. The Committee recommends the adoption of Model Comment 3, which states that in the exercise of professional judgment reserved to lawyers by Rules 1.2 and 1.4, a lawyer permissibly may choose to return unread a document that was sent to the lawyer inadvertently, or may delete unread electronically stored information that was inadvertently sent.

This Comment rejects the notion that the obligation of competence requires a lawyer to read the item before returning or deleting it and that the obligation of communication with the client requires discussion with the client before taking any such action.

Rule 5.1: Responsibilities of Partners, Managers, and Supervisory Lawyers

Rule 5.1(a)–(c). The Committee recommends a few, small explanatory suggestions from the Model Rules, which do not involve substantive changes.

Rule 5.1(d). The Committee recommends the addition of this nonstandard subparagraph, which for the first time in Massachusetts would impose disciplinary responsibility on a law firm by requiring it to make “reasonable efforts” to put reasonable supervisory mechanisms in place to ensure that the firm’s lawyers comply with the Massachusetts Rules. The Committee has followed the concept embodied in the New York and New Jersey rules that the law firm itself, not just individual lawyers, has a responsibility to its clients and the public at large to make a reasonable effort to see that its lawyers comply with the Rules.

Comments to Rule 5.1

Comment 1. The Committee recommends the adoption of the Model Comment’s changes in this Comment to reflect the explanatory changes in the text of the Rule.

Comment 2. The Committee recommends the adoption of this Model Comment, which identifies the kinds of firm policies and procedures that may be required to comply with the Rule.

Comments 3–5. The Committee recommends the adoption of the modifications made by Model Comments in the language of the current Comments to reflect changes in the text of the Rule.

Comment 6. The Committee recommends the adoption of this new Comment, which deals with the relationship between paragraphs (b) and (c) of the Rule.

Comment 8. The Committee recommends the adoption of this new Model Comment, which makes clear that the imposition of duties on managing and supervising lawyers does not alter the duty of all lawyers in a firm to abide by the Rules.

Comment 9. The Committee recommends the adoption of this new Comment, which makes clear that the obligation placed on the law firm by paragraph (d) is in addition to the obligation placed on individual lawyers in the firm.

Rule 5.2: Responsibilities of a Subordinate Lawyer

There are no recommended substantive changes.

Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

Rule 5.3(d). The Committee recommends the same addition recommended with respect to Rule 5.1: that the law firm itself as well as its individual lawyers has a responsibility to make reasonable efforts to see that its nonlawyer assistants, both inside and outside of the firm, are adequately supervised with respect to the ethical components of their work.

Comments to Rule 5.3

Comments 1-4. The Committee recommends the adoption of these Model Comments to spell out the responsibilities of lawyers and law firms with respect to their supervision of nonlawyers in the same fashion as these responsibilities are spelled out for lawyers in Rule 5.1.

Comment 5. The Committee recommends the adoption of this new Comment, which makes clear that the obligation placed on the law firm by paragraph (d) is in addition to the obligation placed on individual lawyers in the firm.

Rule 5.4: Professional Independence of a Lawyer

Explanatory and clarifying material taken from the Model Rule and Comments are the only recommended changes.

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

Rule 5.5. The Committee recommends adopting the Model Rule language in Rule 5.5(d) clarifying that this paragraph, which lists two situations in which lawyers not admitted in this jurisdiction may engage in practice here, applies to lawyers who maintain an office or other systematic and continuous presence in Massachusetts and not to lawyers practicing here on a temporary basis. That latter situation is dealt with in paragraph (c).

Comments to Rule 5.5. The only substantive changes in the Comments are those recommended to reflect the recommended changes in the text of the Rule itself.

Rule 5.6: Restrictions on Right to Practice

Rule 5.6. The Committee recommends adopting the Model Rule language that expands the entities to which the prohibitions on restricting a lawyer's right to practice apply beyond the traditional partnership model.

Comments to Rule 5.6. The only substantive changes in the Comments are those recommended to reflect the recommended changes in the text of the Rule itself.

Rule 5.7: Responsibilities Regarding Law-Related Services

Rule 5.7. The Committee recommends adoption of the changes in the Model Rule addressing the performance of law-related services within the same entity that renders legal services, but adds a requirement that written notice be given to the client that various services are not legal services and hence that the protections of the client-lawyer relationship do not apply.

Comments to Rule 5.7. The only substantive changes in the Comments are those recommended to reflect the recommended changes in the text of the Rule itself.

Rule 6.1: Voluntary Pro Bono Publico Service

Rule 6.1. The Committee recommends no change in the text of the Rule.

Comments to Rule 6.1

The only recommended change of substance is the addition of Model Comment 11 stating that law firms should help firm lawyers fulfill their pro bono responsibilities under the Rules.

Rule 6.2: Accepting Appointments

The Committee recommends no change in the text of the Rule.

Comments to Rule 6.2

Comment 1. The Committee recommends adoption of Model Comment 1, which includes a sentence stating that lawyers should accept their fair share of appointments involving indigent clients and unpopular causes.

Rules 6.3 and 6.4. The Committee is not recommending any changes to the Rules or Comments.

Rule 7.1: Communications Concerning a Lawyer's Services

Rule 7.1. The Committee recommends no change in the text of the Rule.

Comments to Rule 7.1

Comment 1. The Committee recommends adoption of Model Comment 1, but recommends changing "must" to "should."

Comment 2. The Committee recommends adopting Model Comment 2. It adopts a "substantial likelihood" test for determining whether a lawyer's truthful statement is misleading. According to the reporter's notes, the standard was intended to "strike[] the proper balance between the lawyer's free-speech interest and the need for consumer protection."

Comment 3. The Committee recommends adoption of Model Comment 3. The ABA has deleted the issues of raising unjustified expectations or making unsubstantiated comparisons from its former text of Rule 7.1 and moved those concerns to this Comment. The Comment now only warns that such statements may be misleading, a view consistent with current Comment 1 of our Rule. The Committee does recommend changing the words "prospective clients" at the end of the Model Comment to the word "public," that is, an appropriate disclaimer may preclude a finding of misleading the public.

Comment 4. The Committee recommends adoption of Model Comment 4. It provides a cross-reference to Rule 8.4(e), which prohibits lawyers from stating or implying an ability to improperly influence a government agency or official or that they can achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2: Advertising

Rule 7.2(a). The Committee recommends adoption of the Model Rule modifications, which omit specification of types of media in which lawyers may advertise and instead state generally that lawyers may advertise through written, recorded or electronic communication, including public media. This change is consistent with the need to recognize new technology.

Rule 7.2(b). A majority of the Committee recommends adopting the Model Rule's deletion of the requirement in current Rule 7.2(b) that copies of advertisements be retained for two years. It concurs with the observation in the ABA reporter's notes that the obligation was burdensome and seldom used for disciplinary purposes, and certainly disproportionately burdensome to any benefit for disciplinary purposes. The majority believes that with all the sources of information about advertisements available in the public sphere, disciplinary authorities should have sufficient sources of evidence to prosecute violations of the advertising rules without requiring thousands of lawyers to maintain such files. The Committee is, however, divided on deleting the requirement that advertisements be retained, with a substantial minority recommending keeping the requirement with some fine-tuning for websites and other computer-accessed communications. The argument of the minority is set forth in the appendix to this report.

Rule 7.2(c). This Rule has now been renumbered as 7.2(b). The Committee recommends adoption of the Model Rule modifications, albeit with some changes. Of note is new subparagraph (b)(4), providing for reciprocal referral arrangements with other lawyers or nonlawyer professionals on certain conditions. The Committee recommends the following changes: 1) deletion of the definition of "qualified lawyer referral service" in subparagraph (b)(2), as the Committee is recommending it be a defined term in Rule 1.0, and 2) retention from our current Rule as new subparagraph (b)(5) the exception allowing the payment of referral fees permitted by Massachusetts Rules 1.5(e) and 5.4(a)(4).

Rule 7.2(d). Our Rule 7.2(d) requires that a communication under this Rule include the name of the lawyer or law firm responsible for its content. The Committee recommends that it now be renumbered as Rule 7.2(c) and retained in its existing form. The Model Rule version differs slightly, primarily by requiring an address, as well as a name, for the lawyer or law firm.

Comments to Rule 7.2

The Committee recommends adopting most of the Model Comments to Rule 7.2.

Comment 1. The Committee recommends that with one minor change, current Comment 1 should be retained, thus omitting the additional language in the Model Comment not adopted when our Rules were revised in 1999. The Committee does recommend adopting the recent Model Comment addition of the words "learning about and" to the introductory clause of the

first sentence, so that it now will read, “To assist the public in learning about and obtaining legal services...”

Comment 3. The Committee recommends deletion of current Comment 3 because it is covered by more specific and helpful language in the Rule and other Comments.

Comment 3A. The Committee recommends retention of the first two sentences of current nonstandard Comment 3A relating to electronic communications, deletion of the balance as relating to out-of-date technology, and addition of a new final sentence cross-referencing Comment 1 of Rule 7.3 as to the distinction between advertising and solicitation.

Comment 5. The Committee recommends deletion of current Comment 5, consistent with the deletion from the Rule of current paragraph (b). Model Comment 5 expands on proposed subparagraph (b)(1) of the Rule relating to paying for advertising and communications. We recommend adopting Model Comment 5 as Massachusetts Comment 5, with a reference added to our nonstandard subparagraph (b)(5) of the Committee’s proposed Rule. The Committee recommends omitting the two sentences in the Model Comment relating to “lead generators,” as the substantive law in this area is still developing.

Comment 6. The Committee recommends adoption of Model Comment 6. It expands on paragraph (b)(2) of the Rule, which permits payment of the usual charges of a legal services plan or referral service. We recommend deletion of the last two sentences, consistent with the Committee’s decision to make “qualified legal referral service” a defined term under Rule 1.0.

Comment 7. The Committee recommends adoption of this Model Comment, which states that lawyers who accept assignments or referrals from legal service plans or lawyer referral services must act reasonably to ensure that the activities of the plan or service are compatible with their professional obligations.

Comment 8. The Committee recommends adoption of this Model Comment relating to the reciprocal referral arrangements now permitted by paragraph (b)(3) of the Rule. It recommends modification to clarify that such arrangements are governed by the conflict of interest rule, Rule 1.7, and therefore require the client’s informed consent in writing.

Rule 7.3: Solicitation of Clients

Rule 7.3(a). The Committee recommends a few nonsubstantive modifications in format and language to conform to the Model Rule provision but retains the nonstandard current exceptions to the prohibition of solicitation now contained in our Rules.

Rule 7.3(b). The Committee recommends adoption of the modifications contained in the Model Rule, which do not make substantive changes in our current provision except to update technology references.

Rule 7.3(c). The Committee recommends deletion of this current paragraph, consistent with its recommendation of the deletion of the two-year record retention requirement in the text of our current Rule.

Rule 7.3(d) and (e). The Committee recommends deletion of these current paragraphs as the substance of current Rule 7.3(d) and (e) is now part of Rule 7.3(a).

Rule 7.3(f). The Committee recommends deletion of current Rule 7.3(f) and adoption of a new Rule 7.3(d), based on the Model Rule provision relating to referrals. The prohibition against payment for solicitation is now contained in Rule 7.2(b) and the remainder of current Rule 7.3(f) is dealt with in this new Rule 7.3(d).

Comments to Rule 7.3

Comment 1. The Committee recommends replacing the first part of current Comment 1 with Model Comment 1, which sets out the difference between solicitation and advertising in more explicit, up-to-date language, and recommends renumbering the second part of current Comment 1 as a new Comment 2.

Comment 2. The Committee recommends that this new Comment 2 be modified with Model Rule language updating some technology references and other stylistic changes. The Committee also recommends moving much of the current Comment 2, with a few stylistic changes, to a new Comment 3.

Comment 3. The Committee recommends the deletion of current Comment 3, which relates to the current requirement that written solicitations be retained for two years.

Comment 4. The Committee recommends renumbering current Comment 4 as Comment 5 and the adoption of Model Comment 4, which explains the reasons for removal of the requirement for retaining documentary records for two years.

Comments 5, 6, and 7: The Committee does not recommend adoption of Model Comments 5–9., but instead recommends renumbering current Comments 4, 4A, and 5 as Comments 5–7 and making only small stylistic or nonsubstantive changes.

Rule 7.4: Communication of Fields of Practice

Rule 7.4(a). The Committee recommends the adoption of Model Rule 7.4(a) to replace current Rule 7.4(a). As revised, paragraph (a) would permit all lawyers to communicate the fact that they practice in particular fields of law without constituting a claim of specialization.

Rule 7.4(b). The Committee recommends this new paragraph that incorporates the first sentence of current Rule 7.4(a)(1), which permits claims of specialization if not false or misleading, and retains the language of the second sentence of current Rule 7.4(a) that gives examples of the types of statements that constitute a claim of specialization. In light of the recommended change to Rule 7.4(a) to permit lawyers to communicate that they practice in a given field, the Committee recommends that current Rules 7.4(a)(2) and (a)(3) be deleted. We also recommend that the language dealing with the idea that lawyers who hold themselves out as specialists be held to the standard of performance of specialists, now contained in current Rule 7.4(c), be moved to the last sentence of this paragraph and that the remainder of current Rule 7.4(c) be deleted.

Consistent with our existing Rule, the Committee does not recommend the adoption of Model Rule 7.4(b) or (c), which permit lawyers engaged in patent or admiralty practice to so designate themselves. If not false or misleading, such claims are already permitted by current Rule 7.4.

Rule 7.4(c). The Committee recommends the adoption of the substance of Model Rule 7.4(d), which authorizes lawyers to claim certification as specialists by organizations approved by the ABA or state authorities. This subject is currently addressed in Massachusetts Rule 7.4(b). The Committee additionally recommends retaining in this paragraph the provision in the existing Massachusetts Rule that authorizes lawyers to claim certification as a specialist by a private organization if the communication states that the certifying organization is private and not regulated by a state authority or the ABA. The principal practical difference between proposed paragraph (c) and current paragraph (b) is to exempt the ABA from this last requirement.

Comments to Rule 7.4

The Committee's recommended changes to the Comments are consistent with its suggestions concerning the text.

Comment 1. The Committee recommends the adoption of Model Comment 1, modified to account for the variations between Model Rule 7.4(a) and our recommended Rule 7.4(a) and (b).

Comment 2. The Committee recommends the adoption, as Comment 2, of the substance, and most of the language, of Model Comment 3.

Rule 7.5: Firm Names and Letterheads

Rule 7.5(b). The Committee recommends that the current Rule be amended to conform to the Model Rule by adding the phrase "or other professional designation" in relation to the use by a law firm of the same name in offices in multiple jurisdictions.

Comments to Rule 7.5

Comment 1. The Committee recommends adoption of Model Comment 1, in substantially similar language, but it recommends retaining the current Massachusetts Comment's references to firm names that include retired, and not just deceased, members of the firm.

Comment 2. The Committee recommends retaining current Massachusetts Comment 2 concerning space sharing as more comprehensive than its Model Comment counterpart. The Committee recommends that the current Comment be amended by addition of the phrase "or that they are practicing law together in a firm" to the end of the first sentence, i.e., that the denominations "Smith and Jones" or "Smith and Jones, A Professional Association" suggest partnership or that the attorneys are practicing together in a firm.

Comment 3. The Committee recommends retaining current Comment 3, which has no counterpart in the Model Rules and relates to restrictions imposed by Supreme Judicial Court Rule 3:06 on trade names for professional corporations, limited liability companies, or limited liability partnerships.

Rule 7.6: Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

The Committee does not recommend adoption of this Model Rule. The trigger for the prohibition of such political contributions by a lawyer or law firm is that they be made “for the purpose” of obtaining such engagements or appointments. The Committee concludes that that test is much too nebulous to serve as a basis for discipline and believes that this subject matter is more appropriately left to substantive law.

Rule 8.1: Bar Admission and Disciplinary Matters

Rule 8.1. The Committee recommends no change in the text of the Rule.

Comments to Rule 8.1

Comment 1. The Committee recommends the addition of Model Comment language requiring lawyers to correct any prior misstatements in admission matters.

Comment 3. The Committee recommends addition of Model Comment language making clear that Rules 1.6 and 3.3 are applicable with respect to lawyer representation of clients in both admission and disciplinary matters.

Rule 8.2: Judicial and Legal Officials

Rule 8.2. The Committee recommends no change in the text of the Rule.

Comment to Rule 8.2

Comment 1. The Committee recommends adding a sentence at the end of Comment 1 that summarizes the holding of *Matter of Cobb*, 445 Mass. 452 (2005), to the effect that an intentionally false statement or a false statement made when the lawyer has no objective basis to support it violates the Rule.

Comment 2. The Committee recommends deleting Comment 2 since the Massachusetts Rules do not explain all the instances when Massachusetts has chosen not to adopt the Model Rules.

Rule 8.3: Reporting Professional Misconduct

Rule 8.3. The Committee has recommended one stylistic change and the elimination of the final phrase in current Rule 8.3(c), since it duplicates the confidentiality protection set forth in Rule 1.6(c).

Comments to Rule 8.3

Comment 5. The Committee recommends deletion of this Comment because of the recommendation that a portion of current Rule 8.3(c) be deleted.

Rule 8.4: Misconduct

Rule 8.4(e). The Committee recommends the adoption of the Model Rules proposal to add an additional prohibition to this paragraph that would forbid lawyers from stating or implying an ability to achieve results by means prohibited by the Massachusetts Rules or other law. The Committee's recommendation reformulates the ABA proposal in order to clear up a grammatical ambiguity.

Rule 8.4(h). The Committee recommends, with some dissent, that this paragraph, which was deleted by the ABA from its Model Rules, also be deleted from the Massachusetts Rule as too vague to serve as an independent basis for discipline.

Comments to Rule 8.4

Comment 1. The Committee also recommends the adoption of Model Comment 1, which repeats the substance of Comment 4 to Rule 4.2 that a lawyer is not prohibited from "advising a client concerning action the client is legally entitled to take." Current Comment 1 should be renumbered Comment 2.

Comment 7. The Committee recommends deletion of Comment 7, consistent with its recommendation to delete Rule 8.4(h).

Appendix of Special Committee Reports and Dissents

RULE 1.6(b)

Statement in Support of the Committee's Proposal

Over the past thirty years, the legal profession has vigorously debated whether and under what circumstances a lawyer may reveal confidential client information to prevent harm to third parties. When Massachusetts adopted the Rules of Professional Conduct in 1998, the ABA Model Rules permitted such disclosure only to prevent a client from committing a crime that was likely to result in “imminent death or substantial bodily harm.” Massachusetts rejected this standard as too narrow to protect the public interest and instead adopted our current Rule 1.6(b)(1), which was based on the recommendations of the American Bar Association Commission on Evaluation of Professional Standards (“Kutak Commission”) in 1983 and which permits a lawyer to reveal confidential information,

“ . . . to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or to prevent the wrongful incarceration of another.”

Under this rule, a lawyer may disclose a client’s confidential information when the harm will be the result of actions by a third party as well as actions by a client. See Comment 13A.

A majority of the Committee recommends retaining the substance of current Rule 1.6(b)(1) but adopting the format of Model Rule 1.6, which deals with preventing bodily harm in subparagraph (b)(1) and preventing harm to financial interests in subparagraph (b)(2). A majority also recommends eliminating the reference to “financial” in the second clause, so that lawyers have discretion to reveal confidential information to prevent substantial injury to “the interests or property of another.”

1. Narrowing Current Rule 1.6(b)(1).

Three members of the Committee favor narrowing our current rule by adopting the current version of Model Rule 1.6(b)(2), which permits disclosure to prevent harm to financial interests only if it is the lawyer’s client who is threatening to commit a crime or fraud and only if the client has used the lawyer’s services in furtherance of the criminal or fraudulent act. Although our version of Rule 1.6(b)(1) has been in effect for fifteen years, the dissenting members offer no empirical evidence that the Rule’s permission to disclose confidential information has been abused or that attorney-client confidentiality has been eroded. Rather, the dissenters, quoting the Comment to the Model Rules, argue that disclosure should be permitted only when there has been a “serious abuse of the client/lawyer relationship.”

We believe that the dissenters put the emphasis in the wrong place. In our view, the primary purpose of permitting disclosure of confidential information is to give lawyers the opportunity in appropriate cases to prevent serious harm to innocent third parties, regardless of whether the lawyer’s client is the culprit or the lawyer’s services have been used. Indeed,

disclosing confidential information is more likely to harm the attorney-client relationship and to undermine confidence in the confidentiality principle when the disclosure indicates that the lawyer's client is about to commit a crime or fraud than when the perpetrator is a third party. Blowing the whistle on a client may lead to the client's indictment, *see e.g. Purcell v. District Attorney*, 424 Mass. 109 (1997), a result that undermines the lawyer/client relationship more gravely than disclosing information supplied by someone who is not directly involved in wrongdoing.

The dissenters also argue that narrowing the permitted disclosure will promote uniformity with other states that follow the Model Rules. The Model Rule formulation, however, has not won universal acceptance. In our own geographic area, for example, Vermont requires disclosure of client crimes or frauds to prevent substantial financial injury to others, New Hampshire permits such disclosure but only if the client intends to commit a criminal act, Connecticut permits disclosure to prevent both criminal acts and civil frauds, while both Rhode Island and New York prohibit such disclosures. Given this absence of uniformity, we believe we should focus not on counting noses but on achieving the right balance between preserving confidentiality and protecting the public from harm. In our view, the current rule, which focuses on preventing harm to third parties from fraudulent schemes rather than the lawyer's role in furthering the fraud, achieves that balance.

2. Permitting Disclosure to Protect Non-Financial Interests

Five members of the Committee dissent from the Committee's recommendation to delete the qualifier "financial" from Rule 1.6(b)(2), and advocate the adoption of the language of Model Rule 1.6(b)(2), which permits disclosure only to prevent serious injury to financial interests.

We recognize that crimes and frauds can cause financial harm, but they can also seriously injure other vital legal interests. Proposed Comment 8A to Rule 1.6 provides some examples. A non-custodial parent can kidnap a child, injuring the interest of the other parent in maintaining custody or even contact with the child. A criminal trespasser or wire-tapper can invade the privacy of another. A criminal or fraudulent scheme can deprive some citizens of their right to vote or other civil rights.

Under the version of Rule 1.6(b)(1) now in effect, it is not always clear whether a lawyer has discretion to reveal confidential information in order to prevent harm to such non-financial interests. Some types of interests, such as the right to be free of intrusions into one's home and the right to freedom from employment discrimination, might fall within the category of "property" interests protected by the current version of Rule 1.6(b)(1). Other types of interests, such as the right to vote or the rights of a custodial parent, are harder to classify as property rights, but injury to such interests can be just as devastating as any financial loss.

We believe that it is a mistake to permit disclosure to prevent harm to financial interests but not to other types of legally-protectable interests such as parental rights and civil rights. As a profession, we are better off recognizing that civil rights are as important and deserve as much protection as economic interests. The Due Process Clauses in the Fifth and Fourteenth Amendments would be less majestic – and would command less assent—if they protected life and property but not liberty.

The dissenters argue that uniformity would be achieved by adopting Model Rule 1.6(b)(2) and also, somewhat inconsistently, that many jurisdictions do not permit as much disclosure of confidential information as the Model Rule. They worry that eliminating the qualifier “financial” would seriously erode clients’ trust in lawyers. We believe that their fears are misplaced, for two reasons.

First, the dissenters overlook the varied history of exceptions to the confidentiality principle. The Disciplinary Rules in effect in Massachusetts prior to 1998 permitted a lawyer to reveal the intention of his client to commit a crime without regard to the seriousness of the crime or the extent of injury that the crime might cause. The 1998 revisions to our Rules thus represented a substantial narrowing of the lawyer’s discretion to reveal confidential information. The Rules we adopted in 1998 nevertheless gave lawyers substantially more discretion than the ABA Model Rules which were then in effect and which had been adopted in many states. It was not until 2002 that the ABA, under intense criticism, broadened the lawyer’s discretion to something approximating the current Massachusetts position. We are not aware of any empirical evidence that these varied exceptions to the confidentiality rule in effect over the years have undermined the basic principle of lawyer-client confidentiality or eroded clients’ trust in lawyers.

Second, the dissenters overlook other protections built into our recommended version of Rule 1.6(b)(2). Under the proposed Rule, lawyers would have discretion to reveal information only to prevent the commission of a criminal or fraudulent act. “Fraudulent” is defined in the Rules as “conduct that is fraudulent under substantive or procedural law and has a purpose to deceive.” See Proposed Rule 1.0(e). In addition, the lawyer must reasonably believe that the crime or fraud is likely to result in substantial injury to the interests or property of another. And even when these criteria are satisfied, disclosure remains optional: the lawyer may still choose to remain silent. Lawyers are steeped in an ethic of confidentiality. Based on past experience, we believe that most lawyers are likely to consider revealing confidential information only when faced with clear evidence of serious threatened harm to third parties. The elimination of the modifier “financial” is not likely to change this ingrained behavior. It does, however, recognize that non-economic interests can be just as important and as worthy of protection as financial interests.

Dissent of Carol Beck, Elizabeth Mulvey, Andrew Perlman, Constance Rudnick, and Constance Vecchione to Committee’s Proposed Rule 1.6(b)(2) and (b)(3)

The dissenters respectfully dissent on one or more aspects of the Committee’s recommendations on Mass. R. Prof. C. 1.6(b)(2) and (b)(3). The discussion below sets out which of us is dissenting on which part of the rule.

1. Overview of Recommended Changes to Rule 1.6(b)(1)-(2)

Mass. R. Prof. C. 1.6(b)(1) currently combines three circumstances in which disclosures of confidential information are permitted: (1) to prevent the commission of criminal and fraudulent acts reasonably likely to result in death or substantial bodily harm, (2) to prevent the commission of criminal and fraudulent acts reasonably likely to result in substantial injury to the

financial interests or property of another, and (3) to prevent the wrongful incarceration or execution of another.

In contrast, ABA Model Rule 1.6(b) splits paragraph (b)(1) into subsections (b)(1) and (b)(2), with a different standard for disclosures to prevent death or substantial bodily harm than for disclosures to prevent a financial crime or fraud. The Model Rule provides as follows:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services...

It is important to note that Model Rule 1.6(b)(2) (the "financial interests" provision) has a stricter triggering standard than the current Massachusetts Rule. In particular, unlike the equivalent Massachusetts provision, Model Rule 1.6(b)(2) requires the *client* to be the wrongful actor and to have used (or be using) the lawyer's services in *furtherance* of the crime or fraud.²

The Committee now recommends that this Court adopt paragraphs (b)(2) and (b)(3) of the Model Rule, but with the following revisions:

(2) to prevent ~~the client from committing a crime or fraud~~ the commission of a criminal or fraudulent act that the lawyer is reasonably certain believes is likely to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services[.]

(3) to prevent, mitigate or rectify substantial injury to the ~~financial~~ interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

2. Committee's deletion of the modifier "financial" in paragraphs (b)(2) and (3)

All five dissenters oppose the deletion of the word "financial" in paragraphs (b)(2) and (b)(3). According to the Committee's Report, the deletion of this word would allow the disclosure of confidential information to prevent or rectify any crime or fraud that is likely to "substantially injure any protectable interests, not just 'financial' interests[.]" including "rights to privacy, to vote, to be free from invidious discrimination, etc...."

We do not find the Committee's reasoning to be persuasive. The Committee points to no actual circumstance or case demonstrating a strong public interest in support of such a substantial erosion of a lawyer's duty of confidentiality. In addition, if the concept of a protectable interest is not definable, we believe it does not provide adequate guidance to attorneys or adequate protection to clients' confidential information. Indeed, it is hard to imagine a situation where a fraud or crime would not impinge on someone's "interest," because crimes and frauds by their very nature involve some kind of harm to one or more persons.

² We do not dissent with regard to the Committee's recommendation that the Court adopt Model Rule 1.6(b)(1).

In light of these problems, it is not surprising to learn that no other jurisdiction has an exception allowing disclosures to prevent harm to the undefined “interests... of another.” In fact, several jurisdictions have rejected Model Rule 1.6(b)(2) as it is, concluding that the more modest disclosure standard in the Rule is already too permissive.³ Admittedly, some jurisdictions permit (or even require) the disclosure of information to prevent the client from committing a crime without regard to the nature of the harm,⁴ but no jurisdiction permits such an open-ended disclosure in the context of “frauds,” as the Committee’s proposal would allow.

If the word “financial” is retained in paragraphs (b)(2) and (3) to modify “interests,” Comment 7 would have to be modified accordingly, and Comment 8A would be stricken. Proposed Comment 8A purports to explain the types of non-financial interests that permit disclosure.

In sum, we believe that clients’ trust in lawyers would be eroded if they knew that their information could be used to prevent or remedy harm to some undefined legal interest resulting from the misconduct of a non-client and for which the lawyer was in no way responsible. For these reasons, we encourage the Court to reject the recommended deletion of the word “financial” in paragraphs (b)(2) and (b)(3).

3. Committee’s further revisions to Model Rule 1.6(b)(2)

Constance Vecchione, Carol Beck, and Elizabeth Mulvey, but not Andrew Perlman or Constance Rudnick, recommend adopting the Model Rule (b)(2) exception that allows disclosure only to prevent **the client** from committing a crime or fraud reasonably certain to result in substantial injury to the financial interests or property of another; Andrew Perlman and Constance Rudnick favor the Committee’s version in this respect.

Constance Vecchione, Carol Beck, and Elizabeth Mulvey, but not Andrew Perlman or Constance Rudnick, further recommend adopting the Model Rule limitation to (b)(2) that permits disclosure of such crimes or frauds only **in furtherance of which the client has used the lawyer’s services**; Andrew Perlman and Constance Rudnick favor the Committee’s recommended deletion of this phrase. The remainder of this section of the dissent therefore comes from Constance Vecchione, Carol Beck and Elizabeth Mulvey only.

If paragraph (b)(2) is conformed to the ABA version of the paragraph in whole or in part, then Comment 7 should also be revised to match the model comment as applicable. The model comment justifies the limited exception for disclosure of confidential information by noting that such disclosure prevents exploitation of the attorney-client relationship and furthers the goal of preventing or mitigating the consequences of the client’s fraud or crime. The Committee’s proposed comment provides no explanation for the less stringent standard that it proposes. In addition, the added nonstandard sentence providing that “[t]he lawyer should not ignore facts that would lead a reasonable person to conclude that disclosure is permissible” should be stricken; it is not appropriate to offer active encouragement for breaching confidentiality.

One advantage to adopting the Model Rule is that many jurisdictions have adopted it. (Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Illinois, Indiana, Iowa,

³ See, e.g., Alabama, California, Kentucky, Missouri, Montana, Rhode Island.

⁴ See, e.g., Florida, Kansas, Nebraska, New York, Oregon, Virginia, West Virginia, Wyoming.

Maine, Maryland, Minnesota, Mississippi, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Carolina, Utah, Vermont). Idaho, North Carolina, Washington, and Wisconsin have adopted Model Rule 1.6(b)(3), which arguably covers the conduct in Rule 1.6(b)(2). Other jurisdictions have adopted rules capturing the Model Rules exceptions without adopting the precise language (Connecticut, Hawaii, Nevada, New Jersey, and South Dakota). Given that multijurisdictional practice is common, it is beneficial to have the same or similar rules governing exceptions to the rule protecting confidential information.

Departure from the Model Rule is warranted when there are substantial objections to the Model Rule formulation. In this case, however, there is a strong policy reason for adopting the Model Rule limiting disclosure to prevent financial harm and to fraudulent or criminal acts committed by the client and furthered by the lawyer's services. A lawyer should maintain confidentiality except for the most compelling reasons. A client abuses the lawyer-client relationship by making the lawyer the unwitting tool of the client's crime or fraud, and a lawyer should be able to disclose information if the client has used the lawyer's services to commit a crime or fraud that is reasonably likely to result in substantial harm to the financial interests or property of another. In addition, the lawyer's discretion to disclose may cause the client to decide not to commit the crime or fraud or to mitigate its harm. See comment 7 to Model Rule 1.6. When the client is not the perpetrator of the crime or fraud or the lawyer's services have not been used, the lawyer may not be in a position to advise the perpetrator. Moreover, the client may have reasons for protecting the other person, or the client may wish not to be drawn into the controversy, or the client may simply have the entirely reasonable expectation of keeping the information confidential. The client should have the authority to prohibit disclosure of his or her confidential information, and the lawyer should not be able to involve the client in preventing financial harm caused by another or when the lawyer's services have not been used.

RULE 1.8(b) and 1.9(c)(1)

Statement in Support of the Committee's Proposals

The Committee has recommended adopting ABA Model Rules 1.8(b) and 1.9(c)(1). These rules prohibit lawyers from using confidential information relating to the representation of a current or former client to the disadvantage of the client. However, they do not contain the additional prohibitions in the current Massachusetts rules against using such information "for the lawyer's advantage or the advantage of a third party." Certain Committee members object to the removal of these additional prohibitions on the ground that the removal will invite lawyers to breach their fiduciary duties to present and former clients and to disregard other legal obligations.

We believe these objections are unpersuasive. The current rule is not co-extensive with a lawyer's fiduciary duty to present and former clients, but is in fact broader. Indeed, the current rule calls into question practices that most lawyers would acknowledge are proper. We believe that the Model Rules better reflect legitimate disciplinary concerns. To the extent that the use of confidential information relating to the representation of a client violates the law even without harm to the client, there are other legal remedies available, including in many instances discipline under other professional conduct rules.

First, it is important to recognize that this dispute does not implicate the lawyer's duty not to disclose the confidential information of present or former clients. Rule 1.6 and 1.9(c)(2) establish that duty and the exceptions to it, and nothing in Massachusetts Rules 1.8(b) and 1.9(c)(1) or the corresponding Model Rules affects that duty. Rules 1.8(b) and 1.9(c)(2) address only a lawyer's ability to use that information without disclosing it.

Second, as to the use of confidential information, the fiduciary duty of an agent is narrower than the duty that the dissenters would impose on lawyers. According to the Restatement (Third) of Agency, § 8.05, an agent is obliged "not to use or communicate confidential information of the principal for the agent's own purposes, or those of a third party." (Emphasis added.) This obligation reflects the obligation of the agent not to use the principal's property for his or her own benefit. (Trade secrets are a form of property.) By contrast, Rules 1.8(b) and 1.9(c)(2) prohibit use of "confidential information relating to the representation" of the client. Such information includes information constituting the property of the client, but is not limited to that information. The Comment to Rule 1.6 states, "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to virtually all information relating to the representation, whatever its source." Thus, in the course of representation, a lawyer may learn all manner of information that is not generally known but that is in no way the confidential information "of" the client.

For example, the representation of a client frequently exposes a lawyer to information, some of it not generally known, about the industry in which the client does business, along with the players, common practices and recent happenings in that industry. The knowledge that the lawyer acquires plainly increases the lawyer's ability to attract other clients who will value the lawyer's "experience." That knowledge will in turn lead to more business and higher billing rates for the lawyer, thus benefiting the lawyer. While the information on which that knowledge is based is "related" to — indeed, derived from — client representation, it is generally not confidential information "of" the client that a lawyer as a fiduciary must refrain from using without the client's consent. A similar doctrine, familiar to employment and trade secret lawyers, is that a former employee may use the general skills, knowledge and "know-how" derived during employment for the benefit of a subsequent employer. See Restatement of Unfair Competition Law § 42, cmt. d.

Similarly, lawyers often learn information concerning a client's adversary or third parties in the course of a representation. To be sure, a lawyer's subsequent use of such information for his or her own benefit may violate legal obligations such as those imposed by protective orders or the securities laws, but such use does not ordinarily breach any fiduciary obligation to the client. The Restatement of the Law Governing Lawyers recognizes this by qualifying the duty imposed on lawyers to account to a client for any "pecuniary gain" made by the lawyer's use of the client's confidential information, by excluding the lawyer's use of such information "in the practice of law." § 60(2). The Restatement gives the following example: "[I]f otherwise permissible, a lawyer representing a plaintiff who has acquired extensive confidential information about the manner in which a defendant manufactured a product may employ that information for the benefit of another client with a claim against the same defendant arising out of a defect in the same product." *Id.* cmt. j. The comment explicitly recognizes that such use may benefit the lawyer economically by increasing a contingent fee.

In both of these examples, a lawyer may use “confidential information relating to the representation” of a client, in some instances for the pecuniary benefit of the lawyer or some third party (e.g. a subsequent client). Yet few would argue that by doing so, the lawyer breaches a fiduciary duty to any client.

Third, Rules 1.8 and 1.9 are both directed to protecting clients from the misconduct of their attorneys. The prohibition against using client confidential information to the disadvantage of the client obviously advances that interest. The current rules’ further prohibition against any use of such information that advantages the lawyer or a third person without disadvantaging the client is not client-protective. If such use should trigger professional discipline, it should only be because it breaches some other legal obligation. For example, a lawyer who trades in securities with the benefit of material non-public information derived from the representation of a client violates the securities laws even if the client is in no way harmed by the trading.

But it is not necessary to use Rules 1.8 and 1.9 to address the disciplinary consequences of a lawyer’s engaging in insider trading and similar forms of misconduct. Rule 8.4 prohibits lawyers from committing crimes “that reflect adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects” (8.4(b)), and engaging in “conduct involving dishonesty, fraud, deceit, or misrepresentation” (8.4(c)). Moreover, clients whose confidential information is misused frequently have remedies for breach of fiduciary duty, misappropriation of trade secrets, and the like. There is no need to preserve an additional, overbroad ethical obligation in Rules 1.8 and 1.9, as the ABA has recognized in the most recent revisions of the Model Rules.

Fourth, the dissenters suggest that by removing the overbroad provisions in the current rule, the Court would signal to lawyers that “it is perfectly permissible for a lawyer to use client and former client confidential information for personal advantage or for the advantage of a third party without client consent so long as the client or former client is not disadvantaged.” However, we doubt that there are any practicing lawyers who are unaware of the legal prohibitions against insider securities trading or the legal risks faced by anyone, including a lawyer, who conceals material confidential information in his or her business dealings. It is frankly difficult to believe that any lawyer would view the amendment as giving an unambiguous green light to engage in conduct that most lawyers would warn their clients to avoid. And if the Court were concerned about sending such a signal, adding a comment that reminds lawyers that other principles of law may prohibit self-advantaging use of client confidences can address that concern without preserving an overbroad prohibition in the rules themselves.

Fifth, the dissenters also suggest that lawyers will not always anticipate when their undisclosed use of their client’s confidential information will in fact disadvantage their clients because they may not be fully informed about their clients’ plans and interests. But the prohibitions of Rules 1.8(b) and 1.9(c) are not limited to “knowing” uses of confidential information in ways that disadvantage clients. Lawyers who read the rules will therefore know that if they seek to profit from their clients’ confidential information on the mere assumption that the use will not harm the clients, they will remain at risk of professional discipline (not to mention possible civil and criminal liability) if their assumption proves incorrect. Prudent lawyers will refrain from any use of such information unless they are quite confident that their clients will not be harmed and that the law does not otherwise prohibit such use.

The dissenters correctly remind the Court that the ABA Model Rules are not binding on this Court. However, there are obvious advantages to uniformity in the absence of a strong reason for adopting a non-standard rule. While this Committee has recommended departing from the Model Rules on several occasions, the majority of the Committee does not believe that there is a persuasive rationale for departing from the Model Rules in this situation.

**Dissent of Andrew Kaufman, Elizabeth Mulvey and Constance Vecchione to
Committee’s Proposed Rules 1.8(b) and 1.9(c)(1)**

Rule 1.8(b) currently provides that, except where a client consents or where Rule 1.6 or Rule 3.3 would permit or require, a “lawyer shall not use confidential information relating to the representation of a client “to the disadvantage of the client or for the lawyer’s advantage or the advantage of a third party.” Rule 1.9(c)(1) contains the same prohibitions with respect to former clients. When the Supreme Judicial Court adopted the Model Rules of Professional Conduct in 1998, it adopted the recommendation of its Advisory Committee and carried over this tripartite prohibition from its former rules, which were based on the Model Code of Professional Conduct. In so doing, it explicitly rejected the language of the Model Rules that limited the prohibition simply to use of a client’s confidential information to the disadvantage of the client. The present Advisory Committee now recommends that this decision be reversed and that the last two portions of the prohibition be eliminated.

The clear message of the Committee’s recommendation is that it is perfectly permissible for a lawyer to use client and former client confidential information for personal advantage or for the advantage of a third party without client consent so long as the client or former client is not disadvantaged. The committee’s justification is that the additional prohibitions “were unnecessary and perhaps overly restrictive, where the Model Rule and Comment 5 to the Model Rule make it clear that a lawyer cannot use confidential information to the disadvantage of a client, regardless of who benefits.” We would retain the deleted prohibitions on the ground that their deletion sends the wrong message to both lawyers and clients.

The current tripartite prohibition in our view merely codifies substantive contract and fiduciary law principles. A client entrusts the lawyer with confidential information so that the lawyer may work for the client’s benefit, not for the benefit of the lawyer or some third party, and certainly not for those persons without its knowledge or consent. We believe that that notion is implied in every client-attorney contract as part of the fiduciary relationship between client and lawyer. It seems odd in the extreme to characterize prohibitions against use of a client’s confidential information by lawyers for their own benefit or for the benefit of a third party as “overly restrictive.” The exceptions that are carved out of Rule 1.6(a) in Rule 1.6(b) are justified on the basis of the public purpose they serve. Letting lawyers use client confidential information for their own, or for a third party’s, benefit hardly seems like a public benefit. It seems more like a private benefit for lawyers achieved at the expense of the confidentiality principle.

Indeed, this change in our rules may well be a trap for lawyers. If we are correct in thinking that the current tripartite prohibition is a codification of substantive contract and fiduciary law principles, acceptance by the court of the Committee’s recommendation that two

parts of the prohibition be removed from the disciplinary rule might be read as signaling a change in substantive contract and fiduciary law. Would a client, seeking to enjoin its lawyer from using confidential information for the benefit of a third party (or for malpractice after the fact), be met with the defense that the change in the disciplinary rule changed the substantive law? Or would the lawyer learn that a decision not to discipline did not connote a change in the substantive law? Lawyers do use the disciplinary rules as guides to conduct and if adoption of the Committee's recommendation would not change the substantive law, the lawyers might well be misled into liability for taking advantage of the change in the Rules.

An example discussed by the Committee was that of the client who discusses with its lawyer five possible sites it has identified for expansion. With the lawyer's help the client picks one and rejects the others. The Committee view is that the Rules ought not prohibit the lawyer from recommending one of the rejected sites for another client or picking it up for personal investment without discussing the matter with the client so long as the lawyer concluded that the client had no interest in the site. We conclude, however, that since the matter involves the client's confidential information, the lawyer ought not proceed in any fashion with respect to the other sites without client consent. Even on the Committee's version of the Rule, we are doubtful about its conclusion. Without discussion with the client, the lawyer's opinion that his or her action will not disadvantage the client will always be made with incomplete information. For all the lawyer knows, the client may have an animus against the third party chosen by the lawyer to tell about the site or may wish to tell someone else about the rejected sites or may wish to leave them in their current state for future consideration for itself. Even if the Committee is correct that it has chosen an example that satisfies its recommendation, there will be other examples when use of a client's confidential information will be even more problematic.

The very fact that the confidential information has come to the lawyer's attention by reason of being hired by the client leads us to conclude that the client ought to have the last word with respect to disposition of its confidential information. Eliminating the prohibitions currently in our rules will simply tempt lawyers to make use of client confidential information without their consent and give ammunition to those who think that lawyers are looking out for themselves too much when they have sole charge of the rules governing the client-lawyer relationship. It is difficult to imagine that these prohibitions would be eliminated by a committee with a substantial client presence.

We should respond briefly to two points made in the memorandum in support of the Committee recommendation and in opposition to this dissent. The most important criticism is that this dissent misstates the fiduciary duty of an agent. In our view, lawyers are special kinds of agents, with special rights and obligations. The fiduciary duties of lawyers are the duties as they are spelled out in these Rules, and they change as these Rules change. It would be a mistake to apply only the general rules of agency to the client/lawyer relationship. The current Preamble to the Rules states, "A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice." The law of agency does not impose such responsibilities on ordinary agents. And the Massachusetts Rules of Professional Conduct do more than just state disciplinary standards. As the Scope Note to the current Rules states, "The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies." The Rules would be providing the wrong guidance if they are amended to tell lawyers that while other law may prohibit them from using

client's confidential information for their own advantage or for the advantage of a third person, there is nothing in the rules governing lawyers that would prevent such use.

An additional point made in the Committee's statement is that the dissent's recommendation and hence that the current Rule is too broad in that it prohibits use of "all manner of information [that the lawyer has learned] that is not generally known in the course of representation that is in no way the confidential information 'of' the client." One of the examples given is that a lawyer frequently learns "information, some of it not generally known, about the industry in which the client does business, along with the players, common practices and recent happenings in that industry." But that criticism ignores the fact that the Committee has already excluded such information from the category of confidential information. Recommended Comment 3A to Rule 1.6 refers to the "common sense notion that not every piece of information that a lawyer obtains relating to a representation is protected confidential information. Among the examples of such nonconfidential information given in that Comment is "factual information acquired about the structure and operation of an entire industry during the representation of one entity within the industry."

The worry implicit in the Committee statement seems to be that the breadth of Rule 1.6(a)'s protection of information relating to the representation makes the Rule 1.8(b) prohibition of lawyer "use" of such information too broad. The examples given in the Comments of information learned in the representation that is not "confidential" suggest that other situations mentioned in the Committee statement, such as information learned about the client's adversary, would ordinarily not be confidential either. In any event, concern about information at the boundary of protected confidential information should not result in adoption of the current Committee recommendation to permit lawyers to use core confidential information for their own benefit.

The Committee statement presents the issue as one of departing from the Model Rules. The Court departed from the Model Rules when it retained its existing language in these Rules in 1998. The issue today is whether the Court will depart from its existing Rule that prohibits the use of a client's confidential information for the advantage of the lawyer or some other third party. The Preamble to the current Rules tells us that "[t]he 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." We believe that that warning is relevant to the proposed amendment of Rules 1.8(b) and 1.9(c)(1).

The ABA Model Rules and Comments are simply recommendations of a private organization and in this Report the Committee has recommended rejecting various positions the ABA has taken. We recommend that the court reject the Model Rules versions of Rule 1.8(b) and Rule 1.9(c)(1) and retain the current wording of the prohibitions contained in those Rules. We agree that the other clarifying language recommendations of the Committee with respect to those Rules should be adopted.

RULE 1.10

Statement in Support of the Committee's Proposal

One of the most contentious issues addressed by the Committee is whether and to what extent the Rules of Professional Conduct should countenance screening of personally disqualified lawyers without client consent as a cure to disqualification of a law firm under Rule 1.10. After extensive discussion, a majority of the Committee recommends retaining the current Massachusetts screening rule contained in Rule 1.10(d) and 1.10(e), with minor changes to clarify the scope of the Rule.

The debate in the Committee has replicated to a large extent the debate in the Wilkins Committee, which recommended the current version of Rule 1.10 in 1997.⁵ The Wilkins Committee considered all the arguments pro and con and even published for comment a draft rule that, like the current Model Rules, would permit *any* laterally-moving lawyer to be screened from a matter over the client's objection. In the end, however, the Wilkins Committee recommended a narrower version that permitted screening only when there was little likelihood that the lawyer possessed significant confidential information.

Under the current Massachusetts Rule, a firm can avoid disqualification by screening a lawyer who represented a client at another firm, but only if the lawyer "had neither substantial involvement nor substantial material information relating to the matter." The Committee recommends making the requirements for screening more precise by permitting screening when the laterally-moving lawyer "had neither involvement nor information relating to the matter *sufficient to provide a substantial benefit to the new firm's client.*" (New language is in italics.)⁶

⁵ When the Wilkins Committee considered the issue of screening, the Model Rules did not allow any form of screening when a lawyer moved to a firm representing a client whose interests were materially adverse to a client of his former firm. Under the then-existing Model Rules, the "new firm" would be disqualified from taking or continuing with the representation. Recognizing the hardship that might ensue to lawyers and clients, courts, through case law, sometimes refused to disqualify law firms if they had implemented screening mechanisms to keep the infected lawyer away from those in the new firm participating in the matter. Often these involved situations when the ethical violation did not affect the particular lawsuit or where the objecting party had waited too long to complain. See, e.g., *Holcombe v. Quest Diagnostics, Inc.*, 675 F. Supp. 2d. 515, 519 (E.D. Pa. 2009) (factors to be considered in determining if firm employing screen should nonetheless be disqualified include: (1) whether and when notice to the former client was given; (2) the substantiality of the relationship between the attorney and the former client; (3) the time lapse between the matters in dispute; (4) the size of the firm and the number of disqualified attorneys; (5) the nature of the disqualified attorney's involvement, and (6) the timing of the wall). See also *Kafka v. Truck Ins. Exchange*, 19 F.3d 383, 386 (7th Cir. 1994) (delay in filing motion to disqualify will weigh against moving party); *Morin v. Maine Educ. Ass'n*, 993 A.2d 1097 (Me. 2010) (moving party must prove, *inter alia*, it has been prejudiced in order to disqualify firm).

⁶ The dissenters find fault with the use of the word "substantial" in the current version of Rule 1.10 and presumably would object that the modified recommendation also uses the word "substantial." They argue that the definition of "substantial" is subject to interpretation. This argument ignores the fact that words like "substantial," as in the "substantial" relationship test, or, for that matter, "reasonable" are everywhere in the current Rules of Professional Conduct, as well as in statutes and common law decisions. As Justice Holmes put it, "I do not think we need trouble ourselves with the thought that my view depends upon

A majority of the Committee believes that our recommendation strikes the right balance between the ability of lawyers to obtain new employment and the reasonable apprehensions of clients about the loyalty of their lawyer and the safety of their confidential information when the lawyer moves to a firm representing an adversary. Clients have a right to expect that their lawyers, whether partners directing litigation or associates behind the scenes on significant issues,⁷ will not leave their firm and join the opposing law firm. Most clients would rightly view this as a betrayal that raises grave concerns about the sanctity of their confidences,⁸ and this perception should not be ignored. The current Massachusetts Rule protects such legitimate client expectations, while also providing a reasonable degree of lateral mobility.⁹ Our rule is also consistent with the position taken by the *Restatement (Third) of the Law Governing Lawyers*, § 124 (permitting screening only when the information possessed by the personally disqualified lawyer is unlikely to be significant in the subsequent matter).

1. Screening Under the Model Rules

When the Wilkins Committee made its recommendations in 1997, the Model Rules did not permit screening at all in matters covered by Rule 1.10. In 2009, the ABA House of Delegates, having repeatedly rejected any form of screening, finally amended the Model Rules to include an extremely broad screening, but only after a bitter debate and a closely contested vote. Some have urged us to adopt the revised Model Rule for the sake of uniformity,¹⁰ but there is in fact no uniform, or even broad, support for the unlimited screening now permitted by the Model Rules. For example, New York, which recently engaged in a wholesale revision of its rules of professional responsibility, has adopted a version of Rule 1.10 that does not provide for any screening at all, while the Litigation Section of the ABA (which dissented from the Ethics Committee's recommendation) advocated for adoption of the Massachusetts language.¹¹ The ABA's adoption chart shows that as of July 25, 2012, 26 jurisdictions did not permit screening at all, 13 permitted limited screening similar to our current Rule, and only 14 states have adopted Model Rule 1.10 or something like it. This breakdown demonstrates that the majority of states

differences of degree. The whole law does so as soon as it is civilized." *LeRoy Fibre v. Chicago, Milwaukee & St. Paul Railway Company*, 232 U.S. 340, 354 (1914).

⁷ The dissent's repeated references to the "lateral" lawyer seems to imply that the proposed relaxation of the screening rules applies only to low-level associates. In fact, numerous reported disqualification cases concern movement of a partner. See, e.g., *Miroglio, s.p.a. v. Morgan Fabrics Corp.*, 340 F. Supp. 2d 510 (S.D.N.Y. 2004); *Ultradent Products, Inc. v. Dentsply Intern., Inc.*, 344 F. Supp. 2d 1306 (D. Utah 2004). The language of the ABA Model Rule whose adoption is advocated by the dissenters would permit involuntary screening even if the moving lawyer was a named partner in the former firm whose role in the case had been substantial and significant.

⁸ Susan Martyn and Lawrence Fox, "Screening? Consider the Client," 19 No. 4 Prac. Litigator 47, 48–49, n.9 (July 2008). These authors also raise the concern that a rational client might wonder for how long his or her lawyer has been "consorting with the enemy" in an attempt to land employment. *Id.*

⁹ For a case in which our current rule permitted lateral movement, see *Inverness Medical Switzerland GmbH v. Acon Laboratories*, 2005 WL 1491233 (D. Mass. 2005), in which the law firm of one of the dissenting members of this Committee successfully demonstrated compliance with the other safe harbor in Rule 1.10(d) by demonstrating that it had no confidential information that was material to the matter.

¹⁰ See, e.g., Erik Wittman, "A Discussion of Nonconsensual Screens as the ABA Votes to Amend Model Rule 1.10," 22 Geo. J. Legal Ethics 1211 (Summer 2009).

¹¹ Alternative Report 110, <http://www.abanet.org/cpr/ethics/screening.html>.

have concluded that the broad screening provision adopted by the ABA is incompatible with a lawyer's obligation to his or her clients.

The most disturbing feature of the screening permitted by the Model Rule is its extraordinary breadth. Not only does the Model Rule dispense with the need to obtain a former client's consent under any circumstances, but it permits any laterally-moving lawyer to be screened, regardless of the closeness of the lawyer's relationship with the former client, the importance of the role the lawyer played in representing the former client, or the nature of the confidential information to which the lawyer had access. Under the Model Rule, lead counsel in a matter, who had been intimately involved in the planning and strategy for one client, could join the adversary's firm in the middle of litigation without causing that firm to be disqualified, so long as an "adequate" screening mechanism was established. As the Tennessee Supreme Court noted, such a rule would permit "switching teams in the middle of the game after learning the signals." *Clinard v. Blackwood*, 46 S.W.3rd 177, 188 (2001). Clients would rightly feel betrayed by such side-switching.

Also disturbing is the interaction between the broad screening permitted by the Model Rules and the traditional understanding, now recognized explicitly in our recommended Comment 3A to Rule 1.6, that "the accumulation of legal knowledge that a lawyer gains through practice is ordinarily not confidential information protected by this Rule." Under the dissenters' proposal, a firm would be free to hire any opposing counsel in a matter, including the lead counsel for the opposing party, without disqualifying the firm. Once hired, the lawyer would be screened as to confidential information of the lawyer's former client but would be free to share accumulated legal knowledge with the new firm, even legal knowledge that can be used adversely to the lawyer's former client in the very matter requiring screening. While the screened-off lawyer must refrain from personally attacking work performed for the former client, other lawyers in the firm will undoubtedly become adept at taking advantage of the new hire's general legal knowledge and skills without mentioning the matter that requires screening, justifying their conduct by the words of Comment 3A.

The proponents of Model Rule 1.10 argue that opposing lawyers use the current version of the rule to seek disqualification of a law firm for tactical reasons, rather than because of a client's genuine concern for the protection of confidential information. The fact that a rule or any other legal principle may be misused by overreaching lawyers does not justify changing or discarding the rule. If the rule protects an important principle, as Rule 1.10 does, the rule should be applied on a case-by-case basis by a court or other fact finder with knowledge of a particular situation. The whole field of conflict of interest law has received much needed attention in the past twenty-five years primarily because it became the subject of litigation, impelled at least in part by tactical motives. The fact that some firms or their clients may seek a tactical advantage from a disqualification motion is no excuse for countenancing violations of lawyers' fiduciary obligations.

2. The Dissent of Henry Dinger, James Re, and John Whitlock

Five members of the Committee dissent from the Committee's recommendation. Three dissenters urge adoption of the approach to screening contained in Model Rule 1.10. Two of the dissenters, John Whitlock and Henry Dinger, were also members of the Wilkins Committee and

in 1997 wrote a dissent to the present version of Rule 1.10. Then as now, the two dissenters urged the Court to adopt a Rule permitting unlimited involuntary screening. Then as now, they argued that there was no basis for believing that lawyers moving from one private firm to another were less trustworthy than lawyers moving from government employment to a private firm, for whom screening is available under Rule 1.11. Interestingly, they also argued that the economic realities existing in 1997 justified screening. “The job (and partnership) security of lawyers in private practice,” they wrote, “has never been shakier. More and more lawyers find themselves seeking new jobs as a result of tougher partnership standards, law firm mergers and failures, and other economic factors.”¹² The Committee and the Supreme Judicial Court rejected those arguments as inadequate justifications for weakening the protection of client loyalty and client confidences. A majority of the Committee believes that the Court should reject them again.

The dissenters contend the Committee’s concern about side-switching is “hyperbole” that has “no relation to reality.” Unfortunately, such side-switching does occur. For an example of lead counsel in a major firm negotiating to take on representation of an adversary behind a client’s back, see *Maritrans v. Pepper, Hamilton & Sheetz*, 529 Pa. 241 (1992). Other reported examples include *Kala v. Aluminum Smelting Co.*, 688 N.E.2d 258 (Ohio 1998), a case in which the plaintiff’s counsel joined the defendant’s law firm while the case was on appeal, and *Clinard v. Blackwood*, 46 S.W.3d 177 (Tenn. 2001) and *Towne Development of Chandler v. Superior Court*, 842 P.2d 364 (Ariz. App. 1992), in both of which a partner who had represented the defendants in a matter moved to the firm representing the plaintiffs while the case was still pending.

Likewise, we are skeptical of the dissenters’ claim that little damage will be done because laterally moving lawyers leave all their files behind. Increasingly, information about an engagement is stored electronically. Modern technology makes it possible to transfer such information (secretly or in the open, intentionally or accidentally) with nothing more than a keystroke. Such transfers need not indicate wrongful intent. It is common practice for lawyers to take written work product with them when they change firms to use as writing samples or forms or simply as compilations of their own legal knowledge. Contrary to the dissenters’ assertion, even junior associates moving laterally can and do take a substantial amount of legal work product with them. And once the lawyer joins the new firm, file-sharing has never been easier.

Even if client confidences are not deliberately shared, lawyers are fallible and mistakes happen. Modern law practice puts a premium on sharing information quickly and efficiently within the firm. The problem is compounded because groups of lawyers and sometimes whole departments move from one law firm to another. In an environment of free information sharing within firms and frequent moves between firms, inadvertent disclosures can occur during casual discussions in hallways or lunchrooms, in department meetings, in strategy sessions about another case, or through the dissemination of emails and electronic documents to unintended recipients.¹³

The dissenters argue that screening can eliminate the risks that lawyers moving between firms will violate their duties of loyalty and confidentiality, whether deliberately or

¹² See <http://masslawyersweekly.com/1996/06/24/proposed-rules-of-professional-conduct-introduction>.

¹³ For a similar argument, see Martyn and Fox, *supra* note 7, at 50–55.

inadvertently. While there is little empirical evidence about the efficacy of screening, we are doubtful that it provides a sovereign cure. The type of screening advocated by the dissent requires substantial administrative overhead. See Model Rules 1.0(k)(defining “screened”) and 1.10(b)(setting forth procedures for screening). Even well-established law firms sometimes experience problems in implementing such screens in a timely way. See e.g. *Arista Records LLC. V. Lime Group LLC*, 2011 WL 672254 (S.D.N.Y. 2011)(Wall Street firm recognized need for screen, but delayed in blocking access to documents and notifying other attorneys of the screen). In addition, screens undertaken with the best of intentions sometimes break down in the day-to-day work of the firm. See, for example, *Steel v. General Motors*, 912 F. Supp. 724 (D.N.J. 1995) for a rare look behind the scenes at a screen that didn’t work. Although some jurisdictions permit screens, recent cases make it clear that lawyers in these jurisdictions still violate the basic requirements of an effective screen.¹⁴

Moreover, the dissenters’ picture of the ideal operation of one screen in a firm presents a false picture. In larger firms, the more accurate picture is of a complex spider web of dozens, perhaps hundreds of screens, operating in multiple offices throughout the country and in some cases throughout the world, all connected by a firm intranet. Keeping track of who may not be present when a matter is discussed or who may not have access to particular files and information is likely to be a nightmare even in the best managed firms. As one commentator observed, “Screening becomes increasingly more difficult to control where ‘multiple lawyers in multiple office megafirms are being screened from multiple matters over a number of years, requiring an elaborate matrix, perhaps even a computer program, to sort out which lawyers are screened from what engagements.’”¹⁵ And when the inevitable slip-up occurs, how likely is it that the law firm will voluntarily tell the former client, especially when such disclosure might lead to disqualification of the firm in an on-going matter?

In support of their argument for broadening the Rule, the dissenters cite *O’Donnell v. Robert Half, Inc.*, 641 F. Supp. 2d 84 (D. Mass. 2009), which they claim shows that the current Rule permits disqualification “where the later[al] remembers nothing and even where the lateral did not work on the matter in question.” In fact, Magistrate Judge Collings found that the lateral had worked on the matter in question. *Id.* at 87. He concluded that her 7.2 hours billed constituted “involvement,” but not “substantial involvement.” The new firm was disqualified because Magistrate Judge Collings also found that the associate had received confidential information about the client’s legal strategy. This finding is consistent with our current Rule 1.10, which focuses not only on the quantum of involvement but also on the quality of information received. It is not hard to envision other cases like *O’Donnell*, where the moving lawyer billed only a modest amount of time to the case but had been exposed to sensitive factual,

¹⁴ See, e.g., *Shaw v. London Carrier*, 2009 WL 4261168 (W.D. Mich., November 24, 2009) (Michigan’s Rule 1.10 requires prompt notification to the court where an attorney involved in litigation changes sides; defendant’s firm failed to do so; defendant’s firm disqualified). See also *Faith Baptist Church v. Waterford Twp.*, 2009 WL 3756891 (E.D. Mich., November 6, 2009); *HealthNet, Inc. v. Health Net, Inc.*, 289 F. Supp. 2d, 755 S.D. W.Va. (2003) (inadequacy of timing of screen resulted in disqualification).

¹⁵ Memorandum to A.L.I. Council Regarding Adoption of § 204, at 9, quoted in Lee A. Pizzimenti, “Screen Verité: Do Rules About Ethical Screens Reflect the Truth About Real-Life Law Firm Practice?,” 52 U. Miami L. Rev. 305, 318 (1997).

tactical or strategic information that would make screening inappropriate.¹⁶ It is true that the lawyer in *O'Donnell* testified she did not remember the sensitive information to which she had been exposed, but a rule intended to protect a client's confidences would be nugatory if the migrating attorney could demonstrate compliance simply by testifying that he or she "remembered nothing."¹⁷

In an effort to persuade this Court to adopt the wide-open Model Rule, the dissenters offer a hypothetical in which sensitive confidential information learned by a laterally moving lawyer does not disqualify the new firm from appearing against the former client because the firm's representation adverse to the former client is not in a substantially related matter – in the example given, a patent lawyer moves to a firm adverse to the lawyer's former client in product liability litigation.¹⁸ Similar hypotheticals testing the outer limits of the Rules' coverage could be conjured up with respect to most of the Rules of Professional Conduct, but the argument that Rule 1.10(d) (and Rule 1.9) could be drafted so as to encompass even more situations hardly seems to support an argument that it should not cover as much as it does. The Committee believes that the Rule as drafted covers the most common and most dangerous situations—where the migrating attorney has worked on a related matter and, as a result, possesses information likely to cause significant damage to the former client in the hands of the adversary's attorney.

The dissenters also argue that wide-open screening should be permitted because the need of the new firm's current client to retain the law firm of its choice must be weighed against the fears of the former client of the laterally-moving lawyer. That is a false choice. The needs of the new firm's client become an issue only because the firm is putting its own economic needs over its client's needs by hiring its opponent's lawyer. The new firm wants it both ways, or really three ways. It wants to hire a new lawyer for itself, deprive its opponent of a lawyer, and still represent its current client. A trifecta. And if the former client complains, the new firm will accuse it of making a motion for tactical reasons.

The dissenters point to Rule 1.11, which deals with the obligations of former government lawyers, as support for their position, arguing that lawyers moving from one private practice to another are just as responsible and ethical as lawyers moving from government service to private practice. But a difference in trustworthiness is not the basis for the difference between current Rule 1.11 and current Rule 1.10. Under Rule 1.11, government lawyers moving to private

¹⁶ Much of the impetus to expand the scope of involuntary screening comes from the perception of the dissenters that *O'Donnell* was wrongly decided. The Committee did not formally address the correctness of the result but many members of the Committee believe that the court in *O'Donnell* reached the proper result.

¹⁷ Indeed, some courts have held that where there is proof that the migrating lawyer received confidential information in the course of the prior representation, an assertion, even under oath, that the attorney has no present recollection of the information s/he received will not suffice. See, e.g., *Gaton v. Health Coalition, Inc.*, 745 So. 2d 510 (Fla. Dist. Ct. App. 1999).

¹⁸ Drawing the line at similar cases makes perfect sense and furthers the purpose and policy of both Rule 1.9 and Rule 1.10. Where the information learned in the prior client's case is relevant to that of the new client, lawyers will be understandingly tempted to use that information for the benefit of the new client. If the matters are not related, the information is presumably not so relevant and temptation is not as great. The drafters and this Court have concluded that the prohibition against using confidential information set forth in 1.9(b) is sufficient deterrent in those situations.

practice, unlike private lawyers moving between firms, are prohibited from representing the same side in a matter as well as the opposite side. The breadth of this prohibition creates an important public policy issue, as Comment 3 to our current Rule 1.11 points out:

The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

There is no such public policy argument for modifying current Rule 1.10. The current rule has not created any large-scale deterrence against lawyers' lateral movement between private firms, even if it does prevent some lawyers from moving to a particular law firm of their choice.¹⁹ We note also that the public character of government work means that the confidential information protected by Rule 1.11 is different and in many circumstances narrower than the very wide coverage of Rule 1.6.²⁰

More generally, the dissenters contend that our current rule is based on the "offensive assumption" that "lawyers in general are not to be trusted." We make no such assumption about lawyers in general. It is, however, a fact of life that some lawyers will succumb to temptation if the stakes are high enough. The case of *Maritrans v. Pepper, Hamilton & Sheetz*, 529 Pa. 241 (1992), discussed above, provides a striking example. More importantly, lawyers, like most people, are fallible and reluctant to recognize and admit their mistakes. The wide-open involuntary screening advocated by the dissenters permits a lawyer who has learned confidential information critical to a client's case to move to a firm representing the client's adversary, then relies on the new firm to detect and report failures in the firm's screening procedures, even if such reporting could lead to the firm's disqualification in an on-going matter. As one commentator has observed, "Even a person trying very hard to do the right thing would be inclined to minimize the importance of a disclosure that otherwise could result in disqualification of the firm . . ." ²¹ And if we could make and enforce rules of conduct on the assumption that all lawyers were honorable and to be trusted even when their self-interest was strongly engaged, we would not need an Office of Bar Counsel and we would not have 26 volumes of the Massachusetts Attorney Discipline Reports. The rule we recommend minimizes the risks and temptations of self-reporting by drawing the line when the laterally moving lawyer has involvement or information that would be of substantial benefit to the new firm's client.

3. The dissent of Michael Cassidy and Andrew Perlman

Two dissenters, Andrew Perlman and Michael Cassidy, have suggested an approach to Rule 1.10 based on the notion that Rule 1.10 should address only the question of discipline. They would permit broad involuntary screening, putting the burden on the former client to take judicial action seeking disqualification in order to protect its confidential information and

¹⁹ Notably, the dissent cites no evidence to demonstrate that the current Rule 1.10 has unduly restricted the movement of lawyers from one firm to another; indeed, a cursory glance at the professional announcements in *Lawyers Weekly* would suggest otherwise. At most, the current Rule 1.10 may prevent *some* lawyers from moving to *some* firms.

²⁰ See, e.g., *General Electric Co. v. Dept. of Environmental Protection*, 429 Mass. 798 (1999).

²¹ Pizzimenti, *supra* n. 11, 52 U. Miami L. Rev. at 331.

enforce the loyalty obligations of its former counsel. The proposal is based on what we believe to be a theoretical false premise – that discipline is the main thrust of the Rules of Professional Conduct and that Bar Counsel is the main enforcer. Given the large number of lawyers in Massachusetts and the limited resources of Bar Counsel, that Office deals with a relatively small portion of the ethics issues that face lawyers daily in Massachusetts. The principal enforcers of the Rules are lawyers themselves, and one of the major sources of guidance for lawyers seeking to “do the right thing” is the language of the Rules and Comments.

Nor is it appropriate for the Rules of Professional Conduct to abdicate to reviewing courts the responsibility to identify and police conflicts through disqualification motions. A court ruling on a disqualification motion quite appropriately considers a broad range of factors, such as timing of the motion, prejudice or hardship to one or both clients, and the effect on the administration of justice if a substitution of counsel is required. Thus, depending on the factual scenario, even a clear conflict of interest may not be grounds for disqualification.²² The Rules of Professional Conduct, however, serve larger interests, which include enforcing ethical standards even in the absence of proven harm to the client, instilling confidence in the profession, and providing anticipatory guidance for lawyers seeking to avoid conflicts in both litigation and transactional work. If a law firm is trying to determine whether to hire Lawyer X, both the current Massachusetts version of Rule 1.10 and our proposed amended version give a roadmap for proceeding. A Rule that says, “You can screen, but when the other side moves to disqualify, you’re on your own” is no help at all.

We also believe that the Perlman and Cassidy proposal would place the same impossible burden on clients that we discuss in connection with the proposal of the principal dissenters. While clients will know of the existence of a screen, they will have no way to know in most cases of its breach. In addition, in a transactional matter, the former client will have the burden and cost of having to institute a new lawsuit if it fears that the confidentiality and loyalty obligations of its former lawyer have been compromised.

* * * * *

The current Massachusetts rule rests on the principle that lawyers’ fiduciary obligations to clients are compromised when the lawyers’ conduct creates a reasonable fear that client confidences may be revealed either intentionally or unintentionally. Allowing screens to be imposed only where the affected lawyer has neither “involvement nor information relating to the matter sufficient to provide a substantial benefit to the new firm’s client” permits lawyers substantial freedom to change employers, while at the same time respecting reasonable client fears that confidences are at risk. We believe now, as the Wilkins Committee did in 1997, that the Massachusetts version of Rule 1.10 strikes a comfortable balance between competing interests and should be retained.

²² See cases cited in note 6, supra.

**Dissent of Henry Dinger, James Re and John Whitlock in Support of the
Adoption of ABA Model Rule 1.10(a)**

The undersigned, present and former chairs and a member of the Standing Advisory Committee on the Rules of Professional Conduct (the “Committee”), submit this statement in support of their proposal that the Supreme Judicial Court adopt the approach to screening set forth in ABA Model Rule 1.10(a). We disagree with the views of the majority of the Committee that law firms should not be able to avoid imputed disqualification by screening a personally disqualified lateral attorney except under the very limited circumstances set forth in current Mass. R. Prof. C. 1.10(d). The approach taken by Model Rule 1.10(a), adopted by the ABA’s Board of Delegates in 2009, permits law firms to screen lateral attorneys, subject to the obligation to notify the lateral attorney’s former client and subject further to the power of courts to scrutinize the effectiveness of particular screens. In our view, this approach strikes a better balance among the interests of clients (present and former) and attorneys than the current rule does. Attached to this statement is a proposed form of Rule 1.10 that reflects the approach we recommend to the Court.

ABA Model Rule 1.10(a) provides:

- (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless
 - (1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or
 - (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer’s association with a prior firm, and
 - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
 - (ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and
 - (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

Model Rule 1.10(a)(1) is not controversial and the Committee unanimously supports it.

Model Rule 1.10(a)(2), which permits a law firm to avoid imputed disqualification by screening personally disqualified lateral attorneys without the consent of the lateral's former client ("non-consensual screening") under specified circumstances is controversial and has divided the Committee. While all members of the Committee accept the view that screening can avoid the full rigors of the imputed disqualification rule in some circumstances involving lateral attorneys, they disagree as to what those circumstances are.

Model Rule 1.10(a) would permit non-consensual screening as an alternative to imputed disqualification where the firm (i) promptly notifies the former client of the screen, (ii) describes the screening protocol, (iii) agrees to respond promptly to the former client's questions concerning that protocol, (iv) informs the former client that judicial review may be available, and (v) apportions the personally disqualified lawyer no portion of the fee from the matter adverse to the lawyer's former client. Mass. R. Prof. C. 1.10, by contrast, permits non-consensual screening only if the lateral had no substantial involvement in the matter for the former client and no substantial information material to that information. The majority of the Committee has recommended maintaining the approach of the current Massachusetts rule.²³

1. Identifying the Risk

At the outset we think it is helpful to frame the non-consensual screening issue in practical terms. Screening issues involving lateral attorneys arise when the lateral attorney has worked on a particular matter for a client that is substantially related to a matter in which the new firm is representing the adversary of the lateral attorney's former client. In those circumstances, the lateral is personally disqualified under Rule 1.9 because the lateral has (or is presumed to have) confidential information that would give the new firm an unfair advantage in its representation of the adversary of the lateral's former client. Under Rule 1.10, the lateral's inability (absent consent) to represent the former client's adversary is imputed to the rest of the firm unless some exception applies.

In the vast majority of the situations to which Rule 1.10 would apply, the lateral will not bring files (paper or electronic) pertaining to the representation of the former client to the new firm. This is because the former client will generally be unable to follow the lateral to the new firm. The conflict between the lateral's former client and the new firm's client would prevent the new firm from establishing an attorney-client relationship with the lateral's former client (its current client's adversary). So, in the absence of client consent (which will usually involve establishing a screen), the former client's files will either remain with the lateral's old firm or move somewhere other than the lateral's new firm.

Accordingly, the screening problem concerns maintaining the confidentiality of information "in the head" of the lateral. So long as the lateral attorney does not perform services at the new firm for the adversary of the former client in the substantially related matter and is

²³ The majority of the Committee proposes to modify the language of the current Massachusetts rule to permit screening where the lateral attorney has "neither involvement nor information relating to the matter sufficient to provide a substantial benefit to the new firm's client." While we think this is an improvement over current Massachusetts Rule 1.10(d)(2), it would not significantly ameliorate the concerns raised in this statement.

careful not to disclose information learned during her former representation with her new colleagues, the confidences of the lateral's former client will not be disclosed or misused. While there is certainly a risk — a risk that screening is intended to minimize as a secondary goal — that the lateral inadvertently will learn confidential information concerning the new firm's representation of her former client's adversary, no harm can result unless the lateral passes the information on to the former client. But there is no reason for a lateral to make such a disclosure to a person or entity that the lateral no longer represents and cannot now represent, particularly where such disclosure would harm a client of the lateral's new firm. Such an action would expose the lateral to both dismissal and professional discipline without any significant personal benefit.

Rules 1.6 and 1.8(b) prohibit the lateral from disclosing the former client's confidences and Rule 8.4(a) prohibits the lawyers at the lateral's new firm from knowingly assisting or inducing the lateral to do so. If the lateral and the new firm follow these rules, the confidences of the lateral's former client will not be used by the new firm for the benefit of the former client's adversary. No one has proposed any alteration in these obligations.

By contrast, the imputed disqualification imposed by current Rule 1.10 is a prophylactic rule that precludes the new firm from continuing the representation of the adversary of the lateral's former client at all without the former client's consent, consent which is often withheld for tactical reasons rather than any genuine concern about the use of confidential information. The imputed disqualification rule would be unnecessary if lateral attorneys always complied with their obligation not to disclose confidences of their former clients to their new colleagues. The rule thus assumes that in some cases lateral attorneys and their new firms will be unable to resist the temptation to take advantage of the information possessed by the lateral to benefit the former client's adversary and that a prophylactic rule is necessary.

2. Reasons for Adopting the Model Rule's Screening Provisions

There are several reasons that have persuaded us that the approach to screening in Model Rule 1.10 should be adopted by the Court. First, the current rules cause real hardships both to lawyers and to many clients without evidence that they achieve any commensurate increase in protection for the former clients of lateral attorneys. Second, the current rules draw distinctions among situations in which non-consensual screening is permitted and those in which it is forbidden that are very difficult to justify. Third, the Model Rule better reflects the principles applied by judges in resolving motions to disqualify and avoids the risk that professional discipline will be imposed where a judge has found a screen sufficient to protect a former client's interests. We discuss each of these reasons below.

A. The broad prohibition on non-consensual screening imposes significant hardships based on implausible assumptions concerning the risks to former clients.

There is no question that the imputed disqualification rule imposes hardships, hardships that are more significant now than they have been in the past because of developments in the legal profession. With many established law firms dissolving or laying off staff, the number of lawyers looking for a job has never been higher. The *Wall Street Journal* reported in 2011 that

“unemployed lawyers now find themselves in the country’s most cutthroat race for a job, with less than one opening for every 100 working attorneys.”²⁴ This employment situation is not greatly improved in 2013. The imputed disqualification rule reduces the employability of lawyers looking for a job by creating a risk that the law firms that hire them will be disqualified in ongoing matters, even if they screen the lateral attorneys from those matters. These burdens are felt primarily by junior lawyers and lawyers who are not blessed with an established portable client base. Rainmakers will rarely lack employment options, but most other lawyers face bleak employment prospects that show no signs of improvement any time soon.

But lawyers are not the only ones who suffer hardship from the imputed disqualification rule. Imputed disqualification also hurts the clients who lose the services of attorneys with whom they have reposed confidence and invested resources. The Association of Corporate Counsel, the world’s largest organization of in-house counsel, supported the adoption of Model Rule 1.10(a). The ACC articulated the reasons for its support as follows:

ACC wishes to ensure that clients’ rights are preserved; this requires lawyers to respect the need to avoid conflicts. And it is for that very reason that we endorse this rule. It is a reality of practice that lawyers will change firms. It is also a reality that modern practice creates an ever-increasing certainty that lawyers from one firm will carry a backpack of potential conflicts into a new firm to which they wish to move. Rather than suggest that such moves can be prohibited wholesale; rather than create unreasonable burdens on those who wish to change jobs; and rather than create a regulatory environment that — through its lack of guidance or unclear guidance — abandons lawyers and firms to a professional no-man’s land where the incentive is to simply bury or ignore conflicts they cannot resolve, ACC prefers to establish a rule that balances the interests of the lawyer who moves and the client who deserves the profession’s and the firm’s protection. ABA House Report 109 [which proposed Model Rule 1.10] offers a rule that provides that balance, is carefully tailored to address the needs of both lawyers and clients, and is appropriately limited in its scope to create a reasonable accommodation for a carefully defined problem.

<http://www.acc.com/advocacy/upload/acc-Statement-aba-house-res-109.pdf>. The ACC speaks for a significant group of clients who believe that Model Rule 1.10 strikes a reasonable balance between the rights of former clients, the rights of clients of the firms that former lawyers join, and the rights of lawyers themselves.

Proponents of the current Massachusetts limitations on screening seek to justify their position as protective of the interests of the former clients of lateral attorneys in protecting the

²⁴ C. Schoenberger, *Where the Jobs Are*, WALL STREET JOURNAL Sept. 2, 2011 (found at http://online.wsj.com/article/SB10001424053111904716604576546403401376210.html?mod=WSJ_hps_sections_areerjournal).

confidentiality of information “in the heads” of those attorneys. As noted above, the application of the imputed disqualification rule in situations involving lateral attorneys turns on the assumption that many of those attorneys cannot be trusted to preserve the confidences of their former clients when disclosure of those confidences would benefit current clients of their new firms and that it is necessary to impose a broad prophylactic rule to deny the opportunity to use such information, and, secondarily, to provide peace of mind to those former clients.

We consider this assumption to be unproven and unwarranted. We think most lawyers are honorable and will not violate the professional obligations imposed on them.

We find the assumption that lawyers in general are not to be trusted to be particularly offensive because the law does not make comparable assumptions in any other fields. Agents (who generally owe fiduciary obligations to their principals) do *not* violate their fiduciary obligations by terminating their relationship with the principal and becoming employed by a competitor or other adversary of the former principal. To be sure, the agent owes a “duty ... not to use or communicate confidential information of the principal for the agent’s own purposes or those of a third party.” RESTATEMENT (THIRD) OF AGENCY §8.05. That duty survives the termination of the principal/agent relationship. But that duty is only compromised by *using or communicating* the confidential information, without regard to the subjective fear of the former principal about what might happen.

That this is generally true can also be seen in the law of trade secrets. It is well established that, absent an enforceable non-competition agreement, an employee of a company who has learned the company’s most valuable trade secrets is free to accept employment at a competitor of the company. The former employee has a common law obligation to refrain from using or disclosing the trade secrets of his former employer, but, in the absence of proof that the former employee has in fact misappropriated the trade secrets by using them for the new employer or disclosing them to his new colleagues, the former employee violates no fiduciary obligation. There is a very narrow exception where the new employer assigns the former employee to a position where it is “inevitable” that the former employee will use the former employer’s trade secrets. *See generally* 1 R. Milgrim & E. Bensen, MILGRIM ON TRADE SECRETS §5.02[3][d] (2009).

Thus, at common law, an agent is free to provide services for a competitor of the former principal without violating his fiduciary obligations so long as he preserves the confidentiality of the former principal’s confidential information *and is screened from any position where improper use of such information is unavoidable*. This is true even though the former principal fears, reasonably or otherwise, that its confidences may be revealed either intentionally or inadvertently. The common law places great value on the mobility of labor and on the ability of individuals to seek new employment without prior employment limiting their prospects. We have heard no persuasive explanation from the opponents of Model Rule 1.10 why lawyers, *alone among common law fiduciaries*, must be subject to a prophylactic rule that to our knowledge applies in no other context.

We have seen no evidence to support the assumption that lateral attorneys generally cannot be trusted to follow the screening protocols of their new firms. If that assumption were true, one would expect to see a number of disciplinary proceedings brought against such

attorneys in those states where non-consensual screening is permitted. Illinois, for example, only requires imputed disqualification where the personally disqualified lawyer has not been screened. Ill. R. Prof. C. 1.10(e) (“When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.”) One looks in vain for signs that the clients of Illinois lawyers have been significantly harmed by that State’s widespread approval of screening as an alternative to imputed disqualification. *See* R. Creamer, *Lateral Screening after Ethics 2000*, 2006 PROF. LAW. SYMPOSIUM ISSUE 85, 87 (2006) (“As the [ABA] Commission [that recommended Model Rule 1.10] learned, actual cases of lateral lawyers disclosing confidential information about former clients to their new firms are nonexistent.”) Moreover, as discussed below, many courts have denied disqualification motions where firms have screened lateral lawyers even in jurisdictions that do not make provision for screening in their ethical rules. One would expect to see renewed motions to disqualify in those cases had there been any evidence of cheating by lateral attorneys. There are few, if any, such cases published.

Accordingly, in our view, the issue for the Court is whether to continue to protect one group of clients against harms that apparently rarely materialize by imposing the very real harms that the current rule imposes on lawyers (who have fewer options when they lose their jobs or their firms fold), on firms (who lose opportunities to bring in new lawyers), and on other clients of the new firm (who may be forced to seek new counsel if the new firm considers bringing on the lateral to be more important than continuing the attorney-client relationship or if the new firm is blindsided by information that the lateral did not disclose). We believe that the approach of Model Rule 1.10 makes more sense than the current rule.

B. The current Massachusetts rules draw distinctions in applying the imputed disqualification rule that make no sense.

The Committee members who propose no material change in the provisions of the current Massachusetts rules on screening suggest that those rules strike the right balance. We disagree. We believe that the current rules draw distinctions that make no sense. They permit screening in circumstances that present at least as much of a risk to the former clients of lateral attorneys than presented in situations in which screening is unavailable.

First, consider a common situation where the former client’s confidences are placed at theoretical risk, but the ethics rules provide no protection to the former client beyond the confidentiality obligations imposed on all lawyers by Rules 1.6 and 1.8. If the lateral’s new firm is representing the adversary of the lateral’s former client, *but not in a matter that is substantially related to the subject of the lateral’s representation of the former client*, then the current rules impose *no* obligation on the firm either to obtain consent or even to establish a screen. That is because Rule 1.9 does not preclude the lateral herself from taking on the matter adverse to the former client at the new firm. An illustrative hypothetical may make this clearer.

Assume the lateral attorney, a patent lawyer, represented the former client in obtaining a patent and that during the course of the representation of the former client (but after the patent was obtained) the lateral learned vital, non-public information that would support a strong

argument that the patent is invalid.²⁵ Assume further that the new firm's biggest client is being sued by the lateral's former client for infringing that patent and that a judgment for the patentee will put the new firm's biggest client out of business.

If the lateral's new firm were defending that patent case, then the firm could not continue the representation once the lateral arrives without the former client's consent under the current Massachusetts rules, even with screening. However, if the firm "merely" does millions of dollars of products liability defense work for the defendant, but plays no part in the defense of the patent litigation, then there is no ethics rule that prohibits the firm from hiring the lateral and assigning her to work on the product liability litigation, *even though both the firm and the lateral have a powerful incentive to get the information vital for the defense of the patent suit from the lateral to the new firm's client.*²⁶ The lateral has a confidentiality obligation to the former client and the firm may not attempt to subvert that obligation, and both the firm and the lateral are simply "on their honor" not to engage in such misconduct. In other words, the current ethics rules say to the former client that even though your former lawyer, in possession of critical material confidential information, has joined a firm whose biggest client is your adversary and would benefit greatly from that information, you have to trust that your former lawyer will not disclose to his new firm's biggest client information that might keep that client (and possibly the law firm itself) from financial ruin. If we are prepared to "trust" lateral lawyers in this situation (by not compelling their new firms to stop representing the former client's adversary) — and we are — why are we utterly unwilling to "trust" laterals in situations where the stakes will typically be far lower and the lateral is screened (and denied any portion of the new firm's fee), just because the new firm is actually representing the adversary in the matter in which the confidences possessed by the lateral are germane?

Second, if the former client is a government agency, we allow the firm to screen the lateral under Rule 1.11 even if the lateral possesses vital confidential information or was in charge of a major matter for the government adverse to a client of the new firm. We understand, and agree with, the policy determination not to make relatively low paying government service any less attractive for attorneys by making a government attorney into a "Typhoid Mary" when he later seeks private employment in firms that represent the government's adversaries. (Indeed, we do not want to make *any* lawyer into a "Typhoid Mary" if we can help it.) We agree to trust former government lawyers not to disclose the government's secrets for the benefits of the clients of the new firm if they are screened, and have concluded that the risk that some former government attorneys (and their law firms) will cheat is worth running. But surely the risk of dishonest former government lawyers is no different from the risk of dishonest former private

²⁵ For purposes of this hypothetical, assume that neither the lawyer nor anyone associated with the patent prosecution deliberately concealed information from the Patent Office, so there is no argument that the lawyer would have discretion to disclose the information under Rules 1.6 or 4.1. For example, the lawyer might discover after the fact that a sales representative unconnected with the patenting process had sold an embodiment of the patented invention more than a year before the filing of the patent application, a potentially invalidating event under 35 U.S.C. §102(b).

²⁶ Obviously, a prudent lateral attorney in this position would not participate in such litigation adverse to the former client, but such forbearance would not be required by the rules of professional conduct.

attorneys —disclosure of confidences²⁷ — and yet the current rules for each group are very different.

Third, current Mass. Rule 1.10 provides if the lateral attorney had “neither substantial involvement nor substantial material information relating to the” former representation, then screening will avoid imputed disqualification if the procedural requirements of the rules are satisfied. In substance, Massachusetts allows screening where, if the lateral cheats and discloses all she knows about the former representation, the prejudice to the former client would not be significant because the quantity and quality of the information is not “substantial.” We think there is no persuasive argument against this rule as far as it goes. However, there are relatively few decisions applying that rule and little anecdotal evidence suggesting that in the fourteen years since the Court adopted Mass. Rule 1.10, many law firms have relied on this limited authorization for screening over the objection of former clients. We suspect that prospective laterals rarely disclose during negotiations with a new firm matters as to which they neither had substantial involvement nor possess substantial material information. They will often not even recall such matters. Moreover, if the confidential information possessed by a lateral is not significant, former clients will often consent, if asked, to the firm’s continuing to represent the adversary. Mass Rule 1.10 thus primarily permits involuntary screening in that small subset of situations where the availability of involuntary screening is unimportant.

Moreover, the meaning of “substantial” in this context is far from clear and we believe there are very few situations in which the “insubstantiality” of a lateral’s involvement or information will provide a predictable basis for relying on the rule. As the Magistrate’s Order disqualifying the law firm in *O’Donnell v. Robert Half Int’l, Inc.*, 641 F. Supp. 2d 84 (D. Mass. 2009), demonstrates, it often does not take very much involvement or information for Mass. Rule 1.10(d)(2) to be inapplicable. As that decision suggests, under Mass. Rule 1.10 it is entirely possible for a party seeking the new law firm’s disqualification to present evidence of exposure to confidential information sufficient to require disqualification even where the lateral remembers nothing and even where the lateral did not work on the matter in question.

In sum, we consider the current treatment of screening under the current rules to be inconsistent and largely incoherent. Maintaining the status quo will not breed respect for the rule of law in legal ethics.

C. Model Rule 1.10 provides reasonable protections for former clients commensurate with the approach taken by many courts in resolving motions to disqualify counsel.

In our view, the advantage of ABA Model Rule 1.10 is that it does not turn on answering the question “Who do you trust,” but rather follows the admonition, “Trust but verify.” It protects former clients, not by the blunt instrument of blanket prohibition, but rather by requiring a significant measure of transparency by the new firm.

²⁷ Some have argued that the values of openness and transparency in government make the risk of disclosing the confidences of government clients less problematic than risking the disclosure of the confidences of private clients. That argument ignores that there is a range of confidential government information that may be even more important to maintain in confidence than private sector confidences, information pertaining to national security, criminal investigations, and the like.

Model Rule 1.10 gives former clients a say in what procedures will be implemented and an incentive to negotiate them with an opportunity to be creative in ways that no rule can address. For example, one of us negotiated a screen on behalf of our firm with a former firm client under which the firm agreed that a new matter would be staffed entirely by non-Boston lawyers where the former matter had been handled entirely out of the firm's Boston office. The Model Rules recognize that former clients have the right to argue (if necessary to a judge) that the information possessed by the lateral is so sensitive that the lateral should be physically isolated (e.g. in another office), or, in extreme cases, that no screening procedures can provide adequate assurance that information will be protected (e.g. lead counsel for the former client possessing highly sensitive information joining a solo practitioner to practice law out of a single office with shared support staff, where the other partner represents the former client's adversary in high stakes litigation in which the highly sensitive information is critical).

Of course, reliance on procedures and transparency alone cannot prevent lawyers from cheating and lying about it. By the same token, however, the current rules cannot prevent a firm from giving a satchel of cash to a lawyer for confidential information and lying about that either. We believe that most lawyers are honorable and will not disclose the confidences of former clients when they change jobs. But even if one is very cynical about the honesty of lawyers, dishonest people will generally follow the rules if there is an unacceptably high chance of getting caught and the consequences of getting caught are sufficiently awful. It is particularly hard these days not to leave digital fingerprints of one's misdeeds. In most firms, emails are backed up regularly, often daily, and sometimes voice mails are as well. To make effective misuse of confidential information often requires the cooperation of many people. It is hard to corrupt a lot of people even in firms with some unscrupulous lawyers.

Importantly, the ABA Model Rule requires that former clients be notified when a firm relies on a screen and gives those clients the right to require verification. One should not underestimate the deterrent effect of such procedures. Under the Model Rule, even a dishonest lateral attorney will understand that if confidential information appears in a filing of the new firm, the former client will sound the alarm and initiate an investigation. The court will take the investigation very seriously, and will not accept the lawyer's protestations of innocence if the circumstantial evidence of disclosure is strong. How many lawyers in the new firm are going to lie (and thereby risk their own licenses) to protect the lateral?

The Model Rule also acknowledges the right of former clients to challenge the adequacy of screens in court if they cannot negotiate a screening protocol that reasonably assures them.²⁸ This means that the adequacy of screens will be determined on the basis of the particular circumstances and the development of common law principles and not on the basis of general ethics rules that are inevitably too imprecise to reliably guide a lawyer's decision making.

A further advantage of the Model Rule over the alternatives is that, as a practical matter, it reflects the reality that in many instances screening has been blessed by courts deciding disqualification motions. The propriety of a firm screening a lateral attorney as an alternative to

²⁸ Former clients have such a right even as to transactional matters. A number of decisions have recognized the equitable right of former clients to obtain an injunction against the improper representation of current adversaries by their former attorneys. See <http://www.freivogel.com/enjoiningconflicts.html>.

withdrawal is rarely addressed by the disciplinary process. Rather, there is a substantial body of federal and state case law addressing motions to disqualify the law firm for one litigant because of that firm's bringing on a lawyer who formerly represented the party seeking disqualification.

Adopting the Model Rule would largely eliminate what strikes us as a troubling anomaly under the current rules. Many courts have denied disqualification motions even where the pertinent ethics rules make no provision for screening,²⁹ concluding that the screen put in place by the firm in question sufficiently eliminates the risk that the firm will take advantage of the confidences of the lateral attorney's former client. Notwithstanding such conclusions, however, the lawyers in the firm that implemented the screen approved by the court still face the risk of professional discipline if the pertinent ethics rules did not expressly authorize the screen.

We do not argue that the denial of a disqualification motion should *automatically* insulate lawyers from professional discipline under Rule 1.10. Sometimes disqualification motions are denied for reasons unrelated to the adequacy of the firm's screening procedures, as when the judge concludes that the former client unreasonably delayed filing its disqualification motion. However, if the judge does find that a screen adequately protects the former client, then we see no point to punishing lawyers for failing to comply with an unduly prophylactic rule intended to ensure such protection. In the real world, bar officials rarely pursue discipline in such circumstances. The Model Rule would effectively eliminate this anomaly by countenancing screens unless a court disapproves them.³⁰

D. Other objections to the Model Rule are without merit.

The proponents of the status quo say that the Model Rule would permit "lead counsel" to "switch sides" in the "middle of litigation." This hyperbole has no relation to reality. First, the Model Rule would not permit lead or any other counsel to "switch sides," *i.e.* to stop representing the plaintiff and to start representing the defendant in the same case. The Model Rule would only allow the lead counsel to leave the game and go to the sidelines. But even that is unrealistic because of the difficulties that both the lateral lawyer and the law firm representing the adversary of the lateral lawyer's client would face in negotiating the lateral move while the litigation was ongoing. Both clients (and therefore the prospective lateral's current firm) would need to be told, and that will typically be an insuperable obstacle.

²⁹ This is the case, for example, in New York where the New York rules do not recognize screening, but courts have declined to disqualify where the law firm has timely implemented a screen that the judge finds adequately protects the former client. *See Nordwind v. Rowland*, 584 F.3d 420, 435 (2d Cir. 2009) ("not every violation of a disciplinary rule will require disqualification"); *Hempstead Video, Inc. v. Village of Valley Stream*, 409 F.3d 127 (2d Cir. 2005); *Arista Records LLC v. Lime Group LLC*, 2011 U.S. Dist. LEXIS 17434 (S.D.N.Y. Feb. 22, 2011). For a state-by-state summary of the status of screening under rules and court decisions *see* <http://www.freivogel.com/changingfirmsscreeningparti.html>.

³⁰ The California Bar's Board of Governors recently proposed a similar approach to screening. Their proposed rule makes no provision for screening, but adds the following comment: "[10] Rule 1.10 leaves open the issue of whether, in a particular matter, use of a timely screen will avoid the imputation of a conflict of interest under paragraph (a) or (b). Whether timely implementation of a screen will avoid imputation of a conflict of interest in litigation, transactional, or other contexts is a matter of case law." (The text of the proposed rule can be found at <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=J2Mhg5NSNdk%3d&tabid=2669>. In our view the Model Rule is preferable because it provides for notice and other procedural protections for the former client.

Others may object that countenancing “wide open” screening simply exempts “big firms” from the rules that all other lawyers need to follow. The implicit assumption is that screening is impractical for all but the “biggest” firms. But this assumption is highly questionable. While screening may not always be practical for two- or three-person firms in which all the lawyers tend to work on the same matters, screening is often practical for many firms of modest size, especially firms where the screened lawyer’s practice is distinct from the practices of the lawyers on the other side of the screen. Many modest firms have multiple offices between which effective screens are easy to envision. *See generally Hempstead Video, Inc. v. Village of Valley Stream*, 409 F.3d 127, 137-38 (2d Cir. 2005).

The proponents of the status quo insist that the current rule simply addresses the “reasonable fear” of former clients “that their confidences may be revealed either intentionally or unintentionally.” But the current rule goes well beyond addressing “reasonable” fears. If the lateral lawyer had substantial involvement on a matter that is substantially related to a matter the new firm is handling for the former client’s adversary, then the current rule disqualifies the firm even if there is a screen. It does not matter whether the former client *actually* fears that the screen will not be observed, much less whether such a fear is *reasonable*. It is the Model Rule, not the current law, that is addressed to the former client’s *reasonable* fears, by disqualifying the firm if, but only if, it is unreasonable to conclude that the screen will be effective.

3. Proposed Form of Rule 1.10 and Comments

We have attached to this Statement a version of Rule 1.10 with comments that we propose as an alternative to the version proposed by the Committee majority. As to the provisions of the Model Rule authorizing screening that the Committee majority rejected, we have largely adopted the Model Rule’s comments. However, both our version and that of the Committee majority include certain non-standard provisions of current Mass. Rule 1.10 that do not appear in the Model Rule. These include:

- Clarification that the public counsel and private counsel divisions of CPCS are different “firms” for purposes of the imputation rule.
- The current Massachusetts rule’s non-standard definition of screening.
- Current Massachusetts comments 1-4 which provide more extensive guidance concerning the definition of “firm.”
- The additional guidance in current Massachusetts comments 9 and 12 to assist in the determination whether screening is required and whether effective screening is feasible.

4. Conclusion

The fundamental ethical principle at stake here is the preservation of the confidences of former clients. Ethics rules other than Rule 1.10 unambiguously impose on every lawyer the obligation to preserve such confidences, and no member of the Committee seeks any change to that obligation. By contrast, the requirement of imputed disqualification in Rule 1.10 is not an ethical principle; it is, rather, a prophylactic rule — a blunt instrument — meant to eliminate any incentive to violate the confidentiality obligation. We think it is too imprecise an instrument for the legal profession in 2013. Many courts have taken a more nuanced and fact-dependent

approach to the question of screening in resolving disqualification motions. ABA Model Rule 1.10 takes a similar approach. We urge this Court to do so as well.

Dissenters Proposed RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

For purposes of this Rule a lawyer employed by the Public Counsel Division of the Committee for Public Counsel Services and a lawyer assigned to represent clients by the Private Counsel Division of that Committee are not considered to be associated. Lawyers are not considered to be associated merely because they have each individually been assigned to represent clients by the Committee for Public Counsel Services through its Private Counsel Division.

(b) When a lawyer has terminated an association with a firm ("former firm"), the former firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the former firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the former firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) For the purposes of paragraph (a) of this Rule and of Rules 1.11 and 1.12, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if:

(1) all material information possessed by the personally disqualified lawyer has been isolated from the firm;

(2) the personally disqualified lawyer has been isolated from all contact with the new firm's client relating to the matter, and any witness for or against the new firm's client;

(3) the personally disqualified lawyer and the new firm have been precluded from discussing the matter with each other;

(4) the former client of the personally disqualified lawyer or of the former firm receives notice of the conflict and an affidavit of the personally disqualified lawyer and the new firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of the new firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter; and

(5) the personally disqualified lawyer and the new firm reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the new firm and its client.

In any matter in which the former client and the new firm's client are not before a tribunal, the firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

Comment

Definition of “Firm”

[1] For purposes of the Rules of Professional Conduct, the term “firm” includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. See Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

[1A] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[1B] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

[1C] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11 (a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[5A] If the lawyer has no information protected by Rule 1.6 or Rule 1.9 about the representation of the former client, no screening procedures are required. This would ordinarily be the case if the lawyer did no work on the matter and the matter was not the subject of discussion with the lawyer generally, for example at firm or working group meetings. The lawyer must search his or her files and recollections carefully to determine whether he or she has confidential information. The fact that the lawyer does not immediately remember any details of the former client's representation does not mean that he or she does not in fact possess confidential information material to the matter.

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment 22. For a definition of informed consent, see Rule 1.0(f).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(e). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[10A] The former client is entitled to review of the screening procedures if the former client believes that the procedures will not be or have not been effective. For example, in a very small firm, it may be difficult to keep information screened. On the other hand, screening procedures are more likely to be successful if the personally disqualified lawyer practices in a different office of the firm from those handling the matter from which the personally disqualified lawyer is screened. If the matter involves litigation, the court before which the litigation is pending would be able to decide motions to disqualify or to enter appropriate orders relating to the screening, taking cognizance of whether the former client is seeking the disqualification of the firm upon a reasonable basis or without a reasonable basis for tactical advantage or otherwise. If the matter does not involve litigation, the former client can seek judicial review of the screening procedures from a trial court.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

**Dissent of Michael Cassidy and Andrew Perlman to both
Mass. Rule 1.10 and ABA Model Rule 1.10**

The subject of screening has generated considerable controversy, both within Massachusetts and nationally.³¹ One reason for the controversy is that advocates on both sides of the debate typically, and incorrectly, assume that Rule 1.10 supplies the relevant standard for

³¹ For an overview of the contentious legislative history of Rule 1.10, see STEPHEN GILLERS, ROY D. SIMON & ANDREW M. PERLMAN, REGULATION OF LAWYERS: STATUTES AND STANDARDS 244-251 (2013 ed.).

resolving disqualification motions. Although the conflict of interest rules were originally intended to supply that standard,³² the reality is that courts sometimes disqualify law firms that have complied with the screening provisions in Rule 1.10,³³ and decline to disqualify law firms that have failed to comply with the screening provisions in Rule 1.10.³⁴

In light of this reality, and to avoid giving lawyers a misleading impression about the significance of complying with (or not complying with) Rule 1.10, we recommend that the Rule focus solely on matters that are relevant to bar counsel (*i.e.*, matters that could constitute a disciplinary offense). The primary concerns of bar counsel relate to the inappropriate disclosure of confidential information within a firm, appropriate notice to affected clients, and the sharing of fees with disqualified lawyers. The proposed approach would ensure that bar counsel retains authority to discipline lawyers who fail to comply with these requirements, while at the same time delegating the screening-related disqualification standard to judges, as they are in the best position to consider and apply the various factors that are relevant to the decision.

This approach addresses a related problem with the current Massachusetts Rule: it incorrectly implies that lawyers are subject to discipline for using a screen in the wrong type of case. For example, a Massachusetts law firm might hire and screen a lawyer who has a conflict of interest as a result of work performed for a former client at a prior firm. Massachusetts Rule 1.10 currently says that the screen is permissible only if the lawyer did not learn any “substantial material information”³⁵ related to the matter the current firm is handling. This provision implies that, if a court concludes that the lawyer did, in fact, have “substantial material information,” a lawyer might be disciplined for violating Rule 1.10. The reality is that, even if a court may want to make the distinction between “material” and “immaterial” information for purposes of a disqualification decision, this distinction is not (and should not be) a matter of concern to bar counsel. Because Rule 1.10 is supposed to be a professional conduct rule the violation of which can subject a lawyer to discipline, the Rule should be limited to those matters that are of disciplinary concern. The proposal addresses this issue by removing from the black letter of the Rule any reference to the “substantial material information” standard, but recognizes (in the new comment) that materiality may be a factor when resolving disqualification motions.

The majority of the Committee asserts that our analysis fails to appreciate that the Rules are sometimes used only to supply guidance. We do not disagree that the Rules are sometimes useful primarily for guidance. But we respectfully assert that our approach actually accomplishes this goal more effectively than the majority’s approach. In particular, our proposal

³² See generally Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71, 96-97 (1996).

³³ See, e.g., *Burgess-Lester v. Ford Motor Co.*, 643 F. Supp. 2d 811, 815-16 (N.D. W. Va. 2008); *Norfolk S. Ry. Co. v. Reading Blue Mountain & N. R.R. Co.*, 397 F. Supp. 2d 551, 553-57 (M.D. Pa. 2005); *Crudele v. N.Y. City Police Dep’t*, No. 97 Civ. 6687 (RCC), 2001 U.S. Dist. LEXIS 13779 (S.D.N.Y. Sept. 7, 2001); *James v. Teleflex, Inc.*, No. CIV. A. 97-1206, 1999 WL 98559, at *3 (E.D. Pa. Feb. 24, 1999).

³⁴ See, e.g., *Silicon Graphics, Inc. v. ATI Technologies, Inc.*, 2010 U.S. Dist. LEXIS 107057 (W.D. Wis. Oct. 5, 2010); *Kirk v. The First Am. Title Ins. Co.*, 183 Cal.App.4th 776 (Cal. App. Ct. 2010); *Silicon Graphics, Inc. v. ATI Technologies, Inc.*, 741 F.Supp.2d 970 (W.D. Wis. 2010); *In re Data Treasury Corp*, 2010 WL 3074395 (Fed. Cir. 2010); *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127 (2d Cir. 2005); *Laprise v. Paul*, 2007 WL 4636533 (Conn. Super. Ct. 2007); *Milne v. Ryea*, 2004 WL 423117 (Conn. Super. Ct. 2004); *Intelli-Check, Inc. v. Tricom Card Tech., Inc.*, 2008 WL 4682433 (E.D.N.Y. 2008).

³⁵ See, e.g., *O'Donnell v. Robert Half Intern., Inc.*, 641 F.Supp.2d 84 (D. Mass. 2009).

supplies lawyers with substantial and important additional guidance in the form of new comment language, which identifies factors that may be relevant to resolving disqualification motions. This language not only informs lawyers about the relevant factors that courts sometimes use to resolve screening-related disqualification motions, but it also avoids giving lawyers the misleading impression that the Rule supplies the applicable disqualification standard. We believe that, by locating this guidance in a comment and by emphasizing that the disqualification decision is a matter beyond the scope of the Rules, there will be less confusion about the role Rule 1.10 plays in disqualification decisions while ensuring that lawyers receive the guidance that they need to act appropriately in a screening situation.

The approach recommended here is not without precedent. The California Bar recently concluded that the issue of screening is an unsettled area of law and should be left to the courts to resolve on a case-by-case.³⁶ For this reason, the California Bar recommended that the California Rules remain silent on the question of screening.³⁷ (The California Supreme Court has not yet decided whether to accept this recommendation.) Our proposed approach reflects a similar sentiment – that screening-related disqualification decisions should be left to judges to resolve on a case-by-case basis – but recognizes that certain aspects of the screening procedure should be expressly regulated and subject to disciplinary oversight and that comment-based guidance may be useful to lawyers, clients, and judges.

In sum, the proposed approach recognizes that disqualification decisions often turn on factual details that are best left to the discretion of judges to resolve on a case-by-case basis. Although an existing comment to Model Rule 1.10 observes that courts sometimes resolve disqualification motions on grounds unrelated to Rule 1.10,³⁸ the proposal would elaborate on the point through additional comment language. At the same time, the approach ensures that Rule 1.10 continues to address matters that are of legitimate concern to bar counsel (*i.e.*, the procedures for employing a screen, but not the materiality of the information that the screened lawyer happened to have). The proposed approach also ensures that lawyers, clients, and judges receive clearer guidance as to the factors that might be relevant to the disqualification decision, but makes clear that the disqualification decision is ultimately a matter of law beyond the scope of the Rules.

The following version of Rule 1.10 incorporates our views.

Dissenters' Proposed RULE 1.10 IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless

³⁶ See COMM'N FOR THE REVISION OF THE RULES OF PROF'L CONDUCT, PROPOSED RULE 1.10 IMPUTATION OF CONFLICTS: GENERAL RULE (April 2010), at 4 <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=qKcQ8vAQg2E%3d&tabid=2161>.

³⁷ Green, *supra* note 2, at 99 (making a similar point and arguing the conflict rules should not supply the standard for resolving disqualification motions).

³⁸ MODEL RULES OF PROF'L CONDUCT R. 1.10, cmt. [7].

(1) the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

For purposes of this Rule a lawyer employed by the Public Counsel Division of the Committee for Public Counsel Services and a lawyer assigned to represent clients by the Private Counsel Division of that Committee are not considered to be associated. Lawyers are not considered to be associated merely because they have each individually been assigned to represent clients by the Committee for Public Counsel Services through its Private Counsel Division.

(b) When a lawyer has terminated an association with a firm ("former firm"), the former firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the former firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the former firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) For the purposes of paragraph (a) of this Rule and of Rules 1.11 and 1.12, a personally disqualified lawyer in a firm will be deemed to have been screened from any participation in a matter if:

- (1) all material information possessed by the personally disqualified lawyer has been isolated from the firm;
- (2) the personally disqualified lawyer has been isolated from all contact with the new firm's client relating to the matter, and any witness for or against the new firm's client;
- (3) the personally disqualified lawyer and the new firm have been precluded from discussing the matter with each other;
- (4) the former client of the personally disqualified lawyer or of the former firm receives notice of the conflict and an affidavit of the personally disqualified lawyer and the new firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of the new firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter; and
- (5) the personally disqualified lawyer and the new firm reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the new firm and its client.

In any matter in which the former client and the new firm's client are not before a tribunal, the firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening procedures used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

Comment

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. See Rule 1.0(d). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to

information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

[1A] With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[1B] Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

[1C] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11 (a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a)(1) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(a)(2) and 1.10 (b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential

information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[5A] If the lawyer has no information protected by Rule 1.6 or Rule 1.9 about the representation of the former client, no screening procedures are required. This would ordinarily be the case if the lawyer did no work on the matter and the matter was not the subject of discussion with the lawyer generally, for example at firm or working group meetings. The lawyer must search his or her files and recollections carefully to determine whether he or she has confidential information. The fact that the lawyer does not immediately remember any details of the former client's representation does not mean that he or she does not in fact possess confidential information material to the matter.

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment 22. For a definition of informed consent, see Rule 1.0(f).

[7] Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(e). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation. For example, courts may decide to consider the likelihood that the screen will be effective, the size of the law firm, and the extent to which the disqualified lawyer's information is material to the firm's representation of another client. The question of whether a court will rely on these or other factors when ruling on disqualification motions is a matter beyond the scope of these rules.

[8] Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[9] The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the

firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

[10] The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately, either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

[10A] The former client is entitled to review of the screening procedures if the former client believes that the procedures will not be or have not been effective. For example, in a very small firm, it may be difficult to keep information screened. On the other hand, screening procedures are more likely to be successful if the personally disqualified lawyer practices in a different office of the firm from those handling the matter from which the personally disqualified lawyer is screened. If the matter involves litigation, the court before which the litigation is pending would be able to decide motions to disqualify or to enter appropriate orders relating to the screening, taking cognizance of whether the former client is seeking the disqualification of the firm upon a reasonable basis or without a reasonable basis for tactical advantage or otherwise. If the matter does not involve litigation, the former client can seek judicial review of the screening procedures from a trial court.

[11] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[12] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

RULE 1.18

Statement in Support of the Committee's Proposal

For the most part, the Massachusetts Rules of Professional Conduct do not address a lawyer's obligations to prospective clients. Case law, however, establishes that a lawyer may be prohibited from using or revealing information furnished by a prospective client, even if no attorney-client relationship is formed. Those confidentiality obligations, in turn, can materially limit a lawyer's ability to represent other clients and may lead to the disqualification of both the lawyer and the lawyer's firm. A majority of the Committee believe that it would be helpful to the bar to provide specific guidance about a lawyer's obligations to prospective clients in the text of the Rules. Accordingly, we recommend the adoption of Model Rule 1.18.

Under Rule 1.18(c), a lawyer is prohibited from opposing a prospective client in a substantially related matter if the lawyer had received information that would be "significantly harmful" to the prospective client in the matter. That is the same standard recommended by the

Restatement (Third) of Law Governing Lawyers, §15(2). Two members of the Committee recommend that “significantly harmful” be replaced by “used to the disadvantage of.” A majority of the Committee believe that “used to the disadvantage of” is too stringent a standard. Lawyers and prospective clients must be given some leeway to share information in order to make an informed decision about whether to enter an attorney-client relationship, without running the risk that the lawyer and lawyer’s firm will be disqualified from representing anyone else in a substantially related matter. Other provisions of the proposed Rule, including the requirement that lawyers take reasonable measures to avoid exposure to disqualifying information and the requirement that a lawyer who learns significantly harmful information be timely screened, are sufficient to protect the legitimate interests of prospective clients. See Rule 1.18(d).

**Dissent of Constance Vecchione to the Adoption of Rule 1.18,
joined by Elizabeth Mulvey with respect to alternate Rule 1.18(c)**

Model Rule 1.18 concerns duties to prospective clients. Prospective clients are currently protected in Massachusetts by case law such as *Mailer v. Mailer*, 390 Mass. 371, 374-375(1979), as well as by Mass. R. Prof. C. 1.6 and 1.9. Massachusetts rejected Model Rule 1.18 when it was adopted by the American Bar Association in 2002.

The committee has now reconsidered that decision and is recommending that Model Rule 1.18 be adopted. Given the existing protections, I do not think that Rule 1.18 is necessary. If the Court is inclined to adopt it, however, the formulation that appears in Florida Rules of Professional Conduct 4-1.18(c) is preferable to that in Model Rule 1.18(c) and I recommend that it be substituted for the Model Rule standard. Elizabeth Mulvey joins me in supporting this alternative version of paragraph (c).

The Florida rule replaces “significantly harmful to” with “used to the disadvantage of” and thus does not attempt to parse whether the information acquired from the prospective client is merely “harmful,” as opposed to “significantly harmful.”

The proposed change is shown below:

(c) Subsequent Representation. A lawyer subject to subdivision (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~~ used to the disadvantage of that person in the matter, except as provided in subdivision (d). If a lawyer is disqualified from representation under this rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in subdivision (d).

RULE 3.8(e)

Statement in Support of the Committee's Proposal

The Committee recommends retaining the requirement that a prosecutor seek prior judicial approval before issuing a subpoena to a lawyer to obtain evidence about the lawyer's client. That requirement now appears in Mass.R.Prof.C. 3.8(f). In the Committee's recommendations, the identical requirement appears in Rule 3.8(e).

A subpoena from a prosecutor to a lawyer can have profoundly disruptive effects on the relationship between lawyer and client. A lawyer who receives such a subpoena runs the risk of disclosing privileged and confidential information that could affect the client's liberty. Such subpoenas can create distrust between lawyer and client, create conflicts of interest, discourage vigorous advocacy, and place an onerous burden on a client's right under the Sixth Amendment to be represented by counsel in criminal proceedings. *Whitehouse v. United States District Court*, 53 F.3d 1349, 1353 (1st Cir. 1995)(summarizing adverse effects of attorney subpoenas). Our current Rules safeguard against these risks in two ways. First, Rule 3.8(f)(1) requires that, before issuing a subpoena to a lawyer, a prosecutor must reasonably believe that the information sought by the subpoena is not privileged, that the information is essential to the investigation or prosecution, and that there is no other feasible alternative to obtain the information. Second, Rule 3.8(f)(2) requires the prosecutor to obtain prior judicial approval before issuing the subpoena to the lawyer. These two requirements have been in effect for more than twenty years without, as far as the Committee knows, causing any significant disruption in criminal prosecutions in the courts of the Commonwealth.

The dissent argues that we should retain the prerequisites that a prosecutor must satisfy under Rule 3.8(f)(1) but abolish the requirement of prior judicial approval in Rule 3.8(f)(2). As the dissent notes, the ABA amended Model Rule 3.8 in 1995 to remove the requirement of prior judicial approval. The sole reason that the ABA advanced for this change, however, was that the requirement of prior approval was a procedural rather than an ethical rule. The report recommending the change was careful to express no opinion on whether additional procedures were necessary or desirable to implement the ethical standards expressed in Rule 3.8(f). 120 No. 2 Annual Reports A.B.A. 487 (1994).³⁹ The objection that the rule is procedural rather than ethical has some force in the federal arena, where authority for rule making is divided among Congress, the Supreme Court, and the District Courts. See e.g. *Stern v. United States District Court*, 214 F.3d 4, 16-19 (1st Cir. 2000)(holding that District Court exceeded its limited rule-making power by adopting Rule 3.8(f)(2)). The Supreme Judicial Court, however, has authority to promulgate both ethical and procedural rules. The critical question, in our view, is not whether the rule is classified as ethical or procedural, but how best to insure that prosecutors fulfill the ethical responsibilities that all members of the Committee believe they should have. We believe that the current rule strikes the right balance and should be retained.

³⁹ On the merits, the ABA's official position as late as 2011 was that prosecutors should be required to obtain prior judicial approval of subpoenas to attorneys. See Amicus Brief for the American Bar Association in Support of Petitioner, *White & Case LLP v. United States*, No. 10-1147 (U.S. Sup. Ct.)(April 20, 2011), 2011 WL 1540420 at *5-6.

The dissent also advances two arguments of substance. First, the dissent contends that Rule 3.8(f)(1) is “in conflict with” Mass.R.Crim.P. 5(d), which provides that persons performing official functions before the grand jury must keep the jury’s proceedings secret. We see no practical conflict with grand jury secrecy. The dissent argues that an attorney who receives notice of a hearing under Rule 3.8(f)(2) is not a person performing an official function within the meaning of Mass.R.Crim.P. 5(d) and is not bound by grand jury secrecy. We believe that exactly the same argument applies to a lawyer who receives a grand jury subpoena. Indeed, a lawyer who receives a subpoena, just like a lawyer who receives a notice of a hearing, may have an obligation to inform the client and seek the client’s guidance concerning whether to assert any applicable privileges. See Mass.R.Prof.C. 1.4; Mass.R.Prof.C. 1.6, comment [20]. And once the subpoena is in hand, the client may move to quash under Mass.R.Crim.P. 17(a)(2). Whether a prosecutor moves for prior approval of a subpoena or a client moves to quash after the subpoena has been served, the practical effect on grand jury secrecy is the same. Timing does, however, make a difference for the relationship between the subpoenaed lawyer and the lawyer’s client. Permitting the prosecutor to serve the subpoena without some prior ethical control can drive a “chilling wedge” of suspicion and distrust between lawyer and client. *United States v. Klubock*, 832 F.2d 649, 653 (1st Cir. 1987), *aff’d* by an equally divided court, 832 F.2d 664 (1st Cir. 1987). The Committee believes, therefore, that requiring prior judicial approval is a more effective means of discouraging overzealous prosecutors from mounting unnecessary attacks on the attorney-client relationship.

The dissent also argues that the requirements of Rule 3.8(f)(2) are somehow inconsistent with the provisions of Mass.R.Crim.C. 17(a)(2) permitting a judge to quash a subpoena if it is “unreasonable and oppressive.” We fail to see the inconsistency. When a prosecutor subpoenas an attorney, current law permits a court to take the impact of the subpoena on the attorney-client relationship into account in judging whether the subpoena is unreasonable and oppressive. See *e.g. In re Grand Jury*, 194 F.R.D. 384 (D.Mass. 2000)(Ponsor, J.)(quashing grand jury subpoena to attorney as unreasonable and oppressive.) Moreover, the dissenting members of the Committee agree that we should retain the prerequisites that a prosecutor must satisfy under Rule 3.8(f)(1) before issuing a subpoena to a lawyer. The practical effect of the dissent’s position, it seems to us, is that there will be cases in which a prosecutor will not be able to satisfy the requirements of Rule 3.8(f)(1) but will nevertheless be allowed an opportunity to obtain evidence under the arguably more open-ended language of Mass.R.Crim.P. 17. That possibility, we believe, would encourage prosecutors to take a chance on subpoenaing attorneys, even when they cannot satisfy their ethical obligations, and would undermine compliance with the Rule.

Dissent of Michael Cassidy and Andrew Perlman to the Committee’s Proposed Rule 3.8(e)

We respectfully dissent from the Committee’s recommendation that Massachusetts continue its remarkable and pronounced divergence from the majority of states in defining the circumstances under which a prosecutor may subpoena an attorney to provide information about a past or present client at a judicial proceeding. The Massachusetts “attorney subpoena rule” has a long and storied history, which is adequately summarized in two First Circuit decisions involving actions brought by the Department of Justice challenging the application of the rule to

federal prosecutors. *See Stern v. U.S. District Court for the District of Mass.* 214 F.3d 4 (2000); *United States v. Klubock*, 639 F. Supp. 117 (D. Mass 1986), *aff'd*, 832 F. 2d 664 (1st Cir. 1987) (equally divided en banc). We will not recount that complicated history or the resulting litigation. For the reasons discussed below, however, we believe that ABA Model Rule 3.8(e) and Comment 4 more appropriately balance the interests of law enforcement and protections for the attorney-client relationship.

Massachusetts was one of the first states to enact a prophylactic provision curtailing a prosecutor's discretion to subpoena an attorney to give information about his client. SJC R. 3:07 PF 15 was enacted in 1985—it prohibited a prosecutor from subpoenaing an attorney to the grand jury to provide information about his client without prior judicial approval. Notably, the 1985 rule did not require an adversarial hearing to test the propriety of the order, and it did not set forth any standards to guide either the prosecutor's discretion in seeking the subpoena or the judge's discretion in allowing it. In 1990, the ABA enacted Model Rule 3.8(f), which at that time extended the prohibition beyond the grand jury to other criminal proceedings (*i.e.*, trials), contained a provision for an adversarial hearing before issuance of the subpoena, and limited the prosecutor's discretion to seek a subpoena to situations in which the information was essential to completion of an ongoing investigation or prosecution, there were no other feasible avenues for obtaining the information, and the information was not protected by any privilege. Notably, the second sentence to comment 4 to ABA Model Rule 3.8(f) purported to curtail the judge's discretion to allow the subpoena, by calling for an adversarial hearing “in order to assure an independent determination that the applicable standards are met.” *See Stern*, 214 F. 3d at 9-10. The present Massachusetts rule (now renumbered 3.8 (e)) mirrors the 1990 ABA Rule, without the second sentence of Comment 4. A majority of the Committee recommends that the Court retain Rule 3.8(e) in its present form.

However, in 1995 the ABA amended Model Rule 3.8 (f) (now 3.8 (e)) in response to widespread concerns that the Rule conflicted with rules of criminal procedure regarding the standards for grand jury secrecy and the standards for motions to quash. After extensive briefing, consideration, and debate the ABA removed the judicial approval and adversarial hearing requirements from the Rule and its pertinent comment. In their joint report recommending this amendment, the Standing Committee on Ethics and Professional Responsibility, Criminal Justice Section and Litigation Section stated as follows:

Subparagraph (2) of Model Rule 3.8(f) is an anomaly in the Model Rules. Rather than stating a substantive ethical precept, it sets forth a form of implementing requirement that is properly established as a rule of criminal procedure rather than as an ethical norm. Moreover, while nominally addressed to the conduct of prosecutors, subparagraph (2) affects the operations of courts and grand juries by “requiring the erection of novel court procedures and interject[ing] an additional layer of judicial supervision over the grand jury subpoena process.” *Baylson v. Disciplinary Board*, 764 F. Supp. 328, 337 (E.D. Pa 1991). The procedural protections it imposes as matter of professional ethics have no parallel in any other enforceable provision of the Model Rules.

REPORT 101, STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, CRIMINAL JUSTICE SECTION AND LITIGATION SECTION (on file with authors). The Model Rule as amended now constrains the circumstances under which a

prosecutor may issue an attorney subpoena, but it does not require an adversarial hearing or judicial approval prior to doing so.

Our reason for recommending that the Court adopt the ABA form of the “attorney subpoena rule” is that Massachusetts Rule 3.8(e) is in conflict with two important rules of Criminal Procedure in this state. Mass. R. Crim. P. 5(d) provides that persons performing an official function before the grand jury must keep those proceedings secret. Grand jury secrecy helps prevent the loss or destruction of evidence, the intimidation of witnesses and grand jurors, and the flight of potential suspects. An attorney receiving notice of an order to appear at an adversarial hearing about a grand jury matter is not a party performing an “official function” before the grand jury, and therefore has no obligation to keep whatever he learns about the grand jury’s inquiry upon receipt of that motion secret. In fact, absent a judicial gag order imposed at the adversarial hearing itself, that attorney may have a duty to inform his client about the nature of the motion he has received. See Mass. R. Prof. Conduct 1.4(a)(2) (requiring an attorney to reasonably consult with the client about the client’s objectives and the means by which those objectives will be pursued). This consultation could undermine the protections afforded by Mass. R. Crim. P. 5, because timing and secrecy are often imperative to a successful grand jury investigation, especially of organized and covert criminal activity. Second, Mass. R. Crim. P. 17(a)(2) allows a judge to modify or quash a subpoena if it is “unreasonable or oppressive.” To the extent that the three conditions listed in Rule 3.8 (e) are interpreted as prerequisites to the issuance of an attorney subpoena following an adversarial hearing, see *Stern*, 214 F. 3d at 14 (“the most sensible way to construe Local Rule 3.8(f) is as a unified whole”), such conditions may conflict with extensive case law interpreting the motion to quash standard under Mass. R. Crim. P. 17, particularly as it relates to the production of records and physical evidence. For both of these reasons, if there are special judicial procedures or evidentiary standards that should guide the issuance of a subpoena to an attorney, they should be carefully debated, vetted and crafted by the Standing Advisory Committee on the Rules of Criminal Procedure after due consideration of their precise relationship to other criminal procedure rules.

Massachusetts’ adherence to its minority position on attorney subpoenas presents a number of surprising anomalies. First and foremost, Massachusetts took the lead in enacting PF 15, and by its bold initiative encouraged other states and the ABA to follow suit. But after years of experience with the rule and after considering substantial input from a number of interested parties, the Department of Justice, and several ABA sections committees, the ABA has now retreated from its original position. Massachusetts is now farther out on a limb than any other state with regard to attorney subpoenas; the Rhode Island rule is similar to PF 15 in that it requires judicial approval, but it allows for this approval to be obtained *ex parte* rather than after an adversarial hearing. See R.I. Sup. Ct. Rules, Art V. R. Prof. Conduct 3.8 (f) and *Whitehouse v. United States District Court*, 53 F.3d 1349 (1st Cir. 1995).

A second anomaly is that Mass. R. Prof. Conduct 3.8(e) and its predecessor PF 15 were implemented to curtail conduct that is no longer regulated by the Rule. Massachusetts enacted the “attorney-subpoena rule” in 1985 (effective January 1, 1986) at the urging of the criminal defense bar in response to a growing practice by federal prosecutors in narcotics and organized crime cases of subpoenaing attorneys to determine the source of their fees in order to facilitate aggressive forfeiture actions. *Stern*, 214 F. 3d at 7-8. See also Max Stern and David Hoffman, *The Attorney Subpoena Problem and a Proposal for Reform*, 136 U. PA L. REV. 1783, 1787-89

and n. 19 (1988). Yet federal prosecutors are no longer regulated by Mass. R. Prof. Conduct 3.8(e), because in the *Stern* litigation Bar Counsel submitted an affidavit to the United States District Court in which he “vouchsafed that he would not wield State Rule 3.8(f) against federal prosecutors, but, rather, would refer any alleged violations to the federal district court for discipline under Local Rule 3.8(f).” *Stern*, 214 F. 3d at 9. Because the local federal rule was struck down in *Stern* as beyond the court’s rulemaking authority, federal prosecutors in Massachusetts now face no curtailment of their discretion in subpoenaing attorneys to give evidence against their clients, other than internal guidelines of the Department of Justice (*see* United States Attorneys’ Manual § 9-13.410) and the motion to quash standards of Fed. R. Crim. P. 17. State prosecutors in Massachusetts are bound by the rule, but there has been no evidence or suggestion either before or after the enactment of PF 15 that they were a source of the problem that the rule was designed to address.

Finally, the adversarial hearing/judicial approval provisions of Mass. R. Prof. Conduct 3.8(e) might actually impede rather than protect the attorney client relationship in certain contexts. One salutary effect of a grand jury subpoena on counsel is that it serves as official notice that counsel may be called upon to be a witness against his client at trial; it therefore will prompt counsel to find substitute representation in accordance with his professional obligations under Mass Rule Prof. Conduct 3.7. But if prosecutors forego seeking evidence from attorneys due to fear of delay or compromising grand jury secrecy, counsel might continue to represent their client even in situations where other ethical rules might suggest that there would be a conflict of interest in doing so. *See* Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917, 939 (1992)(arguing that the original ABA provision represented an attempt by the defense bar to insulate unprivileged information from discovery, and to protect defense lawyers from having to withdraw from cases).

The very explicit and precise prerequisites embodied in Model Rule 3.8(e) and Mass. R. Prof. Conduct 3.8(e)(1) already prevent a prosecutor from engaging in a fishing expedition, or issuing a subpoena simply to drive a wedge between counsel and his client. In short, they adequately assure that attorney-subpoenas will be issued by prosecutors only in the rarest of circumstances. If a prosecutor issues a subpoena that calls for the production of privileged documents, or asks a question during oral testimony that calls for privileged information, the defense attorney is duty-bound under Mass. R. Prof. Conduct 1.6(c) to refuse to answer, which assures that the matter will be brought before a court via a motion to compel or motion to quash if the prosecutor decides to delay the grand jury proceedings and pursue production of the evidence. Any further protection for the attorney-client relationship via rules of criminal procedure implemented under the guise of ethical rules is simply unnecessary.

RULE 4.4, COMMENT 3

Statement in Support of the Committee’s Proposal

The dissenters contend that Comment 3 should be deleted because it appears to advise lawyers to follow a course of action that is inconsistent with Rule 1.2 and Rule 1.4. The Committee believes that the dissenters misread the import of those two Rules in this context.

The dissenters quote the following portion of Rule 1.2(a): “A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client....” The dissenters argue that the decision not to look at inadvertently disclosed information could prejudice the rights of the client, because the lawyer’s decision may prevent the client from getting access to information that could materially benefit the client’s case. Thus, the dissenters conclude that Rule 1.2 appears to prohibit a lawyer from acceding to an opposing counsel’s request to return or destroy inadvertently disclosed information and that Comment 3’s language to the contrary should be stricken.

The problem with the dissenters’ analysis is that it quotes only a portion of the relevant language from Rule 1.2(a). Here is the entire sentence: “A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.” Mass. R. Prof. 1.2(a). Many lawyers consider the review of an opposing counsel’s mistakenly sent information to be an “offensive tactic.” For this reason, the suggestion in Rule 4.4, Comment 3 that a lawyer may decide to accede to opposing counsel’s request to return or destroy inadvertently sent information is entirely consistent with Rule 1.2(a). Namely, if a lawyer concludes that the review of inadvertently sent information is an “offensive tactic,” the decision whether to return or destroy that information should be “a matter of professional judgment ordinarily reserved to the lawyer,” just as Comment 3 suggests.

The dissenters also point to Rule 1.4(a)(2), which requires a lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” Notably, this provision does not require a lawyer to abide by all of the client’s instructions regarding the means by which the client’s objectives are to be accomplished. The Rule merely instructs lawyers to consult with the client. There is no inconsistency between telling lawyers that, on the one hand, they must consult with a client about a particular strategic decision (here, alerting the client about the receipt of inadvertently sent information) and, on the other hand, telling lawyers that they ultimately have the discretion whether to abide by the client’s wishes regarding that decision.

We note that in complex litigation, parties frequently address the inadvertent production of documents by means of a negotiated protective order that permits lawyers to “claw back” documents produced by mistake. This reflects the reality that when millions of pages are being reviewed and produced by large teams, there will inevitably be some mistakes made. To be sure, when such an agreement is approved by a court, “applicable law” will require the return of inadvertently produced documents and agreement to such protective orders is not inconsistent with comment 3. The point, however, is the recognition by the bar that it is not inconsistent with professionalism to agree not to take advantage of mistakes that will inevitably occur.

For these reasons, a majority of the Committee believes that Comment 3 to Rule 4.4 is consistent with Rules 1.2 and 1.4 and that the Comment (which is also found in the Model Rules) should be retained as a helpful and accurate source of additional guidance.

**Dissent of Timothy Dacey, Andrew Kaufman and John Whitlock to the Committee’s
Proposed Rule 4.4, Comment 3**

The lawyer’s responsibility when receiving a document inadvertently from an opposing party or its counsel has provoked a good deal of recent controversy, especially since modern technology has made it considerably easier for lawyers and clients to send material to the wrong recipient. Model Rule 4.4(b), which the committee recommends for adoption, takes a cautious and modest position in this debate, requiring only that the lawyer-recipient promptly notify the sender of its mistake. It does not go further to state a substantive solution to the problem, leaving the parties and ultimately a court, if need be, to resolve the consequences of the error.

Comment 3 to the Rule, however, does go further than the text of the Rule. It states, in its entirety:

Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Comment 3 states that “ordinarily,” a lawyer in the exercise of his or her own professional judgment (presumably without even telling the client) may decide to return a document to the other side or delete electronic information unread as “a matter of professional judgment ordinarily reserved to the lawyer,” citing Rules 1.2 and 1.4 as authority. But the relevant language in Rule 1.2 states the obligation of a lawyer to “seek the lawful objectives of his or her client through reasonably available means permitted by law and these Rules.” It goes on to provide that “A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client.” The last phrase constitutes the rub. How is a lawyer to know whether the rights of a client are prejudiced by deletion or return of an unread message? The message may, for example, contain crucial, and hitherto concealed, evidence that a court would have permitted the lawyer to use.

The majority report relies on language in Comment 3 that states that a lawyer does not violate Rule 1.2 by avoiding “offensive tactics.” It states that “Many lawyers consider the review of an opposing counsel’s mistakenly sent information ‘an offensive tactic.’” There is no citation of support for the “many lawyers” evidence. One may be pardoned for thinking that the group is heavily made up of people who have sent emails inadvertently. We think of an offensive tactic as something initiated by a person, not something like reading a document that the other side has sent to us. The latter does not seem like a “tactic.”

And Rule 1.4 does not advance Comment 3’s position. If anything, it rejects it. Rule 1.4 provides in relevant part that “A lawyer shall . . . (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished”

We do not understand the response of the majority to our view that there is inconsistency between Comment 3 to Rule 4.4 and Rule 1.4(2)(a). The majority argues that the Comment

leaves the final decision about returning a document to its sender to the lawyer but of course the lawyer may consult with the client. The Comment, however, suggests that some lawyers may choose to return the document unread. We do not see how the lawyer is to consult with the client in that situation. We continue to think that what is meant by the Comment is that the lawyer may return the document unread without telling the client (or at least without telling the client before returning the document).

Once the decision is made to adopt the text of the Rule 4.4(b), mandating only that a lawyer who receives a document or message inadvertently sent must notify the sender, it seems inappropriate for the Comment to suggest that any particular further action is or isn't appropriate. Indeed, the thrust of the Rules cited in the Comment would seem to be just the opposite of the suggestion in the Comment that it would not violate the lawyer's duty to communicate with the client and to provide competent representation if the lawyer returned or deleted the message unread. In any event, given the text of the Rule that the committee recommends, it seems to us much more appropriate to delete Comment 3 entirely in accord with the decision to provide in the Rule itself only that the recipient must notify the sender. The reference to Rule 1.2 and 1.4 can only produce future mischief with respect to defining the duties of the lawyer to communicate and to provide competent representation.

RULE 7.2(b)

Statement in Support of the Committee's Proposal

As stated in the Report, the majority recommends adopting the Model Rules' deletion of the requirement in current Rule 7.2(b) that copies of advertisements be retained for two years, and agrees with the observation in the ABA's reporter's notes that the obligation was burdensome and seldom used for disciplinary purposes.

Dissent of Carol Beck, Andrew Kaufman, Regina Roman, Constance Rudnick, and Constance Vecchione

Mass. R. Prof. C. 7.2(b) currently provides that "[a] copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used." Consistent with the amendments to the Model Rule in 2002, the committee is recommending that this provision be deleted. According to the committee's Executive Summary, the committee concurs with the ABA reporter's notes indicating that "the obligation was burdensome and seldom used for disciplinary purposes."

The undersigned respectfully dissent from this recommendation as this provision permits enforcement of the rule. Comment 5 to Massachusetts Rule 7.2 specifically notes that the rule "requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule." The committee's draft provides no alternative means of enforcement, leaving potential prosecution of the core obligation of honesty in advertising to the happenstance of copies being available to bar counsel. The ability to obtain copies of advertisements on radio or from websites has been critical in recent disciplinary investigations involving loan modifications and unauthorized practice of law where low-income clients were targeted.

Requiring that lawyers maintain copies of advertisements also encourages the use of care in finalizing content. Such encouragement should not be left to the possibility that an advertisement, especially in the form of a radio or television ad or an online entry, might be copied or recorded by a member of the public or retained by the station. Compare proposed comment [4] to Rule 7.3, which, in distinguishing advertising from solicitation, notes that “[t]he contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed....” The distinction will evaporate if there is no requirement that copies of advertisements be retained.

According to the ABA, a majority of U.S. jurisdictions still require that lawyers retain copies of advertisements and solicitations for periods of time ranging from six years (Alabama) to one year (Virginia, for electronic media advertisements), with two to three years being the norm. In addition, seven jurisdictions have even stricter standards, requiring filing copies of some or all advertisements and solicitations with the disciplinary authority prior to or contemporaneous with the first dissemination. A simple provision requiring that advertisements be retained for two years is more than reasonable.

To the extent that the concern driving the committee’s recommended revision is the difficulty in retaining copies of frequent changes to websites, the dissenters suggest adding to the current rule a sentence, such as the one in italics below that we have modeled on the New York rule. If the proposal is accepted, an additional explanatory comment concerning the added language would likely be needed, and certain other related changes recommended by the majority of the committee (the deletion of current comment 5 of Rule 7.2, as well as the deletion of current Rule 7.3(c) and comment 3 of Rule 7.3) would need to be revisited.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used. *Any advertisement contained in a computer-accessed communication, including but not limited to a website, shall be preserved upon the initial publication of the website or other computer-accessed communication, any major redesign of the website or communication, or any meaningful and extensive content change, but in no event less frequently than once every six months.*

RULE 8.4(h)

Statement in Support of the Committee’s Proposal

As stated in the report, the majority agrees with the ABA position in deleting paragraph (h) from Rule 8.4 on the grounds that it is too vague to serve as an independent basis for discipline. No limiting construction of this paragraph has emerged from the case law, and none has been proposed by the dissenters. *Compare Matter of the Discipline of Two Attorneys*, 421 Mass. 619, 628-29 (1996).

Dissent of Andrew Kaufman and Constance Vecchione

Rule 8.4(h), which states that “It is professional misconduct for a lawyer to engage in any other conduct that adversely reflects on his or her fitness to practice law,” reflects the decision by the Supreme Judicial Court in 1998 to continue a provision of its former Rules (based on the ABA Model Code of Professional Conduct) despite the fact that it had been eliminated in the ABA’s Model Rules of Professional Conduct. The issue that the court faced then is identical to the issue it faces today. Is the provision too broad, too vague to give the necessary notice to serve as a basis for discipline? Or, on the contrary, since it is impossible to conjure up all potential misconduct warranting discipline when drawing up a code of disciplinary conduct, is a provision like this needed to cover action that any reasonable lawyer would understand constitutes misconduct?

We believe that the provision serves a useful purpose when understood as limited to conduct that any reasonable lawyer would understand as constituting misconduct. The current provision has been cited many times by the Supreme Judicial Court in imposing discipline, generally but not always in connection with violation of other, more specific Rules. The challenge is to name situations when the provision might be used by itself. That is a difficult proposition since by definition the provision was originally placed in Rule 8.4(h) and its predecessor Rule to cover unusual situations that are sufficiently uncommon that they have not been covered by more specific Rules. We think it useful to have a provision to cover situations like the following: a lawyer misstates earnings on the annual report of earnings forms required of persons receiving disability pensions, without intent to defraud but also without any effort to ascertain what was required and resulting in substantial overpayment of disability pension benefits for two years (the facts of *In re Kelly*, 19 Mass. Atty. Disc. Reports 220 (2003), public reprimand imposed by the Board of Bar Overseers solely on the basis of the predecessor of Rule 8.4(h)); and a lawyer is found by a federal administrative tribunal to have willfully failed to file his federal tax return, although no criminal charges were instituted (the facts of *In re Kilduff*, public reprimand no. 2011-13 in which the court relied solely on Rule 8.4(h), rejecting a Rule 8.4(b) charge). Examples from other jurisdictions of freestanding violations (at least as to the charge at issue) of an equivalent rule include: *Courtney v. Alabama State Bar*, 492 So. 2d 1002 (Ala. 1986) (unwanted sexual advances toward client’s guardian); *People v. Stillman*, 42 P.3d 88 (Colo. O.P.D.J. 2002) (intentional destruction of roommate’s personal property); *People v. Jaramillo*, 35 P.3d 723 (Colo. O.P.D.J. 2001) (harassment of girlfriend’s husband and his children with divorce pending in which she was represented by other counsel; additional counts with other misconduct); *In re Gershater*, 17 P.3d 929 (Kan. 2001) (lawyer sent “vicious, offensive” letter containing “unprintable epithets” to her former counsel; additional counts with other misconduct).

In the absence of a provision like Rule 8.4(h), the temptation would be to stretch some other, more specific Rule to cover the conduct, with the danger of distorting the other provision because the Rule drafters simply couldn’t imagine all forms of potential lawyer misconduct. Massachusetts would not be alone in continuing to retain a provision like our current Rule 8.4(h). Seven other states, including New York and Ohio, have continued to do so. We therefore recommend that the court retain our current Rule 8.4(h).