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REPORT OF THE
NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT ("COSAC")

PROPOSED AMENDMENTS TO THE NEW YORK RULES OF PROFESSIONAL CONDUCT AND RELATED COMMENTS

Based on COSAC's Comprehensive Review of Changes to the ABA Model Rules of Professional Conduct Resulting From the Work of the ABA Commission on Ethics 20/20

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Executive Summary

From 2009 to 2013, the ABA Commission on Ethics 20/20 drafted and recommended proposed amendments to the ABA Model Rules of Professional Conduct to account for increasing globalization and rapid changes in technology. In 2012 and 2013, the ABA House of Delegates adopted many of the proposed amendments.

The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") has systematically reviewed all of the ABA amendments to determine whether New York should adopt similar amendments in the New York Rules of Professional Conduct. Here is a summary of COSAC's report and recommendations regarding the ABA Ethics 20/20 changes:

Rule 1.0(x) (in "Terminology"): COSAC recommends clarifying the definition of "writing" to make clear that it encompasses evolving forms of electronic communications, and adding a new Comment [1A] to clarify the scope of New York's unique related term "computer-accessed communication."

Rule 1.1 ("Competence"): COSAC recommends amending Comments [6] to [8] to cover (a) outsourcing, (b) co-counsel arrangements, and (c) the obligation to understand the risks and benefits of the technologies the lawyer uses.

Rule 1.4. ("Communication"): COSAC recommends amending Comment [4] to replace "telephone calls" with "communications."

Rule 1.6 ("Confidentiality of Information"): COSAC recommends amending the black letter text of Rule 1.6(c) to clarify and extend New York's existing duty to "exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client …." The proposed amendments would require lawyers to make "reasonable efforts" (i) to guard confidential information against "inadvertent" disclosure, (ii) to guard confidential information against unauthorized "access," and (iii) to guard against inadvertent disclosure of or unauthorized access to "information protected by law or by court order." In addition, the amendments would extend the provision, which now expressly covers only "employees, associates, and others whose services are utilized by the lawyer," so that Rule 1.6(c) will expressly extend to lawyers themselves. COSAC also proposes amending Comments [16] and [17] to Rule 1.6 to elaborate on the proposed amendment to Rule 1.6(c), but COSAC goes beyond the ABA amendments to reflect the broader reach of New York's version of Rule 1.6(c).

Also regarding Rule 1.6, COSAC recommends adding a series of new Comments (numbered [18A]-[18F]) to offer guidance on the application of the duty of confidentiality to lawyers and law firms who are considering lateral moves or law firm mergers. The ABA adopted a new exception to Rule 1.6(b) to permit lawyers in the lateral and merger contexts to disclose confidential information, subject to certain conditions, for purposes of checking for conflicts of interest. COSAC does not recommend that New York adopt the new ABA exception, but COSAC recognizes that lawyers need more guidance regarding permissible and impermissible disclosures when lawyers change firms and when law firms merge. (Because New York has unique provisions in Rule 1.10 requiring law firms to check for conflicts of interest, COSAC also

recommends adding new Comments to Rule 1.10 to address the relationship between confidentiality and conflict checking in the lateral and law firm merger contexts.)

Rule 1.10 ("Imputation of Conflicts of Interest"): To complement new Comments [18A]-[18F] to Rule 1.6 regarding the relationship between the duty of confidentiality and the disclosures typically needed to enable a law firm to evaluate a possible lateral hire or law firm merger, COSAC recommends adding new Comments to Rule 1.10 to address the same issues.

Rule 1.18 ("Duties to Prospective Clients"): COSAC recommends amending the black letter text of Rule 1.18(a) and (b) to clarify the language (*e.g.,* by replacing the word "conversations" with "consultation"). COSAC also recommends amending Comments [1]-[2] and [4]-[5] to reflect the black letter changes to Rule 1.18 and to clarify how and when a person becomes a "prospective client" within the meaning of Rule 1.18. Finally, COSAC recommends adding the phrase "Except as provided in Rule 1.18(e)" at the beginning of Rule 1.18(a) (which defines the term "prospective client"), and amending Rule 1.18(e) (which states two exceptions to the definition of "prospective client") by slightly changing its wording and structure to make it easier to understand.

Rule 4.4. ("Respect for Rights of Third Persons"): COSAC recommends amending the black letter text of Rule 4.4(b) to make explicit that it applies to "electronically stored information" (often called "ESI"). COSAC also recommends amending Comment [2] to Rule 4.4 to provide more guidance to lawyers regarding the scope of Rule 4.4(b) and the options available to a lawyer who receives an inadvertently sent document.

Rule 5.3 ("Lawyer's Responsibility for Conduct of Nonlawyers"): Because computers, e-mails, smart phones, and globalization have made outsourcing to nonlawyers far more common than it was a decade ago, COSAC recommends amending Comments [1] and [3] to Rule 5.3 by adding new language offering guidance on outsourcing. In particular, the new language in Comment [3] identifies some of the circumstances a lawyer should consider when determining how to comply with Rule 5.3's requirement to make "reasonable efforts" to supervise nonlawyers. (Existing Comment [3] will be retained but will be renumbered as Comment [2A].)

Rule 5.5 ("Unauthorized Practice of Law"): The ABA amended its version of Rule 5.5, but COSAC does not recommend any changes to New York Rule 5.5.

Rule 7.2 ("Payment for Referrals"): The Internet and other technologies have made it possible for lawyers to find clients in ways that did not exist five or ten years ago, and have enabled nonlawyers to develop new ways to assist lawyers in finding new clients. COSAC recommends amending Comment [1] to Rule 7.2 to clarify the situations in which a lawyer may pay others for generating client leads gathered from the Internet or elsewhere. COSAC also recommends a technical amendment to Comment [3], replacing the term "prospective clients" (which is now defined in Rule 1.18) with the more accurate term "potential clients."

Rule 7.3 ("Solicitation and Recommendation of Professional Employment"): COSAC recommends amending the black letter text of Rule 7.3(b), which defines "solicitation," by deleting the phrase "of a prospective client," which is unnecessary and is confusing because "prospective client" which is defined in Rule 1.18(a), has a different meaning in Rule 7.3(b).

COSAC also recommends amending Comment [9] to Rule 7.3 to provide more guidance regarding the phrase "real-time or interactive communications" in Rule 7.3.

Rule 8.5 ("Disciplinary Authority and Choice of Law"): The ABA amended Comment [5] to ABA Model Rule 8.5 to allow consideration of lawyer-client agreements specifying which jurisdiction's conflict of interest rules will apply to a matter, but the ABA language does not fit with New York's language so COSAC does not recommend adopting it.

Introduction and Background

COSAC has followed the work of the ABA Commission on Ethics 20/20 since 2009 and has intensively reviewed all of the 2012 and 2013 amendments to the ABA Model Rules of Professional Conduct that were based on the Ethics 20/20 Commission's recommendations.

In light of its review, COSAC recommends that the New York State Bar Association adopt the recommendations in this report. The recommendations fall into three categories:

1. ***Black letter Rules.*** COSAC is proposing some changes to the text of the black letter Rules in the New York Rules of Professional Conduct. If the House of Delegates approves these proposals, they will not take effect unless and until the Appellate Division approves the changes – and the Appellate Division will of course be free to accept, reject, or modify the State Bar's proposals.

2. ***Comments conditional on black letter changes.*** COSAC is proposing some amendments to the Comments that will offer guidance on proposed amendments to the black letter Rules if the Appellate Division approves those amendments. COSAC is asking the House of Delegates to approve these proposed amendments to the Comments conditional on Appellate Division approval of the accompanying proposals to amend the black letter Rules.

3. ***Comments independent of black letter changes.*** COSAC is proposing some amendments to the Comments that offer further guidance on existing black letter Rules. COSAC is asking the House of Delegates to approve these changes effective immediately. They do not depend on whether the Appellate Division approves proposed changes (if any) in the black letter text of the Rules.

COSAC has also decided *not* to recommend some of the changes that resulted from the work of the Ethics 20/20 Commission, either because New York has no comparable provisions or because the New York Rules already embody the essence of the Ethics 20/20 changes.

COSAC is also *not* addressing two ABA model court rules – (i) the ABA Model Rule on Practice Pending Admission (which New York's courts have apparently already rejected), and (ii) an amendment to the ABA Model Rule on Admission by Motion (which reduced the requisite time period from "five of the last seven years" to "three of the last five years"). COSAC may address these model court rules at a later time. This report addresses only the Ethics 20/20 amendments to the ABA Model Rules of Professional Conduct and whether those amendments should be incorporated into the New York Rules of Professional Conduct in some fashion.

Discussion of Proposed Amendments

This report addresses COSAC's review of all amendments to the ABA Model Rules of Professional Conduct – both to the black letter Rules and to the Comments – that were recommended by the ABA Commission on Ethics 20/20 ("Ethics 20/20") and that are pertinent to the New York Rules of Professional Conduct. (The ABA also approved a few Ethics 20/20 changes to language in the ABA Model Rules that does not appear in the New York Rules – *e.g.*, changes to (i) Comment [9] to Rule 1.0, which relates to wording in the definition of "screened" that does not appear in New York's equivalent Comment, (ii) changes to Comment [7] to ABA Model Rule 1.17, and (iii) wording in the title of Rule 5.3 that does not appear in the title to New York Rule 5.3. This report does not address such non-substantive changes.)

For each proposed amendment, the report uses the following format: (i) the ABA amendment in legislative style showing changes that the ABA has already adopted (comparing the current ABA provision to the prior ABA provision); (ii) the proposed New York amendments (if any) in legislative style (comparing the current New York Rule to the proposed New York Rule, *not* to the ABA Model Rule); and (iii) COSAC's discussion of the purpose of each proposed amendment and COSAC's reasons for any differences from the changes approved by the ABA. All of COSAC's recommendations in this report are organized by Rule number. For convenience, each separate Rule starts on a new page.

Occasionally, COSAC has made minor non-substantive changes for the sake of grammar or internal consistency. For example, except when COSAC is quoting from ABA sources, COSAC has used "e-mail" (with a hyphen) and has capitalized "Internet" wherever these terms are used in this report. However, the existing New York Rules of Professional Conduct are not internally consistent regarding those terms, and at some future time COSAC will endeavor to make all of the New York Rules and Comments internally consistent.

Rule 1.0. Terminology

ABA: Amended ABA Model Rule 1.0(n) (equivalent to New York Rule 1.0(x))

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording and ~~email~~ electronic communication. A "signed" writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

New York: Proposed Amendment to New York Rule 1.0(x)

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, ~~and~~ e-mail or other electronic communication or any other form of recorded communication or recorded representation. A "signed" writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

New York: Proposed New Comment [1A] to N.Y. Rule 1.0

Computer-Accessed Communication

[1A] Rule 1.0(c), which defines the phrase "computer-accessed communication," embraces electronic and wireless communications of every kind and includes, without limitation, communication by devices such as cell phones, smartphones, and all other handheld or portable devices that can send or receive communications by any electronic or wireless means, including cellular service, the Internet, wireless networks, or any other technology.

COSAC Reporter's Explanation:

The proposed amendment to the black letter text of Rule 1.0(x) would require Appellate Division approval, but proposed Comment [1A] to Rule 1.0 would require approval only from the House of Delegates. COSAC recommends that the House of Delegates approve new Comment [1A] immediately because it does not depend on whether the Appellate Division amends Rule 1.0(x).

The ABA amended the definition of the term "writing" by eliminating the example of "e-mail" and substituting the words "electronic communication." The ABA amendments seek to encompass different types of electronic communications and to capture evolving technologies.

COSAC agrees that the definition of writing should be expanded to encompass evolving types of electronic communications, but recommends two improvements to the ABA approach.

First, COSAC sees no reason to eliminate the word "e-mail," which is a helpful example because

it is currently a popular method of electronic communication.

Second, COSAC believes that the phrase "electronic communication" standing alone may prove too restrictive to encompass future technologies. Accordingly, the proposed COSAC revisions maintain the "e-mail" example, add the phrase "or other electronic communication," and include a more flexible catch-all phrase – "or any other form of ***recorded*** communication or ***recorded*** representation" (emphasis added). This catch-all phrase is designed to encompass whatever technologies may develop over time. At the same time, the revised definition of "writing" should make clear that telephone calls, though "electronic," are not within the scope of the definition unless they are "recorded."

Moreover, New York refers to communication via "a computer or related *electronic* device" in Rule 1.0(c), which defines the term "computer-accessed communication," a term not found in the ABA Model Rules of Professional Conduct. Rule 1.0(c) provides as follows:

> (c) "Computer-accessed communication" means any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a ***computer or related electronic device***, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop up and pop under advertisements, chat rooms, list servers, instant messaging, or ***other internet presences***, and any ***attachments*** or links related thereto. [Emphasis added.]

In effect, a "computer-accessed communication" may be viewed as a special category of "writing." New York lawyers therefore need greater clarity on the scope of Rule 1.0(c) as well as Rule 1.0(x). For example, the scope of words and phrases in Rule 1.0(c) such as "computer," "accessed," "related electronic device," "other internet presences," and "attachments" is unclear. Is a smartphone a "computer"? Is it a "related electronic device"? COSAC thinks that it is both, but neither the text of Rule 1.0(c) nor the Comment to Rule 1.0 addresses the point. Accordingly, COSAC recommends adding a new Comment [1A] to Rule 1.0 to clarify the reach of "computer-accessed communication."

In sum, COSAC recommends that the House of Delegates ask the Appellate Division to amend the definition of "writing" in Rule 1.0(x) to reflect that continued advances in technology are constantly producing new forms of recorded communication. COSAC also recommends that the House of Delegates add a new Comment [1A] to explain the scope of the related term "computer-accessed communication."

Rule 1.1. Competence

ABA: Amended ABA Comments [6]-[8] to ABA Model Rule 1.1

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] *[Note from COSAC: ABA Comment [7] is identical to proposed New York Comment [7], which appears below.]*

~~[6]~~ [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

New York: Proposed New and Amended Comments [6]-[8] to New York Rule 1.1

Retaining or Contracting with Lawyers Outside the Firm

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[6A] Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm and not requiring the disclosure of confidential information. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or

review by the referring lawyer. For example, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routine calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to take a deposition, argue a summary judgment motion, or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

~~[6]~~ [8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, (ii) engage in continuing study and education, and (iii) comply with all applicable continuing legal education requirements -- *see* 22 N.Y.C.R.R. Part 1500.

COSAC Reporter's Explanation:

The proposed amendments to Comments [6]-[8] to New York Rule 1.1 would require approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve new and amended Comments [6] through [8] immediately.

The ABA amended the Comments to ABA Model Rule 1.1 by adding several new paragraphs to address outsourcing legal work to lawyers outside a firm, and by adding one new clause to Comment [8] to address the relationship between competent representation and keeping up with the benefits and risks of technology relevant to law practice. COSAC generally agrees that the Ethics 20/20 changes to the Comments to Rule 1.1 are useful, but has made some departures from the ABA version.

Evolving technologies are changing the ways in which lawyers deliver legal services. Because a variety of technologies are making it increasingly easy to find and communicate with lawyers who work on a part-time or per diem basis, lawyers today frequently contract with lawyers who practice alone or with other law firms ("outside lawyers") to work on client matters.

To help ensure that outside lawyers perform legal work competently, COSAC recommends that the House of Delegates expand the Comments to New York Rule 1.1 ("Competence") to provide greater guidance and clarity regarding a lawyer's responsibilities when engaging outside lawyers to provide legal services to clients. COSAC agrees with the ABA that Rule 1.1 is the appropriate place to add Comments [6] and [7], because the primary ethical consideration when retaining an outside lawyer is whether the outside lawyer is competent to assist in the representation.

The first sentence of proposed Comment [6] explains that a lawyer ordinarily should obtain a client's informed consent before retaining an outside lawyer to assist on a client's matter and

should not refer work to an outside lawyer unless he or she reasonably believes that the outside lawyer's services will contribute to the competent and ethical representation of the client. Following the first sentence of proposed Comment [6] is a list of other New York Rules that lawyers should consult when retaining outside lawyers.

The second sentence of proposed Comment [6] restates a general principle that a lawyer should take reasonable steps to ensure that services performed by outside lawyers will be performed competently and that the outside lawyer's services should contribute to the overall competent and ethical representation of the client.

The last sentence of proposed Comment [6] lists several factors that lawyers should consider when retaining outside lawyers. This list is not intended to be exhaustive.

Proposed Comment [6A], which does not exist in the ABA Model Rules, amplifies and qualifies the general principle that a lawyer should obtain client consent before retaining a lawyer outside the firm. COSAC has written Comment [6A] to provide additional guidance on when client consent is necessary, and COSAC has provided some examples to make the guidance more concrete. Although client consent may not be necessary for discrete and limited tasks supervised closely by a lawyer and not requiring the disclosure of confidential information, COSAC concluded that a lawyer should ordinarily seek to obtain client consent when retaining or contracting with an outside lawyer to handle any substantive or strategic legal work on which the outside lawyer will exercise independent judgment without close supervision or review by the referring lawyer. If an outside lawyer will exercise significant independent judgment or receive the client's confidential information, COSAC believes that clients expect to be notified and consulted.

Proposed Comment [7] emphasizes that, when multiple firms work together on a client's matter, the firms ordinarily should consult with the client and one another about the scope of the work being performed by each firm and the allocation of responsibility among them. The Comment also reminds lawyers that in matters pending before a tribunal, they and their clients might have additional obligations under court rules or other authorities that are a matter of law beyond the scope of the New York Rules of Professional Conduct.

The proposed amendment to current New York Comment [6] (which would become Comment [8]) stems from the evolution of technology and its impact on legal practice. COSAC concluded that to keep abreast of changes in law practice, a lawyer needs to understand the risks and benefits of technology relevant to the lawyer's particular practice. For example, if a lawyer's clients are communicating with the lawyer by web-based document-sharing technology or by social media, the lawyer should have some understanding of how to ensure that confidential communications remain confidential. The proposed amendment impresses upon lawyers the key role that technology plays in law practice and creates the expectation that lawyers will keep abreast of the benefits and risks associated with the technology relevant to their own legal practice. The proposed Comment does not require a lawyer to keep up with developments in technology that are not relevant to the lawyer's own practice.

Rule 1.4. Communication

ABA: Amended Comment [4] to ABA Model Rule 1.4

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. ~~Client telephone calls should be promptly returned or acknowledged~~ A lawyer should promptly respond to or acknowledge client communications.

New York: Proposed Amendment to Comment [4] to New York Rule 1.4

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer's staff acknowledge receipt of the request and advise the client when a response may be expected. ~~Client telephone calls should be promptly returned or acknowledged~~ A lawyer should promptly respond to or acknowledge client communications, or arrange for an appropriate person who works with the lawyer to do so.

COSAC Reporter's Explanation:

The proposed amendments to the Comment to Rule 1.4 would require approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve these amendments immediately.

The ABA amended Comment [4] to ABA Model Rule 1.4 by updating the language, replacing "telephone calls" with "communications." COSAC recommends that the NYSBA adopt the ABA language verbatim.

COSAC's proposed amendment to Comment [4] simply recognizes that clients utilize many methods to communicate with their lawyers, and there is no reason to single out "telephone calls." Amended Comment [4] expresses the common-sense notion that lawyers should promptly respond to or acknowledge client communications regardless of how a client communicates with the lawyer. The amended Comment is thus broad enough to cover phone calls, e-mails, text messages, faxes, or any other future forms of communication.

Rule 1.6. Confidentiality of Information

ABA: New ABA Model Rule 1.6(b)(7)

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

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

New York: No Proposed Changes to Black Letter Text of Rule 1.6(b)

Note from COSAC: As explained in the Reporter's Explanation below, COSAC is not proposing any changes to the black letter text of New York Rule 1.6. However, COSAC is proposing new Comments to New York Rules 1.6 and 1.10 to address the issue of permissible disclosures when lawyers and law firms consider lateral moves or mergers.

ABA: New Comments [13]-[14] to Rule 1.6

Detection of Conflicts of Interest

[13] Paragraph (b)(7) [to ABA Model Rule 1.6] recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (*e.g.*, the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

New York: Proposed new Comments [18A]-[18F] to New York Rule 1.6

Lateral Moves, Law Firm Mergers, and Confidentiality

[18A] When lawyers or law firms (including in-house legal departments) contemplate a new association with other lawyers or law firms through lateral hiring or merger, disclosure of limited information may be necessary to resolve conflicts of interest pursuant to Rule 1.10 and to address financial, staffing, operational, and other practical issues. However, Rule 1.6(a) requires lawyers and law firms to protect their clients' confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client's informed consent or some other exception to Rule 1.6.

[18B] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily permitted regarding basic information such as: (i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer's total book of business; (v) the financial terms of each client-lawyer relationship; and (vi) information about aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments). Such information is generally not "confidential information" within the meaning of Rule 1.6.

[18C] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily *not* permitted, however, if information is protected by Rules 1.6(a), 1.9(c), or Rule 1.18(b). This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. For example, many clients would not want their lawyers to disclose their tardiness in paying bills; the amounts they spend on legal fees in particular matters; forecasts about their financial prospects; or information relating to sensitive client matters (*e.g.*, an unannounced corporate takeover, an undisclosed possible divorce, or a criminal investigation into the client's conduct).

[18D] When lawyers are exploring a new association, whether by lateral move or by merger, all lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts and financial concerns, and should consider whether to ask clients for a waiver of confidentiality if consistent with those fiduciary duties – see Rule 1.10(e) (requiring law firms to check for conflicts of interest). Questions of fiduciary duty are legal issues beyond the scope of the Rules.

[18E] For the unique confidentiality and notice provisions that apply to a lawyer or law firm seeking to sell all or part of its practice, see Rule 1.17 and Comment [7] to that Rule.

[18F] Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms – both those providing information and those receiving information – should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b). These steps might include such measures as: (1) disclosing client information in stages, initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral or merger process.

COSAC Reporter's Explanation:

Proposed new Comments [18A]-[18F] to Rule 1.6 require approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve them immediately because they do not depend on any amendments to the black letter text of Rule 1.6.

The ABA added a new exception to the duty of confidentiality, Rule 1.6(b)(7). When the ABA Ethics 20/20 Commission recommended new Rule 1.6(b)(7), it said:

> … [I]ncreased mobility has produced a number of ethics-related issues and … one question in particular commonly arises: Before a lawyer becomes associated with a firm, to what extent can the lawyer disclose to the firm confidential information about current and former clients to permit the lawyer and the firm to identify possible conflicts of interest arising from the lawyer's potential association? ***The Commission concluded that the Model Rules of Professional Conduct are not clear in this regard and that lawyers and firms would benefit from more guidance.*** [Emphasis added.]

COSAC has concluded that New York lawyers also need more guidance regarding restrictions on permissible disclosures when lawyers and law firms consider lateral moves or law firm mergers – but COSAC does not believe that New York requires a new exception to confidentiality, because New York's definition of confidentiality in Rule 1.6(a) is narrower than the ABA's definition of confidentiality. Accordingly, much information that would be confidential under the ABA Model Rules of Professional Conduct absent Rule 1.6(b)(7) would not be confidential under New York Rule 1.6, and COSAC does not believe that a new exception to the duty of confidentiality is necessary or desirable in New York.

Nevertheless, COSAC does recommend that New York adopt new Comments to Rule 1.6 – as well as to Rule 1.10 (which requires law firms to check for conflicts of interest) – to give lawyers

more guidance about the disclosures that the existing New York Rules of Professional Conduct permit when lawyers and law firms contemplate lateral moves or law firm mergers. COSAC has drafted proposed Comments [18A]-[18F] to Rule 1.6 and proposed new Comments [10]-[11] to Rule 1.10 to provide that guidance.

The new Comments proposed by COSAC differ in at least three significant ways from the ABA Comments that explain ABA Model Rule 1.6(b)(7).

First, COSAC's proposed Comments address the manner in which the duty of confidentiality under existing New York Rule 1.6(a) applies to disclosures in the lateral and merger contexts, rather than addressing the scope of an *exception* to confidentiality in those contexts as ABA Comments [13]-[14] do.

Second, New York's proposed Comments suggest good practices for limiting the disclosures surrounding moves and mergers even when those disclosures are permitted under New York Rule 1.6.

Third, New York's proposed Comments offer guidance not only for disclosures of information needed to check for conflicts, but also for disclosures of information needed to enable lawyers and law firms to assess the financial and strategic concerns relevant to going forward with a prospective lateral hire or a law firm merger.

In addition, because New York has adopted unique provisions in Rule 1.10 requiring law firms to check for conflicts of interest, COSAC recommends adding additional new explanatory Comments to New York Rule 1.10 to provide further guidance on the duty of confidentiality in the contexts of lateral moves and law firm mergers and acquisitions. (The ABA did not add any new Comments to Rule 1.10.)

ABA: Amended ABA Model Rule 1.6(c)

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

New York: Proposed Amendment to New York Rule 1.6(c)

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b), or protected by law or court order.

COSAC Reporter's Explanation:

The proposed amendments to the black letter text of Rule 1.6(c) would require Appellate Division approval. The proposed amendments to the Comments to Rule 1.6 are at least partly contingent on Appellate Division approval of the proposed amendment to the black letter text, so COSAC recommends that the House of Delegates approve the amendments to the Comments conditional on Appellate Division approval of amendments to the text of Rule 1.6(c).

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The ABA amended ABA Model Rule 1.6 by adding a new paragraph (c) requiring a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Unlike New York, the ABA did not previously have any version of Rule 1.6(c). However, the ABA version goes beyond New York's current version in three important ways. First, the ABA version expressly requires lawyers to make reasonable efforts to guard against "inadvertent" disclosure. Second, the ABA version requires lawyers to make reasonable efforts to guard against unauthorized "access" to information. Third, by eliminating New York's reference to "employees, associates, and others whose services are utilized by the lawyer," the ABA version imposes the duty on lawyers themselves, as well as on employees, associates, and others. References to "inadvertent" disclosure and unauthorized "access," and language imposing the duty of care on lawyers themselves, all go beyond the concept of "unauthorized disclosure" in New York's current version of Rule 1.6(c). COSAC believes that New York should adopt the ABA language on all points.

Moreover, COSAC recommends that New York expand the ABA language in three ways: (1) by making clear that the duty to protect confidential information also applies to information protected by Rule 1.9(c) (which applies to former clients) and Rule 1.18(b) (which applies to prospective clients); (2) by making clear that the reasonable efforts extend to preventing the inadvertent or unauthorized "use of" such information, which reflects the fact that New York's Rule 1.6 – unlike ABA Model Rule 1.6 – prohibits a lawyer from using confidential information "to the disadvantage of a client or for the advantage of the lawyer or a third person"; and (3) by extending the duty to encompass information protected by law or by court order.

Arguably, the Rules already protect confidential information of former and prospective clients because Rule 1.9(c) refers to Rule 1.6 and Rule 1.18(b) refers to Rule 1.9(c), but making the point explicit by building it into Rule 1.6(c) is an efficient and a helpful reminder.

Although Rule 3.4(c) states the general proposition that a lawyer shall not "disregard" a ruling of a tribunal, no existing New York Rule of Professional Conduct expressly requires that a lawyer take steps to protect information protected by law (such as medical records) or by court order (such as information covered by a protective order). Rule 8.4(b) prohibits a lawyer or law firm from engaging in "illegal" conduct that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer, but if the disclosure of information protected by law is inadvertent or results from unauthorized disclosure or unauthorized access, it usually would not be "illegal," and an isolated instance might not adversely reflect on the lawyer's honesty, trustworthiness, or fitness as a lawyer. Since Rule 1.6(b)(6) refers to disclosures "to comply with other law or court order," referring to "law or court order" in Rule 1.6(c) fits in smoothly. COSAC recognizes that ABA Comment [18] refers to "other law" as follows:

> Whether a lawyer may be required to take ***additional steps*** to safeguard a client's information in order to comply with ***other law***, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. [Emphasis added.]

But the quoted language simply means that compliance with "other law" might require more than complying with Rule 1.6(c) with respect to information protected solely by Rule 1.6. Amended Rule 1.6(c) essentially requires lawyers to determine what those "additional steps" are (if any) and to make reasonable efforts to implement the appropriate steps.

The rationale for the proposed amendments is compelling. When lawyers and law firms stored virtually all of their confidential information and client files on paper, unauthorized access or outright theft of the information was rare, and reasonable efforts to protect confidential information typically involved simple precautions such as not talking in public places and not leaving confidential papers exposed in a county law library. Today, much of a lawyer's or law firm's data is stored electronically (including on smart phones, iPads, laptops, and other portable devices that can easily be lost or misplaced), and the threats to security are more complex. Hackers and criminals actively seek to gain unauthorized access to law firm computers and computer networks; communications with clients, co-counsel, and experts are frequently conducted electronically; and most lawyers are not experts in technology or computers. All of this poses new and evolving risks to the security of confidential information. Consequently, lawyers and law firms must be sufficiently familiar with the technologies they use to take reasonable precautions against the inadvertent or unauthorized disclosure or use of confidential information in electronic form, and against unauthorized access to such information.

The proposed amendments to New York Rule 1.6(c) address these concerns by imposing on lawyers a duty to "make reasonable efforts" (the ABA phrase) to prevent three types of breaches of confidential information: (i) inadvertent disclosure (such as when a lawyer or secretary accidentally sends an e-mail to the wrong person); (ii) unauthorized disclosure (such as when a paralegal reveals information to an opposing party or other outsider without the client's express or implied consent); and (iii) unauthorized access (such as when hackers break into a law firm's computer network). The existing reference to "employees, associates, and others whose services are utilized by the lawyer" has been deleted. It has no equivalent in the ABA Model Rule, and deleting that phrase broadens the scope of Rule 1.6(c) by making clear that lawyers themselves – not just "employees, associates, and others whose services are utilized by the lawyer" – have a duty to make reasonable efforts to protect confidential information.

ABA: Amended Comments [18]-[19] to ABA Rule 1.6 (formerly Comments [16]-[17])

[~~16~~] [18] Paragraph (c) requires a ~~A~~ lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software

excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

~~[17]~~ [19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

New York: Proposed Amendments to Comments [16] and [17] to Rule 1.6

[16] Paragraph (c) imposes three related obligations. It requires a lawyer to ~~exercise reasonable care to prevent disclosure of information related to the representation by employees, associates and others whose services are utilized in connection with the representation~~ make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. ~~However, a lawyer may reveal the information permitted to be disclosed by this Rule through an employee.~~ Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Moreover, paragraph (c) imposes the same duty regarding information protected by law or court order – *cf.* Rule 1.6(b)(6) (permitting disclosure of confidential information if permitted or required by "other law or court order"). Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, or by law or court order, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or software excessively difficult to use). This Rule is not intended to discipline a lawyer who takes reasonable precautions for an

isolated accidental transmission of privileged documents or confidential information (such as might result from a keystroke error or other minor lapse). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer's duties when sharing information with nonlawyers inside or outside the lawyer's own firm, see Rule 5.3, Comment [2].

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. A lawyer may also be required to take specific steps to safeguard a client's information in order to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked "Confidential" or "Confidential – Attorneys' Eyes Only"; the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") may require a lawyer to take specific precautions with respect to a client's or adversary's medical records; and court rules may require a lawyer to block out a client's Social Security number or a minor's name when electronically filing papers with the court. Although the specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules, paragraph (c) requires lawyers to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information protected by law or court order. However, this duty does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality.

COSAC Reporter's Explanation:

The proposed amendments to Comments [16] and [17] to Rule 1.6 would require approval only from the House of Delegates, not from the Appellate Division, but COSAC recommends that the House of Delegates make its approval of the proposed amendments to Comments [16] and [17] contingent on whether the Appellate Division adopts the proposed changes to the black letter text of New York Rule 1.6.

The ABA added Rule 1.6(c) to impose a black letter duty on lawyers to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." At the same time, the ABA also significantly expanded ABA Comment [16] (now Comment [18]) to explain in depth the nature of a lawyer's duty to safeguard confidential information.

COSAC agrees with the substance of amended ABA Comment [18] (equivalent to New York Comment [16]), but has altered it to reflect New York's formulation of Rule 1.6(a), which defines confidential information more narrowly than ABA Rule 1.6. COSAC has also added express references to information protected by Rules 1.9(c) or 1.18(b), or by law or court order.

The ABA added a new sentence to the end of Comment [19] (equivalent to New York Comment

[17]) to remind lawyers that various state and federal laws govern data privacy, and that Comment [19] does not purport to set the standards for complying with these laws. COSAC agrees that the new sentence is a useful reminder, and therefore recommends that the NYSBA House of Delegates adopt all of the ABA language verbatim. However, COSAC has expanded the ABA amendments to make them more explicit and to offer more guidance to lawyers. For example, COSAC has added a new sentence near the end of New York Comment [16] to provide examples of court orders, statutes, and court rules that may impose additional obligations on lawyers regarding certain types of confidential information.

Rule 1.10. Imputation of Conflicts of Interest

ABA: New Comments [13]-[14] to Rule 1.6 (not Rule 1.10)

Note: None of the Comments to ABA Model Rule 1.10 are equivalent to proposed new Comments [10]-[11] to New York Rule 1.10. However, Comments [13]-[14] to ABA Model Rule 1.6, which also related to lateral moves and law firm mergers, are reprinted above in the materials on Rule 1.6. They are closely related to proposed new Comments [10]-[11] to New York Rule 1.10.

New York: Proposed New Comments [10]-[11] to New York Rule 1.10

Lateral Moves and Law Firm Mergers

[10] Rule 1.10(e) requires a law firm to avoid conflicts of interest by checking proposed engagements against current and previous engagements. When lawyers move from one firm to another firm, or when two law firms merge, the lateral lawyers' conflicts and the merging firms' conflicts arising under Rule 1.9(a) and (b) will be imputed to the hiring or newly merged firms under Rule 1.10(a). To fulfill its duty to check for conflicts *before* hiring laterals or before merging firms, the hiring or merging firms should ordinarily obtain such information as: (i) the identity of each client that the lateral lawyers or merging firms currently represent; (ii) the identity of each client that the lateral lawyers or merging firms, within a reasonable period in the past, either formerly represented per Rule 1.9(a), or about whom the lateral lawyers or the lawyers in the merging firms acquired material confidential information per Rule 1.9(b); (iii) the identity of other parties to the matters in which the lateral lawyers or merging firms represented those clients; and (iv) the general nature of each such matter. The hiring or merging firms may also request financial data (such as past billings, pending receivables, timeliness of payment, and probable future billings) to determine whether the employment or merger is economically justified.

[11] Whether lawyers may disclose information in response to such requests depends on the nature of the information. Some of this information is ordinarily not confidential (*e.g.*, the names of clients and adversaries in publicly disclosed matters, the general nature of such matters, and *aggregate* information about legal fees from all clients or from groups of clients), but other information is ordinarily confidential (*e.g.*, non-public criminal or matrimonial representations, or client-specific payment information). The lateral lawyers or merging firms should carefully assess the nature of the information being requested to determine whether it is confidential before disclosing it. Some measures to assist attorneys in abiding by confidentiality requirements in the lateral and merger context are discussed in Comments [18A]-[18F] to Rule 1.6.

COSAC Reporter's Explanation:

Proposed new Comments [10]-[11] to Rule 1.6 require approval only from the House of Delegates, not from the Appellate Division.

As noted in the COSAC Reporter's Explanation following ABA Model Rule 1.6(b)(7) above, the purpose of proposed new Comments to Rules 1.6 and 1.10 is to clarify the situations in which lawyers and law firms considering lateral moves and law firm mergers may or may not disclose certain information.

The ABA did not make any changes to the black letter text or the Comments to ABA Model Rule 1.10, but COSAC recommends that New York do so because New York Rule 1.10(e), which has no direct equivalent in the ABA Model Rules, requires New York law firms to check all proposed new engagements against current and previous engagements. Lateral hires and law firm mergers bring new current and former clients to law firms, and therefore require conflict checks. Proposed new Comments [10] and [11] to New York Rule 1.10 provide guidelines for abiding by the duty of confidentiality when making the disclosures necessary to check for conflicts in the lateral and merger contexts.

Rule 1.18. Duties to Prospective Clients

ABA: Amended ABA Model Rule 1.18 (Duties to Prospective Client)

(a) A person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

New York: Proposed Amendments to New York Rule 1.18

(a) ~~A~~ Except as provided in Rule 1.18(e), a person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a ~~"~~prospective client~~"~~.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

(e) A person ~~who~~ is not a prospective client within the meaning of paragraph (a) if the person:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter~~; is not a prospective client within the meaning of paragraph (a)~~.

COSAC Reporter's Explanation:

The proposed amendments to the black letter text of Rule 1.18 would require approval from the Appellate Division.

The ABA amended Rule 1.18 in three ways: (i) replacing the word "discusses" in Rule 1.18(a) with the broader term "consults"; (ii) replacing the phrase "had discussions with" in Rule 1.18(b) with the broader term "learned information from"; and (iii) deleting the relatively narrow phrase "learned in the consultation" in Rule 1.18(b) because it would be redundant with the new phrase "learned information from" earlier in paragraph (b).

COSAC agrees that the words "discusses" and "discussions" are too narrow, and may be misleading because they imply face-to-face or live telephone conversations, whereas in reality a prospective client often "consults" with a lawyer by voice mail, e-mail, or other means. Similarly, COSAC agrees that the structural revisions to Rule 1.18(b) (including the use of the

proposed phrase "learned information from" and the deletion of the old phrase "learned in the consultation") help to make Rule 1.18(e) easier to read.

COSAC therefore recommends that the House of Delegates ask the Appellate Division to amend the black letter text of Rule 1.18(a)-(b) to match amended ABA Model Rule 1.18 verbatim.

COSAC also recommends adding an express reference in New York Rule 1.18(a) to the exceptions articulated in New York Rule 1.18(e), which has no equivalent in the black letter text of ABA Model Rule 1.18. As a companion amendment, COSAC recommends amending New York Rule 1.18(e) solely to improve the grammatical structure, without making any substantive change.

ABA: Amended Comment [1] to ABA Model Rule 1.18

[1] *[Identical to proposed New York version.]*

New York: Proposed Amendment to Comment [1] to New York Rule 1.18

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~ consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

COSAC Reporter's Explanation:

The proposed amendment to Comment [1] to Rule 1.18 requires approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve the proposed amendment to Comment [1] immediately, because it does not depend on whether the Appellate Division adopts the proposed changes to the black letter text of Rule 1.18.

As explained above regarding the proposed amendment to the black letter text of Rule 1.18, the word "discussions" is too narrow because it typically connotes discussions in person or by telephone. The ABA substituted the word "consultations," which is more accurate. COSAC agrees with the ABA's assessment and proposes the same amendment. Because COSAC believes that many people already read Rule 1.18 to apply to all forms of "consultations," and because the word "consultations" is consistent with existing New York Rule 1.18(a), COSAC recommends that the House of Delegates adopt the ABA's change verbatim, whether or not the Appellate Division amends the text of Rule 1.18(a).

ABA: Amended Comment [2] to ABA Model Rule 1.18

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule.~~ A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a

consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. ~~A person who communicates~~ Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." ~~within the meaning of paragraph (a).~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

New York: Proposed Amendments to Comment [2] to New York Rule 1.18

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule.~~ A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. ~~As provided in paragraph (e), a person who~~ Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." ~~within the meaning of paragraph (a). Similarly,~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client" – see Rule 1.18(e). ~~from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule. A lawyer may not encourage or induce a person to communicate with a lawyer or lawyers for that improper purpose. *See* Rules 3.1(b)(2), 4.4, 8.4(a).~~

COSAC Reporter's Explanation:

The proposed amendments to Comment [2] to Rule 1.18 require approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve the proposed Comments [16] and [17] immediately, because it does not depend on whether the Appellate Division adopts the proposed changes to the black letter text of Rule 1.18.

The ABA amended Comment [2] to Rule 1.18 to give more guidance to lawyers about when and how a person does (or does not) become a prospective client. COSAC believes that the added

language in Comment [2] is consistent with the black letter language of Rule 1.18. The amended Comment also makes clear that a "consultation" can occur – and a prospective client relationship can therefore arise – when a person communicates with a lawyer in any form, whether "written, oral, or electronic."

ABA: Amended Comment [4] to ABA Model Rule 1.18

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial ~~interview~~ consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

New York: Proposed Amendments to Comment [4] to New York Rule 1.18

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial ~~interview~~ consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7 or Rule 1.9, then consent from all affected ~~current~~ present or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected ~~current~~ present and former clients and the prospective client.

COSAC Reporter's Explanation:

The proposed amendments to Comment [4] to Rule 1.18 require approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve the proposed amendments to Comment [4] immediately, because it does not depend on whether the Appellate Division adopts the proposed changes to the black letter text of Rule 1.18.

The ABA's only amendment to Comment [4] was to replace the narrow word "interview" (which might imply in-person or live telephone communication) with the broader word "consultation" (which could be either in person or in writing). This change matches the changes to the black letter of ABA Model Rule 1.18 (which changed "discusses" to "consults") and ABA Comment [1] (which changed "discussions" to "consultations"). COSAC agrees with the ABA's amendment to Comment [4]. The black letter text of Rule 1.18 does not use the word "interview," and neither should the Comment to Rule 1.18.

COSAC has also made a few small non-substantive changes to New York's version of Comment [4] so that it will be identical to the ABA version (except that New York's version will include the final sentence, beginning "The representation must be declined …," which is already in the

New York Comment but not in the ABA Comment). COSAC recommends that the House of Delegates approve the proposal.

ABA: Amended Comment [5] to ABA Model Rule 1.18

[5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

New York: Proposed Amendment to Comment [5] to New York Rule 1.18

[5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(j) for the definition of "informed consent," and with regard to the effectiveness of an advance waiver see Rule 1.7, Comments [22]-[22A] and Rule 1.9, Comment [9]. If permitted by law and if the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

COSAC Reporter's Explanation:

The proposed amendment to Comment [5] to Rule 1.18 requires approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve the proposed amendment to Comment [5] immediately, because it does not depend on whether the Appellate Division adopts the proposed changes to the black letter text of Rule 1.18.

The ABA's only change to Comment [5] to ABA Model Rule 1.18 was to replace the narrow word "conversations" with the broader phrase "a consultation." The reason for this change was explained above. COSAC agrees with the change and recommends its approval.

Rule 4.4. Respect for Rights of Third Persons

ABA: Amended ABA Model Rule 4.4(b)

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

New York: Proposed Amendments to New York Rule 4.4(b)

(b) A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that ~~the document~~ it was inadvertently sent shall promptly notify the sender.

COSAC Reporter's Explanation:

The proposed amendments to the black letter text of Rule 4.4(b) would require approval from the Appellate Division.

The ABA amended ABA Model Rule 4.4(b) by adding the phrase "or electronically stored information" after both instances of the word "document" in Rule 4.4(b). COSAC generally agrees with the ABA change, but COSAC has added "or other writing" as a catch-all and has simplified the grammar of the Rule.

ABA: Amended Comments [2] and [3] to ABA Model Rule 4.4(b)

[2] Paragraph (b) recognizes that lawyers sometimes receive a document~~s~~, electronically stored information, or other "writing" as defined in Rule 1.0(x), that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information or other writing is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information ~~original document~~, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been ~~wrongly~~ inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is ~~email or other electronic modes of transmission~~ subject to being read or put into readable form.

Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it ~~the document~~ that it was inadvertently sent ~~to the wrong address~~. 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.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document~~s~~ or electronically stored information that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information or other writing is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the ~~original~~ document or deleting electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been ~~wrongly~~ inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email ~~or other electronic modes of transmission~~ and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving ~~the document~~ it that it was inadvertently sent ~~to the wrong address~~. 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

New York: Proposed Amendments to Comments [2] and [3] to New York Rule 4.4(b)

[2] Paragraph (b) recognizes that lawyers and law firms sometimes receive a document~~s~~, electronically stored information, or other "writing" as defined in Rule 1.0(x), that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is "inadvertently sent" within the meaning of paragraph (b) when it is

accidentally transmitted, such as when an e-mail or letter is misaddressed or a document or other writing is accidentally included with information that was intentionally transmitted. One way to resolve this situation is for lawyers and law firms to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, ~~I~~if a lawyer or law firm knows or reasonably should know that such a document or other writing was sent inadvertently, then this Rule requires ~~the~~ only that the receiving lawyer ~~to~~ promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer or law firm is required to take additional steps, such as returning the writing, ~~original document,~~ is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or other writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or ~~electronically stored information~~ other writing that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, "document, electronically stored information, or other writing" includes not only paper documents, but also e-mail and other forms of electronically stored information – including embedded data (commonly referred to as "metadata") – that is subject to being read or put into readable form – *see* Rule 1.0(x).

[3] Refraining from reading or continuing to read a document or other writing once a lawyer realizes that it was inadvertently sent to the wrong address, and returning the document to the sender or permanently deleting electronically stored information, honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document or other writing, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document or other writing, or to return the document or other writing to the sender or permanently delete electronically stored information, or both. Accordingly, in deciding whether to retain or use an inadvertently received document or other writing, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, the decision~~s~~ to refrain from reading such a document~~s~~ or other writing or instead to return or delete it ~~them~~, or both, are matters of professional judgment reserved to the lawyer. *See* Rules 1.2, 1.4.

COSAC Reporter's Explanation:

The proposed amendments to Comments [2] and [3] to Rule 4.4 would require approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve the proposed amendments to Comments [2] and [3] immediately, because they do not depend on whether the Appellate Division adopts the proposed changes to the black letter text of Rule 4.4.

The ABA amended Comments [2] and [3] to ABA Model Rule 4.4 in a number of ways.

First, the ABA added the phrase "or electronically stored information" in several places to recognize that much information today is sent not by regular mail or written memo but by e-mail

and other electronic methods. COSAC agrees that this is a useful change. Even though the word "document" typically includes electronically stored information, adding the phrase is a helpful reminder and avoids ambiguity. But COSAC has also added the phrase "or other writing," and citations to New York Rule 1.0(x), because Rule 1.0(x) broadly defines "writing, as follows:

> (x) "Writing" or "written" denotes a tangible ***or electronic*** record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording ***and email***. … [Emphasis added.]

Near the beginning of this report, COSAC is proposing an amendment to this definition to broaden the kinds of electronic communications that are expressly referred to. Whether or not the House of Delegates approves the proposed amendment to "writing," it makes sense to use an existing defined term ("writing") rather than to rely on an undefined new term ("electronically stored information") – but COSAC recommends using both terms because many lawyers will consult only the Comment, not the definition of "writing."

Second, the ABA added a new second sentence to Comment [2] that defines the phrase "inadvertently sent." COSAC agrees that this is helpful. However, COSAC proposes adding new language after this definition saying: "One way to resolve this situation is for lawyers to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however …" (picking up with "if a lawyer knows"). Agreements should be encouraged because they reduce surprise and misunderstanding.

Third, the ABA added a helpful definition of the phrase "inadvertently sent" in Comment [2], which COSAC recommends adding to Comment [2] to New York Rule 4.4(b) (with some stylistic changes).

Fourth, the ABA added a new sentence stating that metadata in electronic documents "creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer." COSAC recommends that New York not adopt that ABA's new sentence on metadata, which COSAC concluded was unnecessary and potentially confusing. In COSAC's view, metadata can be seen as simply an additional component of a computer-generated writing, so metadata is already governed by the same standards as other inadvertently sent writings. Accordingly, COSAC believes that deleting the ABA's new sentence on metadata does not substantively change the meaning of this Comment.

Finally, the ABA amended its version of Comment [3] to Rule 4.4. COSAC has suggested parallel changes to New York's somewhat different language of that Comment.

Rule 5.3. Lawyer's Responsibility for Conduct of Nonlawyers

ABA: Amended Comment [1] to ABA Model Rule 5.3

~~[2]~~ [1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts ~~to establish internal policies and procedures designed to provide~~ to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters ~~will~~ act in a way compatible with the professional obligations of the lawyer. ~~with the Rules of Professional Conduct.~~ See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1~~.~~ (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over ~~the work of a nonlawyer.~~ such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of ~~a nonlawyer~~ such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

New York: Proposed Amendments to Comment [2] to New York Rule 5.3

[2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm, including nonlawyers outside the firm working on firm matters, is compatible with the professional obligations of the lawyers and the firm. Lawyers typically employ nonlawyer assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such nonlawyer assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. Likewise, lawyers may employ nonlawyers outside the firm to assist in rendering those services. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm). A law firm must ensure that such nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information ~~relating to representation of the client,~~ -- *see* Rule 1.6(c) (requiring lawyers to take reasonable care to avoid unauthorized disclosure of confidential information). Lawyers also should be responsible for the work done by their nonlawyer assistants ~~work product~~. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. A law firm should make reasonable efforts to ensure that the firm has in effect measures giving ~~establish internal policies and procedures designed to provide~~ reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with ~~these Rules~~ the professional obligations of the lawyer. A lawyer with ~~direct~~ supervisory authority over a nonlawyer within or outside the firm has a parallel duty to provide appropriate supervision of the supervised nonlawyer.

COSAC Reporter's Explanation:

The proposed amendments to Comment [2] to Rule 5.3 would require approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve the proposed amendments to Comment [2] immediately.

The ABA amended Comment [1] (formerly Comment [2]) to ABA Model Rule 5.3 to clarify a law firm's obligations, to add a reference to "nonlawyers outside the firm who work on firm matters" (which covers outsourcing), and to add a cross-reference to Rule 1.1, Comment [6]. New York's Comment [2] is generally equivalent but differs in style. COSAC recommends retaining New York's unique language but also incorporating the ABA's changes.

COSAC also recommends using the phrase "[lawyers] should be responsible for the work that their nonlawyer assistants produce" rather than the phrase "[lawyers] should be responsible for their work product," because the phrase "work product" is a term of art but is used here to mean all work produced by nonlawyer assistants, not just work that meets the technical definition of "work product."

ABA: New Comments [3]-[4] to ABA Model Rule 5.3

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

New York: Proposed New Comments [2A] and [3] to New York Rule 5.3

~~[3]~~ [2A] Paragraph (b) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules if engaged in by a lawyer. For guidance by analogy, see Rule 5.1, Comments [5]-[8].

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include (i) retaining or contracting with an investigative or

paraprofessional service, (ii) hiring a document management company to create and maintain a database for complex litigation, (iii) sending client documents to a third party for printing or scanning, and (iv) using an Internet-based service to store client information. When using such services outside the firm, a lawyer or law firm must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer and law firm. The extent of the reasonable efforts under this Rule will depend upon the circumstances, including: (a) the education, experience and reputation of the nonlawyer; (b) the nature of the services involved; (c) the terms of any arrangements concerning the protection of client information; (d) the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality; and (e) whether the client will be supervising all or part of the nonlawyer's work. *See also* Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4 (professional independence of the lawyer), and 5.5 (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

COSAC Reporter's Explanation:

The proposed amendments to Comments [2A] and [3] to Rule 5.3 would require approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve the proposed amendments to Comments [2] and [3] immediately.

The ABA added new Comments [3] and [4] to Rule 5.3 to address the rapid growth of outsourcing to nonlawyers outside a law firm for a wide variety of services and technologies. COSAC believes that ABA Comment [3] offers helpful guidance to New York lawyers, and recommends adding it to the New York Rules of Professional Conduct, with certain additions and clarifications.

In particular, the proposed New York version of Comment [3] differs from the ABA version in the following ways: (1) the New York version changes the ABA word "lawyer" to the phrase "lawyer *or law firm*," reflecting the fact that New York (unlike the ABA) subjects law firms to the Rules of Professional Conduct – see Rule 8.4 ("A lawyer *or law firm* shall not" engage in the enumerated conduct); (2) the New York version adds Romanette numbers and small parenthetical numbers to separate the various factors listed in Comment [3]; (3) the New York version substitutes the phrase "the reasonable efforts" for the ABA phrase "this obligation" near the beginning of the fourth sentence; and (4) as explained in more detail below, at the end of the fourth sentence the New York version adds a fifth factor not present in the ABA version ("(e) whether the client will be supervising all or part of the nonlawyer's work"). The last two sentences of the New York version are essentially identical to the ABA version.

However, COSAC does not recommend adding any form of ABA Comment [4], which concerns a lawyer's responsibilities where the client directs the lawyer to select a particular nonlawyer service provider. COSAC rejects Comment [4] because it inappropriately suggests that an express agreement is necessary in most situations ("ordinarily"). Nevertheless, in some situations a lawyer may consider it appropriate to reach an express agreement regarding allocation of

supervisory authority over a nonlawyer that a client has asked the lawyer to use (*e.g.*, to conduct a document review).

Nevertheless, client direction to use a specific outside service provider may be relevant to the scope of a lawyer's supervisory responsibility over that provider. COSAC therefore recommends adding an additional factor to new New York Comment [3] bearing on the extent of a lawyer's "reasonable efforts" under Rule 5.3 – namely, "(e) whether the client will be supervising all or part of the nonlawyer's work."

Finally, COSAC recommends re-numbering existing New York Comment [3] as Comment [2A] so that New York's version of Comment [3] corresponds to the ABA version of Comment [3]. The ABA has no equivalent to New York's existing Comment [3], so renumbering it as Comment [2A] will not disrupt New York's uniformity with the ABA numbering scheme, and the number "[2A]" will signal that the ABA has no equivalent to New York Comment [2A].

Rule 5.5 Unauthorized Practice of Law

ABA: Amended ABA Model Rule 5.5

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

ABA: Amended Comments [1], [4], [18], and [21] to ABA Model Rule 5.5

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdictionin which the lawyer is not licensed when authorized to do so by federal or other law, whichincludes statute, court rule, executive regulation or judicial precedent. *See, e.g.*, The ABA Model Rule on Practice Pending Admission.

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.

New York: No Proposals to Amend New York Rule 5.5 or Its Comments

Note from COSAC: As noted in the Reporter's Explanation below, COSAC is not proposing any changes to the black letter text of New York Rule 5.5 or to the New York Comment to Rule 5.5.

COSAC Reporter's Explanation:

COSAC is not recommending any amendments to New York Rule 5.5 or its Comment, so no action or approval is required by the House of Delegates or by the Appellate Division regarding Rule 5.5.

The ABA amended Rule 5.5(d), but COSAC is not recommending the amendments to ABA Model Rule 5.5(d). The ABA amendments would overlap New York's in-house registration rule (22 NYCRR Part 522), which took effect in 2011, and would duplicate proposals jointly submitted to the New York Court of Appeals in 2012 by the New York State Bar Association, the New York City Bar Association, and the New York County Lawyers' Association proposing a new set of Court of Appeals Rules that would permit temporary practice under certain conditions. Specifically, proposed § 523.4 of the joint proposals provides as follows:

> *§ 523.4 Other authorized practice.*
>
> A lawyer admitted and authorized to practice law in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this state that:
>
> (a) are provided by in-house counsel in accordance with Part 522 of these Rules; or
>
> (b) are services that the lawyer is authorized to provide in this state by federal law or other law of this state.

The ABA also amended Comments [1], [4], [18], and [21] to ABA Model Rule 5.5 by adding a new final sentence saying: "For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction." COSAC does not recommend adopting the ABA's new sentence. The concept is already sufficiently addressed by New York Rule 5.5 in its present form because the black letter text of New York Rule 5.5(b) – unlike the ABA version of Rule 5.5(b) – already provides that a lawyer "shall not aid a nonlawyer in the unauthorized practice of law," and New York Comment [1] to Rule 5.5 already paraphrases Rule 5.5(b).

The amendments to Comments [4], [18], and [21] to ABA Model Rule 5.5 refer to language or court rules that New York has not adopted, so they are irrelevant to the New York Rules of Professional Conduct, and COSAC does not recommend their adoption.

Rule 7.2. Payment for Referrals

ABA: Amended Comment [5] to ABA Model Rule 7.2

[5] Except as permitted under paragraphs (b)(1)-(b)(4), ~~L~~lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 ~~for the~~ (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another). ~~who prepare marketing materials for them.~~

New York: Proposed Amendments to Comment [1] to New York Rule 7.2

[1] Except as permitted under paragraphs (a)(1)-(a)(2) of this Rule or under Rule 1.17, ~~L~~lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer. *See* Rule 8.4(a) (lawyer may not violate or attempt to violate a Rule, knowingly assist another to do so, or do so through the acts of another). A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (a), however, does not prohibit a lawyer from paying for advertising and communications permitted by these Rules, including the costs of print directory listings, directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads~~ Internet-based advertisements, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as (i) the lead generator does not recommend the lawyer, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (Advertising) and 7.3 (Solicitation and Recommendation of

Professional Employment). To comply with Rule 7.1, a lawyer may not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 ~~for the~~ (Lawyer's Responsibility for Conduct of Nonlawyers) ~~who prepare marketing materials for them~~).

COSAC Reporter's Explanation:

The proposed amendments to Comment [1] to Rule 7.2 would require approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve the proposed amendments to Comment [1] immediately.

The ABA amended Comment [5] to ABA Model Rule 7.2 in several ways. These ways are summarized below, followed by COSAC's recommendations for New York.

First, the ABA clarified the scope of the prohibition on solicitation by making clear that (i) it is subject to certain exceptions, and (ii) it applies to paying others not only for "channeling" legal work but also for "recommending the lawyer's services." COSAC generally agrees with this change, but has expanded the exceptions to include Rule 1.17, which permits a lawyer to purchase an entire law practice. Also, because the "others" are usually nonlawyers, COSAC has added that the prohibition is on paying nonlawyers to recommend or refer clients "in a manner that would violate Rule 7.3 if engaged in by a lawyer." COSAC amplified this clause with a reference to Rule 8.4(a), which prohibits a lawyer from doing through others what the lawyer could not do personally. (COSAC also eliminated the reference to Rule 8.4(a) at the end of the ABA version.) COSAC considered adding language to define the term "channeling" or to distinguish it from "recommending," but decided that the term "channeling" is sufficiently understood by lawyers that it does not require definition.

Second, the ABA defined the term "recommendation." COSAC agrees with this definition and recommends that New York adopt it verbatim.

Third, the ABA replaced the phrase "banner ads" with the broader term "Internet-based advertisements." COSAC agrees with this change.

Fourth, the ABA added several sentences regarding restrictions on paying others (especially nonlawyers) to generate "leads" on prospective new clients. COSAC agrees with the ABA's changes but has added a cross-reference to Rule 1.8(f), which prohibits a lawyer from allowing a person who recommends the lawyer's services to interfere with the lawyer's independent professional judgment. COSAC also substituted "may" for "must" because this is only a Comment, and therefore is interpretive but not binding.

ABA: Amended Comment [7] to ABA Model Rule 7.2 (equivalent to N.Y. Comment [3])

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with ~~prospective clients~~ the public, but such

communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public ~~prospective clients~~ to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

New York: Proposed Amendments to Comment [3] to New York Rule 7.2

[3] A lawyer who accepts assignments or referrals from a qualified legal assistance organization must act reasonably to ensure that the activities of the plan or service are compatible with the lawyer's professional obligations. *See* Rule 5.3. The lawyer must ensure that the organization's communications with ~~prospective~~ potential clients are in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a qualified legal assistance organization would mislead ~~prospective~~ potential clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic or real-time interactive electronic contacts that would violate Rule 7.3.

COSAC Reporter's Explanation:

The proposed amendments to Comment [3] to Rule 7.2 would require approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve the proposed amendments to Comment [3] immediately.

The ABA amended its Comment [7] to ABA Model Rule 7.2 (equivalent to New York's Comment [3]) to substitute the phrase "the public" for the phrase "prospective clients." COSAC agrees that the phrase "prospective client" should be replaced because that phrase is defined in Rule 1.18(a), but its meaning in the Comment to Rule 7.2 is different. However, COSAC recommends using the phrase "potential clients" instead of "the public," which is vague and ambiguous.

Rule 7.3 Solicitation and Recommendation of Professional Employment

ABA: Amended ABA Model Rule 7.3

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact, solicit professional employment ~~from a prospective client~~ when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the ~~prospective client~~ target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone ~~a prospective client~~ known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

New York: Proposed Amendment to New York Rule 7.3(b)

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request. ~~of a prospective client.~~

COSAC Reporter's Explanation:

The proposed amendment to the black letter text of Rule 7.3(b) would require approval from the Appellate Division.

The ABA amended the black letter text of ABA Model Rule 7.3 by eliminating or replacing the phrase "prospective client" wherever it appears. The phrase "prospective client" is defined in

Rule 1.18(a) to mean something other than what it means in Rule 7.3, so deleting or replacing "prospective clients" in this separate context avoids confusion.

In New York's Rules of Professional Conduct, however, the phrase "prospective client" appears only in Rule 7.3(b), not in Rules 7.3(a) and (c). COSAC considered replacing the word "prospective" in New York Rule 7.3(c), with the word "potential" (the word substituted in the Comment to Rule 7.2), but the phrase "prospective client" in Rule 7.3 seems entirely unnecessary. Sending information in response to a specific request from *anyone*, whether a potential client or a prospective client or someone else, is not solicitation. COSAC therefore recommends deleting the last four words – "of a prospective client" – from Rule 7.3(b).

ABA: Amended Comments [2]-[9] to Rule 7.3

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

~~[1]~~ [2] There is a potential for abuse when a solicitation involves ~~inherent in~~ direct in-person, live telephone or real-time electronic contact by a lawyer with someone ~~a prospective client~~ known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject ~~the layperson~~ a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person ~~prospective client~~, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

~~[2]~~ [3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation ~~of prospective clients~~ justifies its prohibition, particularly since lawyers have ~~advertising and written and recorded communication permitted under Rule 7.2~~ ~~offer~~ alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded~~ In particular, communications~~, which may be~~ can be mailed ~~or autodialed~~ or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for ~~a prospective client~~ the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting ~~the prospective client~~ the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm ~~the client's~~ a person's judgment.

~~[3]~~ [4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to ~~prospective client~~ the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with

others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct-in-person, live telephone or real-time electronic ~~conversations between a lawyer and a prospective client~~ contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

~~[4]~~ [5] There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client, or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~its~~ their members or beneficiaries.

~~[5]~~ [6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with ~~a prospective client~~ someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication ~~prospective client~~ may violate the provisions of Rule 7.3(b).

~~[6]~~ [7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves ~~a prospective client~~. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

New York: Proposed Amendments to Comment [9] to N.Y. Rule 7.3

[9] Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure an individual to hire the lawyer without adequate consideration. These same risks are present in telephone contact or in real-time or interactive computer-accessed communication.

These same risks are also present in all other real-time or interactive electronic communications, whether by computer, phone, or related electronic means – *see* Rule 1.0(c) (defining "computer-accessed communication") – and are regulated in the same manner. The prohibitions on in-person or telephone contact and the prohibitions on contact by real-time or interactive computer-accessed communications do not apply if the recipient is a close friend, relative, former or current client. Communications with these individuals do not pose the same dangers as solicitations to others. However, when the special 30-day (or 15-day) rule applies, it does so even where the recipient is a close friend, relative, or former client. Ordinarily, e-mail communications and web sites are not considered to be real-time or interactive communications. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communications. However, instant messaging ("IM"), chat rooms, and other similar types of "conversational" computer-accessed communications – whether sent or received via a desktop computer, a portable computer, a cell phone, or any similar electronic or wireless device, and whether sent directly or via social media – are considered to be real-time or interactive communications.

COSAC Reporter's Explanation:

The proposed amendments to Comment [9] to Rule 7.3 would require approval only from the House of Delegates, not from the Appellate Division. COSAC recommends that the House of Delegates approve the proposed amendment to Comment [9] immediately, because they do not depend on whether the Appellate Division adopts COSAC's proposed changes to the black letter text of Rule 7.3.

As noted above, the ABA amended its Comments to Rule 7.3 by replacing the term "prospective client" with broader terms (such as "the public"), and by updating and broadening terms describing technology to include all forms of electronic communications.

COSAC has deleted the phrase "prospective client" from Rule 7.3(b) as unnecessary (see above).

However, COSAC recommends that New York should not substitute the ABA phrase "electronic communications" for the existing New York phrase "computer-accessed communications," because COSAC believes that the phrase "computer-accessed communication," which is defined in New York Rule 1.0(c) (but not in the ABA Model Rules), already covers communications via a "related electronic device."

Rule 8.5. Disciplinary Authority and Choice of Law

ABA: Amended Comment [5] to Rule 8.5

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

New York: No equivalent proposal

COSAC Reporter's Explanation:

Because COSAC is not recommending any amendments to Rule 8.5 or its Comment, no action or approval is required by the House of Delegates or by the Appellate Division regarding Rule 8.5.

COSAC does not recommend that New York adopt the ABA's one-sentence addition to the Comment to Rule 8.5 at this time because the ABA addition depends on language in ABA Model Rule 8.5 that is not present in the black letter text of New York Rule 8.5.

Conclusion

COSAC has carefully and intensively reviewed and debated the Ethics 20/20 amendments to the ABA Model Rules of Professional Conduct and to the ABA Comments. COSAC recommends that New York should adopt many of these amendments, sometimes with revisions that improve the ABA language or make it more consistent with New York law and practice. COSAC urges the House of Delegates to adopt all of the proposed new and amended New York Comments recommended by this report, and asks the House of Delegates to forward to the Appellate Division the proposed changes to the black letter text of the New York Rules of Professional Conduct.

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Respectfully submitted,

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