

Explanation of
Proposed Amendments to the Rules of Professional Conduct relating to
Harassment, Discrimination and Maintaining Competence and Compliance with the Rules

The Standing Advisory Committee on the Rules of Professional Conduct is publishing for public comment the amendments to Mass R. Prof. C. 3.4 and 4.4 and Comments to Rules 1.2, 3.4, 4.4 and 5.1.

Background

In its recent Report to the Justices (the “Report”), the Supreme Judicial Court Steering Committee on Lawyer Well-Being found that incivility among lawyers was a continuing problem in all practice areas and was a particular problem among practitioners in the Probate and Family Law Court. Such incivility, the Well-Being Committee concluded, has a corrosive effect on those who experience it and diminishes respect for the law.

In some cases, incivility may be due to a misunderstanding of the lawyer’s duty of zealous advocacy. In addition, some forms of incivility violate the lawyer’s obligations under existing Rules of Professional Conduct, but these obligations may not be clearly understood.

The Report also recommended consideration of a comment to Rule 1.1 designed to encourage lawyers to seek assistance or treatment if the lawyer’s mental, emotional, and physical ability necessary for the representation of a client may be impaired. The Committee on the Rules of Professional Conduct was reluctant to adopt a comment that might be a basis for disciplining a lawyer who failed to maintain his or her mental, emotional or physical abilities. However, the Committee believed that it would be useful to remind lawyers practicing in firms that supervisory lawyers have a duty to take reasonable steps to protect clients if an impaired lawyer’s actions might adversely affect the clients’ interests.

To address these issues, the Committee on the Rules of Professional Conduct recommends the following amendments. The Committee is also proposing an amendment to revised paragraph 9 of the Preamble and Scope, which addresses some of these same issues.

Rule 1.2.

Rule 1.2 is unchanged.

Comment 1A. This Comment is new. It is intended as a reminder that, in considering how to achieve the clients’ objectives, lawyers must take into account their own ethical duties to courts and to third parties and should resist client pressures to engage in abusive tactics. No change in substance is intended.

Rule 3.4

Rule 3.4. The Committee recommends deleting Rule 3.4(i) and moving the prohibition on conduct manifesting bias or prejudice to Rule 4.4(a). See the discussion of Rule 4.4(a), below.

Comment 3A. This Comment is new. Rule 3.4(c) now prohibits a lawyer from knowingly disobeying a rule of a tribunal. The new Comment reminds lawyers that their obligations under Rule 3.4(c) extends to rules that require lawyers to cooperate in scheduling, case management, and in narrowing issues for submission to the tribunal. See for example Superior Court Rule 9C(a). No change in substance is intended.

Comment 7. This Comment deals with the prohibition on conduct manifesting bias or prejudice in Rule 3.4(i). The Committee recommends that this Comment be deleted and a new Comment be added to Rule 4.4.

Rule 4.4

Rule 4.4. The Committee recommends several changes in Rule 4.4.

First, the Committee recommends adding “harass” to the list of conduct proscribed by the Rule. Rule 4.4(a) now prohibits the use of means that have no substantial purpose other than “to embarrass, delay, or burden a third person.” The Committee recommends adding “harass,” so that the phrase reads “embarrass, *harass*, delay or burden a third person.” Although the reference to embarrassing or burdening a third person is broad enough to cover harassment as well, the Committee believes that expressly including harassment adds useful clarity to the Rule.

Second, the Committee recommends amending the Rule to prohibit conduct manifesting bias or prejudice on the basis of race, sex, religion, and other grounds proscribed by law. Currently, Rule 3.4(i) prohibits a lawyer from engaging in such conduct, but only when the lawyer is appearing before a tribunal. The Committee believes that the prohibition on such conduct should apply whenever a lawyer is representing a client. Accordingly, we recommend that the prohibition be moved from Rule 3.4 to Rule 4.4(a). In addition, the Committee recommends adding “gender identity” to the list of prohibited categories to conform to the categories listed in the Commonwealth’s anti-discrimination statute, Mass.Gen.Laws c. 151B, §4. The Committee considered but does not recommend adoption of Model Rule 8.4(g), which extends the prohibition on conduct manifesting bias or prejudice to all conduct relating to the practice of law.

Third, as a matter of style, the Committee proposes to reorganize Rule 4.4(a) into three subsections to make the requirements of the Rule easier to follow.

Comment 1. This Comment currently refers to “the rights of third persons.” The Committee recommends adding a reference to “other parties, counsel, witnesses, court personnel, and other participants in the legal process” to illustrate the intended breadth of the Rule. No change in substance is intended.

Comment 1A. This Comment is new and is intended to provide guidance on what constitutes harassment prohibited by the Rule.

Comment 1B. This Comment is new and is intended to explain the purpose and meaning of the prohibition on conduct manifesting bias or prejudice. The Comment is based on current Comment 7 to the Massachusetts Rule 3.4 and on Comment 3 to Model Rule 8.4.

Rule 5.1

Rule 5.1 is unchanged.

Comment 3A. This Comment is new. Rule 5.1 obliges supervisory lawyers to “make reasonable efforts” to ensure that firm lawyers conform to the rules. Accordingly, they may not ignore signs that one of their colleagues may be suffering from impairment that materially affects his or her ability to practice. If a lawyer is suffering from an impairment that materially affects his or her ability to practice or otherwise conform to the rules, then supervisory lawyers must “make reasonable efforts” to protect clients. The Committee concluded that more specific guidance in a new comment would be helpful, not only for supervisory lawyers to encourage the lawyer to seek assistance but also for supervisory lawyers to put procedures in place to protect clients.

The proposed revisions are outlined in Appendix A-1. A copy of Rules 1.2, 3.4, 4.4 and 5.1 and their Comments marked to show the changes from the corresponding current Massachusetts Rules and Comments is included as Appendix B-1.

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

The Standing Advisory Committee on the Rules of Professional Conduct is publishing for public comment proposed amendments to Mass. R. Prof. C. 1.8 as well as comments to Rules 1.8 and 1.7 to prohibit sexual relations between attorney and client in certain situations. The amended Rule 1.8 would have one new paragraph: (j); the language of paragraph (k) would be changed slightly. The rule would have a new comment, Comment 17; Comment 20 would be slightly amended. In addition, Comment 12 to Rule 1.7 would be amended and a new comment, Comment 12A, would be added to Rule 1.7. In connection with these amendments, the committee recommends adding a definition of “sexual relations” to Rule 1.0. The amendments will align Massachusetts with at least 32 other states that have adopted ABA Model Rule 1.8(j) or a version of it. The amended rules and comments will clarify for members of the bar and the public what conduct is prohibited.

Background

Adopted in 2002, ABA Model Rule 1.8(j) provides, “A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.” The Model Rule appears to be motivated by three concerns: (1) the disparate power between attorney and client; (2) the potential that the relationship could impair the lawyer’s independent professional judgment; and (3) the uncertainty over whether communications would be protected by the attorney-client privilege.

Rule 1.8(j)

Rule 1.8(j): The proposed Massachusetts rule provides more specific guidance than the Model Rule. Except in domestic relations cases, it does not contain a blanket ban on sexual relations with clients, focusing instead on whether the lawyer acted improperly in initiating or continuing the relationship. Rule 1.8(j)(1)(a) prohibits a lawyer, during the course of the representation, from using coercion, intimidation, or undue influence to enter into or continue sexual relations with a client. Rule 1.8(j)(1)(b) forbids a lawyer, as a condition of entering into or continuing any representation, from requiring or demanding sexual relations with a client or potential client. Thus, paragraph (1)(b) would apply even if the demand did not involve coercion, intimidation, or undue influence. Both proscriptions apply to the lawyers who deal with a client and to other lawyers in the same firm. Paragraph 1.8(j)(2) forbids lawyers in domestic relations cases from entering into a sexual relationship with their clients, but the ban does not apply to other lawyers in the firm.

Comment 17: This is a new comment to Rule 1.8. It explains the reasons for a specific rule concerning sexual relations with clients. It further explains the three different types of prohibited conduct as set forth in paragraphs (1)(a), (1)(b), and (2) of the rule. In addition, Comment 17 notes that even if a sexual relationship would not run afoul of the plain language of Rule 1.8(j), the conduct could implicate Rule 1.7’s general provisions concerning conflicts of interest with current clients.

Comment 20: This comment was amended only to include paragraphs (j)(1)(a) and (j)(1)(b) in the list of paragraphs where a prohibition arising from a conflict of interest applies firm-wide. Of note, the list does not extend to the ban on sexual relations with domestic relations clients in Rule 1.8(j)(2). That ban applies only to the lawyer who represents the client.

Rule 1.7

Rule 1.7 is unchanged.

Comment 12: For purposes of consistency and clarity, the committee recommends changes to Comment 12 of Rule 1.7. In its current form, Comment 12 recognizes the potential conflict of interest when a lawyer has an intimate personal relationship or a sexual relationship with a client. The amended comment retains most of this language. Consistent with Comment 17 to Rule 1.8, Comment 12 advises that conduct may violate Rule 1.7 even in the absence of a Rule 1.8(j) violation. It advises lawyers to avoid sexual relations with clients, “[u]nless it would be clear to a reasonable person that a sexual relationship with the client would not materially affect the representation.” The comment elucidates the text of Rule 1.7(a)(2), which precludes representation when “[t]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”

Comment 12A: A new comment, Comment 12A, to Rule 1.7 addresses the potential conflicts of interest when a lawyer has a sexual relationship with a representative of an organizational client. Concerns would be raised if the representative supervises, directs or regularly consults with the outside lawyer concerning the organization’s legal matters. In such situations, another representative of the organization may have to assess and waive any conflict of interest for the organization.

Rule 1.0

In light of the new rules and comments concerning sexual relations with clients, a definition would be added to Rule 1.0 to define the term “sexual relations” as follows: “Sexual relations’ denotes sexual intercourse or the intentional touching of an intimate part of the lawyer or another person for the purpose of sexual arousal or sexual gratification.” The definition focuses on the physical aspects of the relationship rather than a more general definition of “intimate” or “personal” relationship. The intention of the definition is to send a clear message to the bar and the public as to the type of conduct that would run afoul of the Rules of Professional Conduct.

The proposed revisions are outlined in Appendix A-2. A copy of proposed Rule 1.8 marked to show the changes from (i) the current Massachusetts Rule 1.8 and its comments and Comment 12 to current Massachusetts Rule 1.7 is included as Appendix B-2-1, and (ii) the ABA Model Rules 1.8 its comments and Comment 12 to ABA Model Rule 1.7 is included as Appendix B-2-2.

Explanation of
Changes to Massachusetts Rules of Professional Conduct Rules 7.1-7.5 and Comments

The Standing Advisory Committee on the Rules of Professional Conduct is publishing for public comment amendments to Mass. R. Prof. C. 7.1 through 7.5 to update the advertising rules incorporating certain changes adopted by the American Bar Association in its Model Rules of Professional Conduct. In 2018, the ABA revised its advertising rules to eliminate Model Rules 7.4 and 7.5 and to incorporate the substance of these rules in Model Rules 7.1 through 7.3 and their comments. The proposed revisions to the Massachusetts rules adopt this format, but preserve a number of the provisions of the current Massachusetts advertising rules that differed from the ABA Model Rules when the current Massachusetts advertising rules were adopted.

Rule 7.1:

Rule 7.1 is unchanged, and reflects the previous and current Model Rule.

Comment 1: The Model Rule comment said that the statements “must” be truthful, but when the comment was adopted in Massachusetts, the word “must” was changed to “should.” The word “must” was restored to conform to the current Model Rule comment; if a statement must not be false, then it must be truthful.

Comments 2-4: The changes in these comments from those in the current Massachusetts comments are all taken from the current Model Rule Comments 2-4. The first sentence of Comment 2 was rewritten for clarity.

Consistent with the revised comments to the Model Rules, Comments 5 through 8 incorporate the provisions of former Model Rule and current Massachusetts Rule 7.5.

Comment 5 is taken from new Model Rule Comment 5, which is based on Comment 1 to former Model Rule 7.5 and reflects former Model Rule 7.5(a) and current Massachusetts Rule 7.5(a). Comment 1 to Massachusetts Rule 7.5 added “or retired” in two places to the Model Rule comment in effect when current Massachusetts Rule 7.5 was adopted, and that change was included in new Comment 5.

Comment 6 is taken from Model Rule 7.5(b) and current Massachusetts Rule 7.5(b). The Model Rule Comment omits the following caution from former Model Rule (and current Massachusetts Rule) 7.5(b):

“but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.”

Massachusetts has a statute that makes it a misdemeanor to hold oneself out as a lawyer without being admitted to the bar. Mass. Gen. Laws ch. 221, §41; *see also* ch. 221, §46A. The recommended version of Comment 6 retains the requirement to indicate jurisdictional limitations even though not included in Model Rule Comment 6.

Comment 7: The first sentence is Model Rule Comment 7, based on former Model Rule 7.5(d) and current Massachusetts Rule 7.5(d). The second and third sentences are adapted from Comment 2 to current Massachusetts Rule 7.5. These were non-Model Rule comments when originally adopted.

Comment 8 is Model Rule Comment 8 and is former Model Rule 7.5(c) and current Massachusetts Rule 7.5(c).

Comment 9 is Comment 3 to current Massachusetts Rule 7.5 and was retained as a helpful cross-reference.

Rule 7.2:

Rule 7.2 incorporates changes from the Model Rule in paragraphs (a) and (b)(5). Paragraph (b) was rewritten based on that paragraph of the Model Rule. Paragraph (c) is based on former Rule 7.4(c). Paragraph (d) is a revision of former Rule 7.2(c).

Rule 7.2(b)(2). Rule 7.2(b)(2) retains the reference to qualified legal assistance organizations from the current Massachusetts rule. See the definition of such organizations in Rule 1.0(j). Like the current Massachusetts rule, paragraph (b)(2) does not permit for-profit lawyer referral services, referred to in the Model Rule as “qualified lawyer referral services.” In the absence of a widely accepted definition of what would constitute a “qualified lawyer referral service,” the Committee has recommended making no change in the Massachusetts restriction to non-profit lawyer referral services and qualified legal assistance organizations.

Rule 7.2(b)(5) is taken from the Model Rule and codifies common understanding and practice.

Rule 7.2(c), like Model Rule 7.2(c), incorporates the substance of Rule 7.4 concerning communication of fields of practice. The Committee has retained the substance of current Massachusetts Rules 7.4(b) and (c), which differs from current Model Rule 7.2(c).

Rule 7.2(d) is based on Model Rule 7.2(d) but, as with current Massachusetts Rule 7.2(c), does not require that contact information for the lawyer or law firm be included.

The comments have been rewritten to reflect updates to the comments in Model Rule 7.2.

Comment 6 is revised from the Model Rule to add a reference to qualified legal assistance organizations, as defined in the current Massachusetts Rules. See Rule 1.0(j). The reference to “qualified” legal referral services in the Model Rule version of Comment 6 has been eliminated.

The last sentence in **Comment 9** is adapted from the second sentence of current Massachusetts Rule 7.4(b), which addresses the standard of performance for lawyers who hold themselves out as specialists. It was not included in the rule, as it reflects a potential liability rather than an issue of professional responsibility, but was included in the comment as cautionary advice for lawyers.

Comment 12 of the Model Rule has been eliminated. Without the requirement in Model Rule 7.2(d) to include contact information, the comment serves no function.

Rule 7.3:

Rule 7.3 has been updated to incorporate certain, but not all, revisions in Model Rule 7.3.

Rule 7.3(a) incorporates the Model Rule definition of “solicitation” or “solicit.”

Rule 7.3(b)(1) and (2) were updated to conform to the corresponding provisions of the Model Rule 7.3(b)(1) and (2). Rule 7.3(b)(2) is adopted in lieu of the current Massachusetts Rule 7.2(b)(2) and (3), which had varied from the Model Rule when adopted. Rule 7.3(b)(3) incorporates current Massachusetts Rule 7.3(a)(4) in place of the more restrictive test in Model Rule 7.3(b)(3).

Rule 7.3(c) is consistent with the current Massachusetts rule, except that the description of prohibited forms of solicitation in the first sentence of current Massachusetts Rule 7.3(b) was removed as being superfluous in light of proposed Comments 1 and 2. Subparagraphs (1) and (2) match both Model Rule 7.3(c)(1) and (2) and 7.3(c)(1) and (2) of the current Massachusetts rule. Rule 7.3(c)(3) is not included in the Model Rule but is retained from the current Massachusetts Rule.

Rule 7.3 (d) is adopted from Model Rule 7.3(d). As noted in proposed Comment 8, the purpose of this rule is to remove doubt regarding communications such as notice to potential members of a class in class action litigation.

Rule 7.3 (e) adopts the language from Model Rule 7.3(e), in place of the current language in the Massachusetts Rule 7.3(d).

Comment 1 is Comment 1 from the Model Rule.

Comment 2 is largely taken from Comment 2 to Model Rule 7.3, with the exception of the last sentence, which is taken from current Comment 5 to Massachusetts Rule 7.3. In the comment to the Model Rule, chat rooms are included in the second sentence with text messages and other written communications that are excluded from live person-to-person contact. The term “chat rooms” was deleted as an overly specific reference to a technical term, but no change from the Model Rule is intended.

Comments 3 and 4 are adopted from Comments 3 and 4 to Model Rule 7.3.

Comment 5 largely incorporates Comment 5 to the Model Rule, although among other changes the Model Rules comment has been edited to address the Massachusetts language retained in proposed Rule 7.3(b)(3).

Comment 6 revises Comment 6 of the Model Rules, to take account of the retained Massachusetts language in 7.3(c)(3). Consistent with this, Comment 6 also incorporates (with the exception of its last two sentences) Comment 3 of the current Massachusetts rule, outlining how a determination is to be made whether a contact is permissible under Rule 7.3(c)(3).

Comment 7 corresponds to Model Rule Comment 7.

Comment 8 corresponds to Comment 8 to Model Rule 7.3, and, as noted above, explains the proposed adoption of Rule 7.3(d).

Comment 9 corresponds to Comment 9 to Model Rule 7.3 and explains the new proposed language for Rule 7.3(e).

The proposed Rules 7.1 through 7.3 are shown in Appendix A-3. A copy of the proposed Rules 7.1 through 7.3 marked to show changes from (i) the current Massachusetts Rules 7.1 through 7.5 is contained in Appendix B-3-1, and (ii) the current ABA Model Rules 7.1 through 7.3 is contained in Appendix B-3-2.

**Explanation of
Proposed Changes to the Preamble and Scope of the Rules of Professional Conduct**

The Standing Advisory Committee on the Rules of Professional Conduct is publishing for public comment amendments to the Preamble and Scope of the Massachusetts Rules of Professional Conduct to update them to reflect revisions by the American Bar Association in the Preamble and Scope to the Model Rules of Professional Conduct and to clarify certain provisions, and to make a clarifying change to Comment 3 of Rule 1.6.

The ABA last amended the Preamble and Scope of the ABA Model Rules as part of the changes that were adopted in 2002. Because Massachusetts had just adopted the Rules of Professional Conduct effective in 1998, the Committee initially did not recommend wholesale revisions to the Massachusetts Rules to incorporate the revisions to the ABA rules adopted in 2002. Rather, the committee recommended certain substantive changes adopted by the ABA, but deferred consideration of the many technical and stylistic changes. The remaining 2002 revisions were considered later and adopted when other changes to the Massachusetts rules were adopted in 2015. However, the Committee never reviewed or considered the changes to the Preamble and Scope adopted by the ABA in 2002. The proposed changes to the Preamble and Scope are intended as the completion of unfinished business and a reconsideration of the statement in the Scope about the status of Comments to the Rules.

When the Massachusetts Preamble and Scope were adopted effective in 1998, the Massachusetts version of the Preamble was taken from the ABA version with no changes. Three paragraphs of the ABA Scope were modified or deleted from the Scope adopted with the Massachusetts Rules.

1. Paragraph 4 of the Massachusetts Scope, which corresponded to paragraph 18 of the ABA version of the Scope, was modified to refer to Massachusetts public officials and incorporate other changes reflecting Massachusetts law.
2. Paragraph 6 of the Scope, corresponding to paragraph 20 of the ABA version of the Scope, was simplified and included a citation of a leading Massachusetts case.
3. Massachusetts Scope paragraph 8 was reserved. The text of the corresponding paragraph in the ABA Scope that was not adopted in Massachusetts read as follows:

[20] The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The current ABA Scope does not contain that paragraph, as the substance of this comment was incorporated in comments to Rule 1.6.

The proposed revisions to the Preamble incorporate all the changes to the Preamble in the ABA Model Rules, with the exception of paragraphs 10 and 11 from which the Committee deleted references to the self-governing of the legal profession. Massachusetts lawyers are governed by the Board of Bar Overseers and the courts, and ultimately by the

Supreme Judicial Court. Revised paragraph 9 includes a final sentence, contained in the ABA Preamble that also addresses the importance of balancing zealous advocacy with maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

The Scope also incorporates the current versions of the ABA Scope, including continuing the numbering from the Preamble, with the following exceptions.

The final two sentences of Paragraph 14 were deleted. The penultimate sentence was deleted as it had no significant content. The final sentence was deleted as inconsistent with revised Paragraph 21, discussed below.

Paragraph 18 retains and modifies non-Model Scope language from the current Scope paragraph 4 referring to Massachusetts officials and applicable Massachusetts law.

Paragraph 20 retains references to *Fishman v. Brooks*, which is still the leading case in Massachusetts on the subject, and related comments from current Scope paragraph 6.

The substance of current Scope paragraph 7 was dropped from the Model Scope in 2002, as the substance was addressed in comments to the Rules including Comment 3 to Rule 1.6. The proposed revised Scope likewise does not include current Scope paragraph 7. However, the proposals include a revision to Comment 3 to Rule 1.6 to incorporate some of the substance of current Scope paragraph 7.

Paragraph 21 contains the most notable change from the language of the Model Scope and the current Scope paragraph 9. The Committee believes that the revised language of Paragraph 21 more accurately reflects the importance and binding effect of the Comments as they have been used by disciplinary authorities including the Court in interpreting the Rules.

A copy of the Preamble and Scope and revised Comment 3 to Rule 1.6 as proposed is shown in Appendix A-4. A copy of the proposed Preamble and Scope and Comment 3 to Rule 1.6 marked to show the changes from the current version of the Massachusetts Preamble and Scope and Comment 3 to Rule 1.6 is found in Appendix B-4-1, and a copy of the proposed Preamble and Scope marked to show the changes from the current version of the Preamble and Scope to the ABA Model Rules is found in Appendix B-4-2.

**Explanation of
Proposed Changes to Rule 1.15A on Client Files**

The Standing Advisory Committee on the Rules of Professional Conduct is publishing for public comment amendments to Mass. R. Prof. C. 1.15A and its comments to make certain technical corrections and recommended revisions. Rule 1.15A on the retention and disposition of client files was adopted by the court in 2018. Since its adoption, the Committee has been made aware that Rule 1.15A(c) as currently written may be interpreted to require the lawyer to disregard client instructions on file disposition if the retention requirements of Rule 1.15A(f) apply to the files. Accordingly, Rule 1.15A(c) has been revised, as reflected in paragraphs (c)(1) and (c)(2) of the proposed changes, to make it clear that a client's instructions as to the disposition of client files are to be honored, and only in the absence of those instructions is a lawyer required to maintain the file for up to six years or the applicable periods in paragraphs (d), (e) or (f).

In addition, two new provisions have been added to the Rule.

Rule 1.15A(c)(3) has been added to require that a lawyer must keep evidence of the file disposition for at least six years after the completion of the matter or the termination of the representation in the matter. The evidence of the client instructions may be contained in the engagement letter. This record-keeping requirement is similar to the record keeping requirement relating to the records on the disposition of trust property in Rule 1.15(f).

Rule 1.15A(g) has been added at the request of the Committee for Public Counsel Services to enforce its policies on file retention.

Comment 8 was added to make it clear that any agreement on which the lawyer relies for instructions as to file disposition must have been made by a person competent to make a binding contract.

The proposed revisions are outlined in Appendix A-5. A copy of the proposed Rule 1.15A marked to show the changes from the current Rule 1.15A is included as Appendix B-5.

**Explanation of
Amendments to Rules 1.0 and 1.6, and Comment 3A to Rule 1.6**

The Standing Advisory Committee on the Rules of Professional Conduct is publishing for public comment amendments to Mass. R. Prof. C. 1.6 and its Comment 3A to move the definition of the term “confidential information” from the Comment to the Rule. The Massachusetts version of the Rules of Professional Conduct incorporates a definition of the term “confidential information” in Comment 3A to Rule 1.6 that is narrower than the term “information relating to the representation of a client” used in the corresponding ABA Model Rules. The term “confidential information” is used not only in Massachusetts Rule 1.6, but also in Rules 1.8, 1.9, 1.14, 1.17 and 1.18 and is referred to in comments to Rules 1.0, 1.10, 1.13, 2.3, 3.3, 3.6, 4.1, 4.2, 5.3 and 5.7.

Considering the pervasive use of the defined term, the proposed changes move the definition from Comment 3A to the end of Rule 1.6(a) and add a cross-reference in Rule 1.0 to assist the users of the Massachusetts Rules in finding the definition. Inserting the cross reference as new Rule 1.0(c) causes the renumbering of the definitions that follow. There are such cross-references in one Rule and 18 Comments that would require updating.¹

The Committee considered moving the definition to Rule 1.0 itself, but that change would also entail consideration of whether some of the other Comments to Rule 1.6 should also be moved to Rule 1.0. The proposed change was the least disruptive to accomplish the purpose of moving the definition from the Comments to the Rule.

The change is not intended to change the substance of any of the Rules or their interpretation.

A summary of the proposed changes is found in Appendix A-6, including the complete Rules 1.0 and 1.6 and their comments as revised. A copy of Rules 1.0 and 1.6 and their comments marked to show the changes from the current Massachusetts rules is included as Appendix B-6.

¹ Rule 1.4(a)(1) and the following Comments to Rules: Rule 1.6, Comment 2; Rule 1.7, Comments 1, 17, 18 and 20; Rule 1.8, Comments 2 and 13; Rule 1.9, Comment 9; Rule 1.11, Comment 1; Rule 1.12, Comment 2; Rule 1.13, Comment 3; Rule 1.15, Comment 13; Rule 1.17, Comment 11; Rule 1.18, Comment 5; Rule 2.4, Comment 5; Rule 3.3, Comments 1 and 8; Rule 3.5, Comment 5; Rule 3.7, Comment 6; Rule 4.2, Comment 8; Rule 5.1, Comment 1; and Rule 7.2, Comment 6.