



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #8

REQUESTED ACTION: Approval of the report and recommendations of the Committee on Standards of Attorney Conduct.

The Committee on Standards of Attorney Conduct (COSAC) is in the process of a comprehensive review of the Rules of Professional Conduct. In 2018, COSAC published for comment draft amendments to the rules relating to (a) conflicts of interest and (b) tribunals. COSAC received comments from several individuals and entities (attached to the committee's report) and revised its draft to take into account the comments received. It made further revisions to its proposals after it made an informal presentation at the November 2018 House meeting. These changes are summarized at the beginning of the report.

The proposed amendments may be summarized as follows:

### CONFLICTS

- **Rule 1.0.** Eliminate the definition of “differing interests” currently found in Rule 1.0(f), because COSAC proposes to eliminate the phrase “differing interests” from Rule 1.7 and from other Rules and Comments where it appears.
- **Rule 1.7.** Eliminate the term “differing interests” in Rule 1.7 (New York’s basic current-client conflict Rule), and adopt instead the formulation of the ABA Model Rules barring representations “directly adverse” to a current client and representations where the representation of a client would be “materially limited” by the lawyer’s responsibilities to another client or the lawyer’s personal interests.
- **Rule 1.8.** Change the wording of Rules 1.8(a), (b) and (c), which deal with certain specific conflict of interest rules, and move Rule 1.10(h) to Rule 1.8.
- **Rule 1.10.** In Rule 1.10, which governs imputation of conflicts among lawyers in a law firm: (i) remove imputation for most personal conflicts; (ii) permit screening to avoid imputation of lateral-hire conflicts; and (iii) address conflicts that would

arise solely from information that resides in databases or files of a law firm where all lawyers who worked on the matter in question have left the firm. (NOTE: this proposal has been amended to add a new paragraph (c)(3) and a new comment to place a limitation on screening.)

- **Rules 1.11 and 1.12.** Eliminate the “appearance of impropriety” standard that limits the use of screening to address conflicts of former government lawyers and former judges and arbitrators in Rules 1.11 and 1.12. That vague standard has otherwise been eliminated from the New York Rules of Professional Conduct.
- **Rule 1.11.** Clarify in Rule 1.11 that the conflicts of lawyers entering or serving in government law offices are not imputed to other lawyers in the office, and thus can generally be cured by recusal of the disqualified lawyer. (NOTE: this proposal has been amended to address the possibility that a conflict with a current private client might arise from the private practice of a part-time government lawyer.)
- **Rule 1.11.** Clarify in Rules 1.11 and 1.12 that law clerks to judges may negotiate for employment with lawyers or parties appearing before the judge or other adjudicative officer after notifying the judge or adjudicative officer.
- **Rule 6.5.** Revise Rule 6.5, which addresses participation in short-term pro bono representations (such as legal services clinics), in a number of ways to clarify the operation of the Rule.

## TRIBUNALS

- **Rule 1.16(c)(5).** Amend the test for when a lawyer may withdraw because a client has failed to pay fees. The existing test permits withdrawal only when a client “deliberately disregards” an agreement or obligation to the lawyer as to expenses or fees. The amended test would instead permit a lawyer to withdraw if “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.”
- **Rule 3.3(c).** Insert a proviso that a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct before a tribunal ends at the conclusion of the proceeding.
- **Rule 3.4(a).** Insert a new provision prohibiting a lawyer from knowingly participating in or counseling the “the unlawful destruction or unlawful deletion of any document having potential evidentiary value.”

- **Rule 3.4(e).** Amend the existing prohibition on presenting or threatening “criminal charges solely to obtain an advantage in a civil case” so that it prohibits presenting “criminal or disciplinary charges to obtain an advantage in a civil matter, *if those charges are not advanced in good faith or are unrelated to the civil matter.*”
- **Rule 3.6(c).** Amend the introduction to the list of permitted forms of trial publicity in Rule 3.6(c) so that it reads “*Notwithstanding* paragraph (a)” rather than “Provided that the statement complies with paragraph (a).” The amendment will make Rule 3.6(c) a true safe harbor.

Comments on the proposals are attached.

The report will be presented at the January 18 meeting by Profs. Roy D. Simon and Barbara S. Gillers, co-chairs of COSAC, and past COSAC chair Joseph E. Neuhaus.



# **MEMORANDUM**

January 4, 2019

**To:** NYSBA Executive Committee

**Cc:** Kathy Baxter, NYSBA General Counsel

**From:** NYSBA Committee on Standards of Attorney Conduct (“COSAC”)  
Roy D. Simon, Co-Chair of COSAC  
Barbara S. Gillers, Co-Chair of COSAC  
Joseph E. Neuhaus, COSAC Review Committee Chair

**Subject:** COSAC Proposals Regarding Conflict of Interest Provisions  
Revised Final Report Responding to Public Comments

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The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is engaged in a comprehensive review of the New York Rules of Professional Conduct (the “Rules”). On May 3, 2018, COSAC circulated, for public comment, proposals to amend the New York Rules governing conflicts of interest (the “Public Comment Conflicts Report”). After analyzing the public comments, COSAC presented a Final Report to the House of Delegates at its November 2018 meeting for informational purposes.

During the discussion in the House of Delegates, a concern was expressed about the proposed amendment to Rule 1.10(c), which would permit screening, with notice, to cure certain conflicts arising from lateral movement of a lawyer to a new firm. In light of that concern, COSAC now proposes an alternative amendment to Rule 1.10(c) – adding a new subparagraph (c)(3) – that would not permit screening alone to cure conflicts where the lawyer with “primary responsibility” for a litigation matter “switched sides” If the House approves subparagraph (c)(3), then COSAC recommends adding a new Comment [5F] to Rule 1.10 to explain the limitation on screening. (See pp. 20-21, 25 & 28 below.)

In addition, COSAC has slightly revised the proposed screening procedures for current government lawyers in proposed Rule 1.11(e), and has revised proposed Comment [9C] to the Rule, to take account of the possibility that a conflict with a current private client might arise from the private practice of a part-time government lawyer. (See pp. 32-33, 35 & 37 below.)

COSAC is now forwarding this report to the Executive Committee of the Association for consideration by the House of Delegates at its January meeting. Below are COSAC’s revised proposals. We summarize the issues that led COSAC to propose each particular amendment, and set out the proposed amendments in legislative style, striking out deleted language (in red) and underscoring added language (in blue).

### Summary of Proposals

COSAC proposes changes to the Rules and Comments dealing with conflicts of interest. COSAC is proposing to amend the black letter text of the Rules in the following principal ways:

- **Rule 1.0.** Eliminate the definition of “differing interests” currently found in Rule 1.0(f), because COSAC proposes to eliminate the phrase “differing interests” from Rule 1.7 and from other Rules and Comments where it appears.
- **Rule 1.7.** Eliminate the term “differing interests” in Rule 1.7 (New York’s basic current-client conflict Rule), and adopt instead the formulation of the ABA Model Rules barring representations “directly adverse” to a current client and representations where the representation of a client would be “materially limited” by the lawyer’s responsibilities to another client or the lawyer’s personal interests.
- **Rule 1.8.** Change the wording of Rules 1.8(a), (b) and (c), which deal with certain specific conflict of interest rules, and move Rule 1.10(h) to Rule 1.8.
- **Rule 1.10.** In Rule 1.10, which governs imputation of conflicts among lawyers in a law firm: (i) remove imputation for most personal conflicts; (ii) permit screening to avoid imputation of lateral-hire conflicts; and (iii) address conflicts that would arise solely from information that resides in databases or files of a law firm where all lawyers who worked on the matter in question have left the firm. (For the screening provision, COSAC proposes two alternatives – one with and one without a limiting paragraph.)
- **Rule 1.11.** Clarify in Rule 1.11 that the conflicts of lawyers entering or serving in government law offices are not imputed to other lawyers in the office, and thus can generally be cured by screening and recusal of the disqualified lawyer.
- **Rule 1.11.** Address conflicts of interest arising from a government lawyer’s part-time private law practice (a common situation in upstate New York).
- **Rules 1.11 and 1.12.** Eliminate the “appearance of impropriety” standard that limits the use of screening to address conflicts of former government lawyers and former judges and arbitrators in Rules 1.11 and 1.12. (That vague standard has otherwise been eliminated from the New York Rules of Professional Conduct.)
- **Rules 1.11 and 1.12.** Clarify in Rules 1.11 and 1.12 that law clerks to judges may negotiate for employment with lawyers or parties appearing before the judge or other adjudicative officer after notifying the judge or adjudicative officer.

- **Rule 6.5.** Revise Rule 6.5, which addresses participation in short-term pro bono representations (such as legal services clinics), in a number of ways to clarify the operation of the Rule.

Proposed changes to the black letter Rules can take effect only if they are adopted by the Appellate Divisions of the New York state courts. In contrast, proposed changes to Comments can be made by the House of Delegates of the New York State Bar Association without judicial approval (although some proposed changes to the Comments are contingent on Appellate Division approval of the related changes to the black letter Rules).

## **Rule 1.7**

### **(Conflict of Interest: Current Clients)**

#### **and Comments to Rule 1.7 and Other Rules**

#### **Incorporating the “Differing Interests” Standard**

COSAC recommends that New York abandon its vague “differing interests” standard in Rule 1.7 and adopt instead the more specific and more helpful standard found in ABA Model Rule 1.7(a)(1) and (a)(2). In addition, we address below proposed changes to Comments [21], [34] and [34A] to Rule 1.7. These Comments deal with revoking consent and with certain considerations regarding conflicts in representing clients adverse to an affiliate of an organizational client. We also address a change to a sentence in Comment [6] to Rule 1.7.

#### **Proposal to abandon the “differing interests” standard and adopt a more useful standard**

New York’s current-client conflict of interest rule, Rule 1.7, is an outlier among the states. It incorporates the “differing interests” standard of the former ABA Model Code of Professional Responsibility. No other state uses that standard, and COSAC believes the revised standard we now propose offers more guidance to lawyers and courts.

Under current Rule 1.7(a)(1), a lawyer has a conflict if a reasonable lawyer would conclude that the representation “will involve the lawyer in representing differing interests.” The term “differing interests” is then defined, in Rule 1.0(f), as “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest.” This formulation has, in our view, a number of weaknesses. It starts with a highly vague term – “differing interests” – that would seem to be triggered even by very limited differences in client interests, including purely economic differences (for example, the development of a product by one client that will compete with another client’s product). The definition does not provide sufficient guidance because it ultimately rests on an inquiry into whether the differing interests will adversely affect “either the judgment or the loyalty of a lawyer to a client.” While the concept of an effect on the “judgment” of a lawyer is a concept that can be readily understood, the concept of an effect on the “loyalty” of a lawyer ultimately reflects a value or policy judgment as to what the extent of a lawyer’s loyalty to a client should be. In the end, the Rule provides no guidance on that question.

A further objection to the current Rule is that, by its terms, it is triggered only when a reasonable lawyer would conclude that the representation “will” involve representation of differing interests and “differing interests” exist only when the lawyer’s judgment or loyalty “will” be affected. In other words, the Rule by its terms finds a conflict only when a reasonable lawyer would be certain that differing interests will arise. There is no room to accommodate the numerous situations in which a divergence of interests is likely or reasonably possible. In practice, lawyers often consider themselves to have a conflict when a divergence in interest is likely but not certain, so the Rule does not describe the understanding of prudent lawyers.

In drafting the ABA Model Rules that the ABA House of Delegates ultimately adopted in 1983, the ABA abandoned the “differing interests” formulation early on – it does not appear in any of the discussion drafts from 1980 to 1983 posted on the ABA website.<sup>1</sup> While there was extensive discussion of the precise formulation of a conflict standard, apparently no one proposed returning to the old standard.

In its current form, ABA Model Rule 1.7 retains the concepts behind the two core elements in the definition of “differing interests,” but articulates those concepts differently and with greater precision. ABA Model Rule 1.7 replaces the concept of an adverse effect on the “judgment” of the lawyer with the concept of a “material limitation” on the lawyer’s “representation” of the client; and it replaces the concept of an adverse effect on the lawyer’s “loyalty” by defining precisely what is meant by the term “loyalty”: the lawyer cannot be “directly adverse” to the client. This latter shift accurately captures what lawyers generally believe to be a conflict of interest, and it is far clearer than the “differing interests” standard. The twin prohibitions on representations that are “directly adverse” or “materially limited” have been adopted, in the same or substantially similar forms, by all other states except California, Georgia, and North Dakota.<sup>2</sup>

For the same reasons, COSAC recommends deleting the definition of “differing interests” in Rule 1.0(f). If COSAC’s recommendation to replace the “differing interests” standard is adopted, there will be no need to define the term because it will no longer appear in the Rules.

We also propose to insert the term “significant risk” in place of “will” in New York Rule 1.7(a)(2). Under our proposal, a conflict arises if a reasonable lawyer would conclude that there is a “significant risk” of a material limitation on the representation. Again, we believe this accurately captures the practice of prudent lawyers today.

In recommending adoption of the current Rule and Comments in the years leading up to the New York State Bar Association’s 2008 recommendation to the courts, COSAC likewise

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<sup>1</sup>[https://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/kutakcommissiondrafts.html](https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/kutakcommissiondrafts.html).

<sup>2</sup> The California, Georgia and North Dakota Rules find a conflict only if the representation or relationship with another client or a third party will have an adverse effect on the representation of a client, essentially eliminating the “directly adverse” aspect of the test. Other jurisdictions have adopted minor variations on the “directly adverse/materially limited” model. For example, the District of Columbia uses the term “adverse positions” in place of the concept “directly adverse,” and Texas replaces the term “materially limited” with the phrase “adversely limited.”



recommended that New York abandon the “differing interests” standard. At that time the New York Courts chose, as they did on a number of points, to adhere more closely to language in the former New York Code of Professional Responsibility, but for the reasons outlined above, COSAC believes the time has come to reconsider that decision.

Specifically, in 2005-2008, COSAC recommended altering the New York Rules in three ways, all of which we also recommend at this time, with a few minor modifications to the 2008 proposals.

First, COSAC recommended “retain[ing] New York’s traditional reference to a lawyer’s ‘independent professional judgment,’” a term contained in former DR 5-105, noting that “the concept of independent professional judgment is understandable and meaningful to New York lawyers” and that “New York courts and ethics authorities have developed over time a rich body of decisional law that has reinforced and illuminated it.” At the same time, COSAC observed that “in some circumstances, it may be easier for a lawyer to understand the consequences of a conflict in terms of its impact on the *representation* itself, rather than its impact on the lawyer’s own *judgment*” (emphasis added), so COSAC proposed using both terms.<sup>3</sup> We still agree with that dual articulation. The concept of an effect on independent professional judgment is easy to understand, and is discussed in the existing Comments to the New York Rule, but it does not exhaust the realm of conflicts. For example, a lawyer may have a conflict if the lawyer is advancing a legal position for Client A that is contrary to the position the lawyer is taking (or has previously taken) for Client B, where, because of the timing or prominence of the argument, the fact that the lawyer is making the argument on behalf of Client A may be used against Client B. That situation could “materially limit” the lawyer’s *representation* of Client B even if the lawyer’s *judgment* was not affected. However, we believe any adverse effect on the lawyer’s independent professional judgment would be a “material limitation” on the representation, so instead of recommending that the two terms be included as co-equal alternatives, as COSAC did in 2008, we now recommend a formulation that refers to an adverse effect on “independent professional judgment” as well as to the representation “otherwise” being materially limited. This tracks the discussion in existing Comment [8] to New York Rule 1.7.

Second, COSAC recommends departing from the ABA Model Rule by incorporating the existing New York phrase “a reasonable lawyer would conclude” in the introductory language to Rule 1.7(a), before defining the two general types of conflicts. This makes explicit what we believe is implicit in the ABA Model Rule and, as noted, is consistent with the current New York Rule.

Third, where the ABA Model Rule refers simply to the “personal interest of the lawyer,” we recommend retaining the existing New York term “the lawyer’s own financial, business, property or other personal interests.” This is a useful expansion of the concept of personal interest conflicts. It identifies the most common personal interests that give rise to conflicts, and is a term with which New York courts and lawyers are familiar.

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<sup>3</sup> New York State Bar Association, Proposed New York Rules of Professional Conduct: Report and Recommendations of Committee on Standards of Attorney Conduct 68-69 (Sept. 30, 2005).

The changes set forth below reflect the above recommendations, including certain places where Rule 1.7's current "differing interests" standard is mentioned in Comments to other Rules. In addition, in the next section of this report we recommend deleting the reference to "differing interests" in Rule 1.8(a) and the reference to "interests differ" in former Rule 1.10(h) (which we propose be moved to new Rule 1.8(i)).

**Proposal to amend Comments [6], [21], [34] and [34A] to Rule 1.7**

COSAC proposes several other amendments to the Comments to Rule 1.7.

Comment [6] provides that a client "is likely to feel betrayed" every time a lawyer who may represent a client in unrelated matters appears on the other side of a matter. This is undoubtedly sometimes true of some clients, but COSAC does not believe that it is always true of all clients. COSAC proposes to moderate this language as shown in the redline below.

Comment [21] addresses the effect of one client's revocation of a previously given consent on the lawyer's ability to continue representing other clients in the same matter or in a conflicting matter. COSAC believes Comment [21] pays insufficient attention to the interests of the other clients who may have relied on the advance consent when retaining and subsequently relying on and expending resources on the lawyer's services. The suggested amendments in the redlines below place greater emphasis on the interests of the non-revoking clients.

Comments [34] and [34A] address whether a conflict exists where a law firm represents a constituent or an affiliate of an organizational client and seeks to act adversely to another constituent or affiliate of the organizational client. The focus is on the relationship between the constituent entities involved. COSAC proposes to revise those Comments to include, among other things, a discussion of how closely related the matters are. This revision is consistent with case law on disqualification motions that refer to the well-understood "substantial relationship" test in such circumstances. *E.g., Brooklyn Navy Yard Cogeneration Partners, L.P. v. PMNC*, 254 A.D. 2d 947, 679 N.Y.S.2d 30 (2d Dep't. 1998); *see generally* Richard Flamm, *Conflicts of Interest* §§17.1 & 17.2 (2015 and Supp. 2016); Roy D. Simon & Nicole Hyland, *Simon's New York Rules of Professional Conduct Annotated* 382-83 (Thomson Reuters 2017 ed.).

**Redlined proposals to delete Rule 1.0(f), amend Rule 1.7(a), and amend related Comments**

For the foregoing reasons, COSAC proposes to delete Rule 1.0(f), amend Rule 1.7(a), and amend the related Comments, as indicated below.

**Rule 1.0**  
**Terminology**

(f) **[Reserved.]** ~~"Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.~~

## Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if either:

(1) the representation of one client will be directly adverse to another client ~~will involve the lawyer in representing differing interests~~; or

(2) there is a significant risk that (i) the lawyer's independent professional judgment on behalf of a client will be adversely affected by, or (ii) the representation of one or more clients otherwise will be materially limited by, the lawyer's responsibilities to another client, a former client or a third person or by the lawyer's own financial, business, property or other personal interests.

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### Comment

#### General Principles

[1] Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Concurrent conflicts of interest, which can impair a lawyer's independent professional judgment, can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. A lawyer should not permit these competing responsibilities or interests to impair the lawyer's ability to exercise independent professional judgment on behalf of each client. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "~~differing interests,~~" "informed consent," "writing" or "written," and "confirmed in writing," see Rules 1.0(~~f~~), (j), ~~and~~ (e), and (x), respectively.

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer, acting reasonably, to: (i) identify clearly the client or clients, (ii) determine whether a conflict of interest exists, *i.e.*, whether the lawyer's independent professional judgment may be impaired or the lawyer's ~~loyalty may be divided~~ representation will be materially limited if the lawyer accepts or continues the representation, (iii) decide whether the representation may be undertaken despite the existence of a conflict, *i.e.*, whether the conflict is consentable under paragraph (b); and if so (iv) consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include ~~all-both~~ of the clients ~~who may have differing interests under~~ referred to in paragraph (a)(1) and ~~any~~ the one or more clients whose representation might be ~~adversely affected~~ materially limited under paragraph (a)(2).

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**Identifying Conflicts of Interest: Direct Adversity**

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. ~~The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent. For example~~ Thus, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated. ~~The~~ Some clients as to whom the representation is adverse ~~is likely to~~ could feel betrayed, and in those circumstances the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken may reasonably fear that the lawyer will pursue that client's case less effectively out of deference to the other client, that is, that the lawyer's exercise of independent professional judgment on behalf of that client will be adversely affected by the lawyer's interest in retaining the current client. Similarly, a direct adversity conflict may arise when a lawyer is required to cross-examine another current client who is appearing as a witness in a lawsuit ~~involving another client, as when especially if~~ the testimony of the client to be cross-examined will be damaging to the client represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] ~~Differing interests~~ Direct adversity conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

**Identifying Conflicts of Interest: Material Limitation**

[8] ~~Differing interests~~ Even where there is no direct adversity, a concurrent conflict of interest exists if there is a significant risk that a lawyer's exercise of independent professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests. For example, the independent professional judgment of a lawyer asked to represent several individuals operating a joint venture is likely to be adversely affected to the extent that the lawyer is unable to recommend or advocate all possible positions that each client might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's independent professional judgment in

considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

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### Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. ~~Whether r~~ Revoking consent to the client's own representation does not necessarily precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients, and whether material detriment to the other clients or the lawyer would result. Whether the lawyer may continue to represent such other clients ordinarily depends on whether the other clients reasonably relied on the revoking client's consent, whether any understanding existed at the time of the original engagement as to the lawyer's ability to represent other clients in the event of revocation, and whether (and to what extent) the lawyer and the other clients will suffer harm. On the other hand, withdrawal from the other representation might be required depending on the severity of the conflict, a client's reason for revoking consent (such as a lawyer's misuse of confidential information or the lawyer's failure to follow a client's instructions because of conflicted loyalties), or a material change in circumstances after the consent was given.

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### Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, simply by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Although a desire to preserve good relationships with clients may strongly suggest that the lawyer should ~~always seek informed consent of the client organization~~ consider informing the entity the lawyer represents and seeking consent as a prudential matter before undertaking any representation that is adverse to its affiliates, Rule 1.7 does not require the lawyer to obtain such consent unless: (i) the lawyer has an understanding with the organizational client that the lawyer ~~will avoid~~ shall not undertake representation adverse to ~~the client's~~ an identified affiliate or affiliates, (ii) the lawyer's obligations to either the organizational client or the new client are likely to adversely affect the lawyer's exercise of independent professional judgment on behalf of the other client, or (iii) the circumstances are such that the affiliate should also be considered a client of the lawyer. ~~Whether the affiliate should be considered a client will depend on the nature of the lawyer's relationship with the affiliate or on the nature of the relationship between the client and its affiliate.~~ For example, the lawyer's work for the client organization may be intended to benefit its affiliates. The overlap or identity of the officers and boards of directors, a shared legal department, general counsel and other management personnel, shared information systems, and the client's overall mode of doing business in a unitary manner, may be so extensive that the entities would be viewed as "alter egos." Under such circumstances,

the lawyer may conclude that the affiliate is the lawyer's client despite the lack of any formal agreement to represent the affiliate.

[34A] ~~Whether the affiliate should be considered a client of the lawyer may also depend on: (i) whether the affiliate has imparted confidential information to the lawyer in furtherance of the representation, (ii) whether the affiliated entities share a legal department and general counsel, and (iii) other factors relating to the legitimate expectations of the client as to whether the lawyer also represents the affiliate.~~ In other circumstances, the key consideration, as in many other instances of determining whether a conflict exists, is whether the representation adverse to one affiliate will be materially limited by the lawyer's representation of another affiliate that the lawyer or lawyer's firm represents in other matters. This will often depend on whether there is a substantial relationship between matters or whether an affiliate has imparted confidential information to the lawyer in one representation that may be used in a manner detrimental to the interests of another affiliate in another representation. Further, ~~w~~Where the entities are related only through stock ownership, the ownership is less than a controlling interest, and the lawyer has had no significant dealings with the affiliate or access to its confidences, the lawyer may reasonably conclude that the affiliate is not the lawyer's client.

### **Comments to Rule 1.8 Relating to Rule 1.7**

#### **Current Clients: Specific Conflict of Interest Rules**

##### **Comment**

##### **Business Transactions Between Client and Lawyer**

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[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's independent professional judgment will be adversely affected by,<sup>4</sup> ~~or the~~ representation of the client will be materially ~~adversely affected~~ limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal

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<sup>4</sup> In her comments on an earlier version of these proposals, Nancy Ann Connery, a member of the Bar, observed that COSAC's proposed change did not capture all of the circumstances set forth in Rules 1.7 and 1.8 that constitute a conflict, and specifically did not include the phrase "adversely affected by" from Rule 1.7(a)(2). COSAC has amended the proposal that appeared in its Public Comment Report to take Ms. Connery's suggestion into account.

advice in a way that favors the lawyer's interests at the client's expense. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction. A lawyer has a continuing duty to monitor the inherent conflicts of interest that arise out of the lawyer's business transaction with a client or because the lawyer has an ownership interest in property in which the client also has an interest. A lawyer is also required to make such additional disclosures to the client as are necessary to obtain the client's informed consent to the continuation of the representation.

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[4E] If the lawyer reasonably concludes that the lawyer's representation of the client will not be ~~adversely affected~~ materially limited by the agreement to accept client securities as a legal fee, the Rules permit the representation, but only if full disclosure is made to the client and the client's informed consent is obtained and confirmed in writing. *See* Rules 1.0(e) (defining "confirmed in writing"), 1.0(j) (defining "informed consent"), and 1.7(b)(4) (governing consent to concurrent conflicts).

....

[12] Sometimes it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest ~~may exist if the lawyer will be involved in representing differing interests or~~ if there is a significant risk that either the lawyer's independent professional judgment on behalf of the client will be adversely affected or the representation otherwise will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing. *See* Rules 1.0(e) (definition of "confirmed in writing"), 1.0(j) (definition of "informed consent"), and 1.0(x) (definition of "writing" or "written").

### **Comments to Rule 5.7 Relating to Rule 1.7 Responsibilities Regarding Nonlegal Services**

#### **Comment**

....

[5A] Under Rule 1.7(a)(2), a concurrent conflict of interest exists when (among other things) a reasonable lawyer would conclude that there is a significant risk that the lawyer's independent professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or personal interests. When a lawyer or law firm provides both legal and nonlegal services in the same matter (or in

substantially related matters), a conflict with the lawyer's own interests will nearly always arise. For example, if the legal representation involves exercising judgment about whether to recommend nonlegal services and which provider to recommend, or if it involves overseeing the provision of the nonlegal services, then a conflict with the lawyer's own interests under Rule 1.7(a)(2) is likely to arise. However, when seeking the consent of a client to such a conflict, the lawyer should comply with both Rule 1.7(b) regarding the conflict affecting the legal representation of the client and Rule 1.8(a) regarding the business transaction with the client.

## **Rule 1.8**

### **Current Clients: Specific Conflict of Interest**

COSAC proposes a number of changes to the text of Rule 1.8 and accompanying Comments.

#### **Proposal to amend Rule 1.8(a) and Comment [1] to Rule 1.8**

Rule 1.8(a) currently bars a lawyer from entering into a business transaction with a client, unless certain criteria are met (*e.g.*, the client signs a writing giving informed consent, and the transaction meets a test of fairness and reasonableness), if the lawyer and client "have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client." These last two requirements (differing interests and the client's expectation) are not included in the ABA Model Rules. COSAC recommends deleting the requirement that the lawyer and client "have differing interests therein," because it is redundant. If a lawyer and client are entering into a business transaction with each other, they will always have differing interests in the transaction. A parallel change would be made to Comment [1].

#### **Proposal to delete Rule 1.8(b) and Comment [5] to Rule 1.8**

COSAC recommends deleting Rule 1.8(b) and Comment [5] to Rule 1.8, and marking them "[RESERVED]."

Rule 1.8(b) currently provides, "A lawyer shall not *use* information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." (Emphasis added.)

Rule 1.8(b) was not proposed by COSAC but was adopted by the Courts *sua sponte*. COSAC did not propose Rule 1.8(b) because COSAC considered it redundant of other Rules and because the substance of it was included in Rule 1.6(a) as proposed by COSAC and adopted by the Courts. Rule 1.6(a) provides, in part:

A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or *use* such information *to the disadvantage of a client* or for the advantage of the lawyer or a third person, unless: (1) the client gives informed consent, as defined in Rule 1.0(j); (2) the disclosure is impliedly authorized . . .; (3) the disclosure is permitted by paragraph (b). [Emphasis added.]



The ABA Model Rules include Rule 1.8(b), but the Model Rules do not contain the same redundancy as New York Rule 1.8(b) because the Model Rules distinguish between “revealing” confidential information and “using” confidential information. The ABA Model Rules deal with “revealing” confidential information in Model Rule 1.6, and deal with “using” such information to the disadvantage of the client in Model Rule 1.8(b). New York’s Rules instead combine those two points (“revealing” and “using” confidential information to the disadvantage of the client) in a single rule, New York Rule 1.6(a).

In 2008, the Courts added the language of ABA Model Rule 1.8(b) to the Rules proposed by COSAC. For this reason, New York Rule 1.8(b) contains the ABA Model Rules’ broader and vaguer definition of protected information – “information relating to representation of a client” – even though New York chose to retain in New York Rule 1.6(a) a definition of “confidential information” similar to the definition of “confidences” and “secrets” that had appeared in DR 4-101(A) of the former New York Code of Professional Responsibility.

COSAC proposes to delete New York Rule 1.8(b) entirely (as well as to delete the corresponding Comment [5] to Rule 1.8) for three reasons. First, Rule 1.8(b) overlaps and largely duplicates Rule 1.6(a). Second, Rule 1.6(a) already sufficiently protects confidential information. Third, Comment [4B] to Rule 1.6 already captures most of the ideas in Comment [5] to Rule 1.8 (sometimes in identical language). We recognize that Rule 1.8(b) is not identical to Rule 1.6(a) – it is narrower in some ways and broader in others – but on balance we think Rule 1.8(b) is not necessary to protect clients and creates confusion for lawyers. Indeed, Rule 1.8(b) effectively refers to Rule 1.6 by the final clause of Rule 1.8(b), which says “except as permitted or required by these Rules.”

**Proposal to revise Rule 1.8(c)(1) and (c)(2)**

New York Rule 1.8(c) currently provides as follows:

(c) A lawyer shall not:

- (1) solicit *any gift* from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or
- (2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer *any gift*, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship. [Emphasis added.]

New York Rule 1.8(c) is more restrictive than ABA Model Rule 1.8(c). The ABA Model Rule prohibits a lawyer from soliciting any “substantial” gift from a client, or preparing an instrument giving any “substantial” gift to the lawyer or a person related to the lawyer, unless the lawyer or other recipient of the gift is related to the client. In the Public Comment Conflicts Report,

COSAC proposed to relax the near-absolute ban on gifts in New York Rule 1.8(c) and adopt instead the ABA's prohibitions only on soliciting or preparing an instrument for "substantial" gifts.

The NYSBA Ethics Committee disagreed with this proposal, stating, "We believe allowing lawyers to solicit gifts—even ones that are not 'substantial', however defined—is likely to put lawyers in a bad light." The Ethics Committee therefore urged that New York Rule 1.8(c) be retained in its current form.

COSAC is persuaded that New York Rule 1.8(c) should be retained in its current form and that no change is warranted. There do not appear to have been interpretive difficulties with New York's language or real-world problems with its enforcement. Rule 1.8(c) sensibly distinguishes between (i) *preparation* of instruments giving lawyers gifts, which are permitted in narrow circumstances where the client is related to the lawyer and the transaction is fair and reasonable (as when a fully informed client insists on it), and (ii) *solicitation* of gifts, which is prohibited in all circumstances.

**Proposal to move Rule 1.10(h) to Rule 1.8 and to update the wording of Rule 1.10(h)**

For the reasons explained below in connection with Rule 1.10, COSAC proposes to move Rule 1.10(h), which is a special conflict rule and not an imputation rule, to Rule 1.8, as a new paragraph (l) at the end of existing Rule 1.8. As noted above in connection with the changes to Rule 1.7 deleting the phrase "differing interests," COSAC also proposes in Rule 1.10(h) to change the phrase "a client whose *interests differ* from" to the phrase "a client whose *interests conflict under Rule 1.7(a)* with."

To further update the language in existing Rule 1.10(h) to make it consistent with wording used elsewhere in the New York Rules of Professional Conduct, COSAC also proposes to change the phrase "client consents after *full disclosure*" to the phrase "client gives *informed consent*," which is the phrase used in Rule 1.7(b)(4), and to change the phrase "the lawyer *concludes* that the lawyer can adequately represent the interests of the client" to the phrase "the lawyer *reasonably believes* that the lawyer will be able to *provide competent and diligent representation*" to the client, which is the phrase used in Rule 1.7(b)(1). Here is a redline showing the changes COSAC recommends making to former Rule 1.10(h) to create new Rule 1.8(l):

(l) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests ~~differ~~ conflict under Rule 1.7(a) with those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client gives informed consents ~~after full disclosure~~ and the lawyer ~~concludes~~ reasonably believes that the lawyer ~~can adequately represent~~ will be able to provide competent and diligent representation to the client.

**Redlined proposal to amend Rule 1.8(a)-(c), amend Comments [1] and [5]-[7], and add new Rule 1.8(l)**

Thus, COSAC proposes to revise New York Rule 1.8(a), (b) and (c), to revise Comments [1], [5], [6] and [7] to Rule 1.8, and to add a new Rule 1.8(l), so that Rule 1.8 would read as follows:

(a) A lawyer shall not enter into a business transaction with a client ~~if they have differing interests therein and~~ if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) ~~[Reserved.] A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.~~

....

(l) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests conflict under Rule 1.7(a) with those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client gives informed consent to the representation and the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the client.

## Comment

### Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer's investment on behalf of a client. For these reasons business transactions between a lawyer and client are not advisable. If a lawyer nevertheless elects to enter into a business transaction with a current client, the requirements of paragraph (a) must be met if ~~the client and lawyer have differing interests in the transaction and~~ the client expects the lawyer to exercise professional judgment therein for the benefit of the client. This will ordinarily be the case even when the transaction is not related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, such as the sale of title insurance or

investment services to existing clients of the lawyer's legal practice. *See* Rule 5.7. It also applies to lawyers purchasing property from estates they represent.

....

[5] ~~[Reserved.] A lawyer's use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or a business associate of the lawyer, at the expense of a client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. But the rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits use of client information to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules. Rules that permit or require use of client information to the disadvantage of the client include Rules 1.6, 1.9(e), and 3.3.~~

## **Rule 1.10**

### **Imputation of Conflicts of Interest**

#### **Overview**

COSAC proposes the following four changes to Rule 1.10:

- (A) Remove imputation for personal conflicts;
- (B) Permit screening to avoid imputation of lateral-hire conflicts;
- (C) Avoid imputation of conflicts to a firm that is no longer associated with any lawyers who worked on a conflicting matter, but continues to have information regarding the matter in its databases or paper files, provided the firm meets certain conditions; and
- (D) Move Rule 1.10(h), which is not an imputation rule, to Rule 1.8.

Each of these proposals is explained below. In addition, for reasons set forth in the discussion of our proposal to amend Rule 1.11(d), relating to imputation of conflicts of current government employees, COSAC proposes to add a new paragraph (i) to Rule 1.10 and to amend Comment [7] to that Rule.

#### **Proposal to remove imputation for personal conflicts**

COSAC proposes to eliminate New York's minority rule that categorically imputes to associated lawyers all conflicts that arise from a lawyer's own financial, business, property or

other personal interest (“personal conflicts”). New York’s inflexible rule is shared by only five other states: Alabama, California, Georgia, Mississippi, and Texas. All other states appear to have adopted the position in ABA Model Rule 1.10(a) that such conflicts are not ordinarily imputed to the law firm as a whole.

The New York rule is an unrealistic standard that creates a conflict where, as Comment [3] to ABA Model Rule 1.10 puts it, “neither questions of client loyalty nor protection of confidential information are presented.” Many personal conflicts affecting one lawyer in a firm pose no risks whatsoever to clients of other lawyers in the firm. For example, if a spouse of a lawyer in a large firm works for the contractual counterparty of the firm’s client, or if the strong religious or political beliefs of one lawyer in the firm would prevent that lawyer from working on a particular matter, there is typically no risk that the independent professional judgment of other lawyers in the firm would be affected.

New York’s rule imputing personal conflicts has been the subject of numerous ethics opinions, and has resulted in imputation (and hence disqualification of an entire firm) that often seems unwarranted in light of the minimal risks presented. *See, e.g.*, N.Y. State 900 (conflicts imputed from lawyer serving as a mediator); N.Y. State 881, 890, 895, and 941 (conflicts with lawyer’s spouse imputed to firm); N.Y. State 925 (conflicts arising from lawyer’s business relationship with law partner’s adversary imputed to firm); N.Y. State 968 (conflict imputed from government lawyer with personal claim against agency for imposing furlough program); N.Y. State 994 (conflict imputed from part-time football coach where firm represents clients with claims against town); *see also* N.Y. State 798 and 909 (concluding that legislator-law enforcement conflicts are *not* imputed to firm because prohibition arises from Rule 8.4 and not from one of the conflicts rules).

Nevertheless, to ensure that client interests will be protected in the unusual cases in which personal conflicts in fact do present risks to client loyalty or confidentiality, COSAC proposes amending Rule 1.10(a) to provide for a safeguard. The safeguard is that the rule would provide for non-imputation of personal conflicts only if, “under the circumstances, a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely effected.”

The formulation we propose was previously proposed by COSAC in 2008 and varies from ABA Model Rule 1.10 in two ways: (1) COSAC expands the ABA term “personal interest” to the more descriptive phrase already in New York’s Rule 1.7, “a lawyer’s own financial, business, property or other personal interest”; and (2) COSAC replaces the ABA’s language “does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm” with the language quoted above, which we believe is clearer and expressly provides for an objective, “reasonable lawyer” test rather than a subjective determination.

COSAC also considered variations on the ABA language from other jurisdictions, such as the District of Columbia’s change from “materially limiting” to “adversely affecting,” and North Dakota’s adoption of a definition of a “personal conflict” to be a conflict “created by a lawyer’s interests other than those arising from the representation of other clients or the owing of fiduciary duties to some third party.” These changes do not seem to justify a further departure from the ABA Model Rule, and COSAC decided not to propose them.

COSAC also proposes to make two parallel changes to New York’s Comments to Rule 1.10. First, COSAC proposes to add all of ABA Comment [3], which explains why personal conflicts generally should not be imputed. Second, COSAC proposes to expand New York Comment [4] to include a sentence from the ABA Comment making clear that there is no imputation of personal conflicts if a lawyer is personally disqualified “because of events before the person became a lawyer, for example, work that the person did while a law student.” This later provision was removed from COSAC’s proposed New York Comments after the New York Courts rejected COSAC’s 2008 proposal not to impute most personal conflicts.

#### **Proposal for screening to remove imputation arising from lateral hire conflicts**

COSAC proposes that New York join more than a dozen other states whose rules provide that screening, with various conditions, will prevent imputation of conflicts from lateral-hire lawyers.<sup>5</sup>

Current Comment [4A] to New York Rule 1.10 notes the following rationale for permitting screening to avoid imputation of lateral-hire conflicts:

[4A] ... If the principles of imputed disqualification were defined too strictly, the result would be undue curtailment of the opportunity of lawyers to move from one practice setting to another, of the opportunity of clients to choose counsel, and of the opportunity of firms to retain qualified lawyers. For these reasons, a functional analysis that focuses on preserving the former client’s reasonable confidentiality interests is appropriate in balancing the competing interests.

New York’s current version of Rule 1.10(a) imputes a lateral-hire lawyer’s conflicts arising out of his or her former representation of a client in all cases except where “the newly associated lawyer did not acquire any information protected by Rule 1.6 or 1.9(c) that is material to the current matter” — an extremely limited exception that typically applies only to a very junior

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<sup>5</sup> States providing that screening, with various conditions, will prevent imputation of conflicts from all lateral-hire lawyers are Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Washington and Wyoming. Further, as discussed in more detail below, another group of states have adopted rules providing for screening for lateral-hire lawyers who had limited participation in the prior matter, with the limited participation expressed in various standards, such as “did not have primary responsibility” or had “no substantial responsibility.” These states are Arizona, California, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, and Wisconsin.

lawyer who did only abstract legal research for a former client and was exposed to no client confidences.

COSAC believes that Rule 1.10 should permit screening to avoid imputation of a lateral hire's conflicts with appropriate safeguards. The current rule creates a significant obstacle to the movement of lawyers between firms, particularly early in their careers. Obtaining a former client's consent to a conflict is frequently difficult, because the moving lawyer generally has no continuing relationship with the former client or with his or her former firm, and because neither the firm nor the client has any particular interest in promptly providing the required waiver.

As noted, in addition to the many states that have adopted lateral-hire screening by rule, some states have approved of screening for lateral hires via state court decisions. Further, federal courts in New York have repeatedly approved of screening to cure lateral-hire conflicts in decisions declining to disqualify counsel. *E.g.*, *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) (approving of screening to cure conflict from laterally-hired of-counsel lawyer); *Maricultura del Norte, S. de R.L. de C.V. v. Worldbusiness Capital, Inc.*, 2015 WL 1062167, at \*15 (S.D.N.Y. Mar. 9, 2015) (surveying case law in Second Circuit and concluding that “[i]n every other post-*Hempstead* case I have located within this circuit, the district court, after considering whether an ethical screen was sufficient, has found the presumption rebutted and denied a motion to disqualify”). COSAC proposes to codify these federal court decisions in New York's Rule 1.10(a), which would then be applicable in state courts and in disciplinary proceedings and would provide clear guidance for the day-to-day practice of law firms in New York State.

Under the current New York Rules, screening is permitted to avoid imputation of conflicts of former government lawyers (Rule 1.11(b)), former judges, arbitrators and law clerks (Rule 1.12(d)), and lawyers who have received significantly harmful information from prospective clients (Rule 1.18(d)(2)). We propose to import into Rule 1.10 the screening procedures set forth in Rules 1.11, 1.12 and 1.18, with two exceptions noted below.

COSAC does not propose that New York adopt the screening procedures in ABA Model Rule 1.10, because they have some unusual provisions requiring: (i) “a statement that review may be available before a tribunal”; (ii) “an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures”; and (iii) periodic certifications of compliance with the screening procedures, to be provided to the former client at reasonable intervals upon the former client's written request. These ABA provisions, adopted in full by only three states (Connecticut, Idaho, and Wyoming), are cumbersome and could encourage disputes over compliance. The ABA provisions, moreover, provide for a different screening procedure in Rule 1.10 from the screening procedure provided in Rules 1.11, 1.12 and 1.18. Finally, the ABA provisions appear to COSAC to be unduly complicated and unjustified. We see no substantial reason to distinguish among laterally-hired former government lawyers, laterally-hired former law clerks, and laterally-hired lawyers previously employed at other private law firms.

In 2008, COSAC proposed a limited form of lateral-hire screening. Under that proposed rule, if the lateral hire had acquired information that was material to the current matter while at his or her former firm, then screening could avoid imputation only if “a reasonable lawyer would

conclude that any such information, if used, is not likely to be to the former client's material disadvantage." COSAC no longer supports that proposal. Apparently a compromise, the 2008 proposal would not apply to many representations and would often require a fairly searching inquiry into the information that the lateral hire had acquired in the course of the former representation, thus potentially jeopardizing the very information the screening proposal was designed to protect. Further, the proposal would not alleviate the difficulties in obtaining consent from former clients in the vast majority of cases. Under Rule 1.9, a lateral hire conflict exists in the first place only where a lawyer "has acquired information protected by Rule 1.6 [*i.e.*, confidential client information] ... that is material to the matter," generally measured by whether the lawyer worked on a matter.

As a consequence, many firms already believe that if a lateral-hire lawyer had very limited involvement in a matter (such as a junior associate who did only legal research on discrete issues), the risk of conflicts is limited and can be managed by screening under the current rules. State court decisions have declined to disqualify lawyers who are properly screened in such circumstances. *E.g.*, *Nimkoff v. Nimkoff*, 18 A.D.3d 344, 346, 797 N.Y.S.2d 3, 6 (1st Dep't 2005) (if party seeking to avoid disqualification proves that any information acquired by the lateral "is unlikely to be significant or material in the litigation," then "a 'Chinese Wall' around the disqualified [lateral] lawyer would be sufficient to avoid firm disqualification"); *see Matter of Jalicia G.*, 41 Misc. 3d 931, 971 N.Y.S.2d 831 (Bronx County Family Ct. 2013) (permitting Legal Aid Society to oppose a former client in a substantially related matter as long as (i) all LAS personnel working on current matter avoid any contact with records relating to representation of former client and (ii) all LAS staff who worked on former client's matter are screened from current matter). *See also Kassis v. Teacher's Ins. & Annuity Ass'n*, 93 N.Y.2d 611, 617 (1999) (disqualifying firm in particular matter but saying, in dicta, that screening at a lateral hire's new firm would be sufficient to avoid disqualification where new firm can prove that "any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation").

In response to concerns expressed when COSAC presented its proposals to the NYSBA House of Delegates in November 2018 for informational purposes, COSAC has drafted an alternative to its prior proposal. Specifically, concern was expressed that COSAC's proposed provision regarding lateral-hire screening did not sufficiently protect a former client in a classic (albeit rare) case in which a client's lawyer, in the midst of a hotly litigated matter, moves to the opposing firm. As an alternative, COSAC has drafted language that would limit the situations in which screening would avoid imputation of lateral-hire conflicts. Under the alternative provision – which COSAC does not favor – screening will not overcome a former client's objection to the conflict arising from the extreme conflict that caused concern. In other words, under COSAC's alternative proposal, screening will *not* substitute for the former client's informed consent if the lawyer with "primary responsibility" for a litigated matter moves to the opposing law firm while the matter is pending. Screening in that situation will not overcome the former client's objection even though the lawyer who had primary responsibility at the former firm will play no role whatsoever on the matter at the new firm and will have no access to the new firm's confidential information about the matter.



Several states have adopted limitations on screening similar to COSAC's alternative proposal. Arizona and Indiana limit screening to lawyers who did not have "primary responsibility" for the matter that is causing the disqualification; New Jersey and Tennessee bar screening in litigated matters where the lawyer had "primary responsibility" (New Jersey), or was "substantially involved" (Tennessee), in the representation.<sup>6</sup>

In addition another ten states have adopted screening for lateral-hire lawyers who had limited participation in the prior matter, with the limited participation expressed in various standards, such as "performed no more than minor or isolated services" or "did not have a substantial role in the matter."<sup>7</sup>

To be clear, COSAC opposes any exception to lateral screening. If any exception is adopted, however, COSAC believes that the exception should be narrow and should above all be objective and clearly expressed, so as not to swallow the rule by uncertainty. Thus, proposed Rule 1.10(c)(3) – which is an alternative to Rule 1.10(c)(2) without subparagraph (c)(3) – would specify that "screening as set forth in subparagraphs (i)-(iv) is not available to prevent imputation of conflicts where the matter involves an adjudicative proceeding for which the newly associated lawyer had *primary responsibility*." A proposed new Comment [5F] would explain this provision.

COSAC also proposes two modifications to the screening procedures set out in existing New York Rules 1.11, 1.12 and 1.18.

First, COSAC proposes a self-executing provision that would permit the law firm to postpone sending the screening notice to lateral-hire's former client if the notice would disclose confidential information protected by Rule 1.6. The notice would usually disclose confidential information, for example, (a) in merger and acquisition matters where the new firm was working for a potential bidder in an auction where the lateral-hire had previously worked for the target on the sale process, but the bidder's interest has not yet been disclosed; or (b) in litigation matters where the new firm was in the process of investigating a claim that might be asserted against the lateral-hire's former client. When the exception allowing a delayed screening notice applies, the

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<sup>6</sup> Arizona Rule 1.10(d) and Indiana Rule 1.10(c) both limit lateral-hire screening to situations in which the lateral hire lawyer "did not have primary responsibility for the matter that causes the disqualification." New Jersey Rule 1.10(c) permits screening to cure lateral-hire conflicts only where "the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility"; the term "primary responsibility" is defined to mean "actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions." Tennessee Rule 1.10(d) specifies that screening is unavailable where "(1) the disqualified lawyer was substantially involved in the representation of a former client; and (2) the lawyer's representation of the former client was in connection with an adjudicative proceeding that is directly adverse to the interests of a current client of the firm; and (3) the proceeding between the firm's current client and the lawyer's former client is still pending at the time the lawyer changes firms."

<sup>7</sup> The states setting out language regarding lateral-hire lawyers who had limited participation in the prior matter are California, Colorado, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, and Wisconsin.

notice would be provided to the former client once the confidential aspect of the work was otherwise disclosed to the former client or was otherwise no longer subject to protection under Rule 1.6. (As set forth below, COSAC is also recommending a parallel change to the screening procedures in Rules 1.11, 1.12 and 1.18.)

COSAC's proposal for delayed notice to former clients roughly resembles a District of Columbia provision permitting a law firm to file the required notice with the D.C. Disciplinary Council if a firm's current client has requested confidentiality, with the notice to be released to the former client when the new matter is no longer confidential. This D.C. provision is designed for situations where the existing or new matter at the lateral-hire's new firm is confidential. It is a sensible innovation, but it would require constructing new infrastructure in New York authorizing disciplinary authorities to receive and embargo such notices. We do not believe that infrastructure would be worth the cost, because we think our proposed self-executing provision will achieve the same purpose without the new infrastructure.

Second, COSAC's proposal for screening procedures does not include the requirement set forth in current New York Rules 1.11 and 1.12 that "there are no other circumstances in the particular representation that create an appearance of impropriety." As explained in the discussions below with respect to Rules 1.11 and 1.12, the "appearance of impropriety" provision is not found in New York Rule 1.18 and incorporates the former Code's otherwise now-discarded appearance-of-impropriety test. COSAC recommends that this vague highly subjective test also be eliminated from Rules 1.11 and 1.12.

We also propose amending the New York Comments to incorporate the substance of the Comments on these screening procedures that appear in the existing Comments to Rule 1.11 (Comments [6] – [7B]), Rule 1.12 (Comments [3] – [5]) and Rule 1.18 (Comments [7] – [8]). Proposed new Comment [5D] to Rule 1.10 modifies language taken from the existing Comments to Rules 1.11, 1.12 and 1.18. Here is the unmodified fourth sentence of existing Comment [7A] to New York Rule 1.11:

[7A] ... If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm's disqualification. ...

The identical language currently appears in Comment [4C] to Rule 1.12 and in Comment [7C] to Rule 1.18. In new Comment [5D] to Rule 1.10, COSAC proposes to modify this sentence by inserting an exception for disclosures permitted or required by other Rules (*e.g.*, permitted by Rules 1.6(b)(4) and 1.9(c), or required by Rule 3.3(a) or (b)). The modified sentence would thus read as follows:

[5D] ... *Except as these Rules would permit or require with respect to a current client or when information has become generally known, if* any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent effort to institute or maintain screening will not avoid the firm's disqualification.

Rule 1.6 provides a number of exceptions to the protections usually given to confidential information, including, for example, disclosure to prevent a client from committing a crime or disclosure in order to obtain legal advice about a lawyer's ethical obligations. Disclosure that is permitted by another Rule would not ordinarily be subject to the consequences set forth in the Comment. COSAC believes this qualification was likely implied in any event. (COSAC also proposes identical amendments to Comment [7A] to Rule 1.11, Comment [4C] to Rule 1.12, and Comment [7C] to Rule 1.18.)

In the Public Comment Conflicts Report, COSAC also proposed replacing the phrase "confidential information *about* the matter," which is currently in Comment [5D] to Rule 1.10, with the phrase "confidential information *material* to the matter," so that an immaterial leak or breach in screening procedures would not nullify the entire screen. (The same phrase also appears in Comment [7A] to Rule 1.11, Comment [4C] to Rule 1.12, and Comment [7C] to Rule 1.18.) The NYSBA Ethics Committee disagreed with this proposal. It stated that lawyers and the public were already skeptical about the efficacy of information walls and that adopting a "materiality" standard would weaken the incentive to make sure that walls are impermeable. COSAC is persuaded that adding a materiality standard is unnecessary and potentially unwise, and COSAC has withdrawn that recommendation. The phrase "confidential information about the matter" will therefore remain unchanged in all of the Comments in which it currently appears.

**Proposal to clarify that conflicts based on former-client information solely in databases will not be imputed**

We propose that Rule 1.10(b) be amended to clarify that, when all the lawyers who have worked on a matter have left a firm, the firm will not be disqualified from representing a party adverse to the former client based solely on information residing only in the firm's databases, as long as no lawyer presently at the firm has actual knowledge of, or has accessed, the information in the firm's databases. Under the current version of New York Rule 1.10(b), a law firm is prohibited from representing a person adverse to its former client "if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter." We think that standard is too harsh.

Our proposed amendment codifies the result in a recent New Jersey appellate decision, *Estate of Francis P. Kennedy v. Rosenblatt*, 149 A.3d 5 (N.J. Super. Ct. App. Div. 2016). The court there found that New Jersey's version of this rule was not violated where all the lawyers who had worked on the earlier matter had left the firm, even though the firm continued to maintain materials in its electronic files relating to the former representation, because no lawyer presently at the firm had accessed the electronic files (other than to determine that the files existed). The Superior Court reached that conclusion because New Jersey's version of Rule 1.10(b) refers to the condition that "any *lawyer* remaining in the firm has information protected by [Rule] 1.6 or [Rule] 1.9(c) that is material to the matter" (emphasis added), but New Jersey's version does not refer to the *firm* having such information.

The New Jersey interpretation cannot easily be reached under New York’s current version of Rule 1.10, but the New Jersey approach makes sense in an age when the vast majority of the client information in law firm files is maintained electronically and those files are not typically deleted as lawyers who worked on matters leave the firm. COSAC therefore recommends amending Rule 1.10(b) to accord with New Jersey’s practical approach to electronic files.

**Proposal to move Rule 1.10(h) to Rule 1.8**

Rule 1.10(h) currently reads:

A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

This rule is not a rule governing imputation of conflicts to lawyers in a law firm, but rather a special conflict rule dealing with family conflicts. The rule, which does not appear in the ABA Model Rules at all, presumably appears in Rule 1.10 in order to *avoid* imputation, which would otherwise apply if it appeared in Rule 1.8. If, as we propose, personal conflicts are not subject to imputation, then Rule 1.10(h) can safely be moved to Rule 1.8, which deals with “Current Clients: Specific Conflict of Interest Rules.” That is where the rule logically belongs.

The NYSBA Ethics Committee recommended changing the phrase “the other lawyer” in this sentence to “the related lawyer” for clarity. COSAC does not see this change as necessary or particularly clarifying and therefore recommends no change in the language of Rule 1.10(h).

*Redlined proposal to amend Rule 1.10(a), (b), (c), (h) and (i) and Comments [3], [4], [5], [5A] and [7]*

We propose to revise New York Rule 1.10(a), (b), (c), (h) and (i) and the accompanying Comments (in relevant part) to read as follows:

**(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein, unless:**

**(1) the prohibition is based on a lawyer’s own financial, business, property or other personal interests within the meaning of Rule 1.7(a)(2), and**

**(2) under the circumstances, a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely affected.**

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if ~~the firm or~~ any lawyer remaining in the firm has actual knowledge of, or has accessed, information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless

(1) the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter; or

(2) the newly associated lawyer's current firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the former client to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the former client or is otherwise no longer protected by Rule 1.6;

*[Note from COSAC: Below is a proposed new paragraph (c)(3), which would be combined with paragraph (c)(2) as an alternative to paragraph (c)(2) standing alone. In other words, COSAC is offering two screening choices: paragraph (c)(2)(i)-(iv) alone, or paragraph (c)(2)(i)-(iv) plus paragraph (c)(3).]*

(3) Notwithstanding paragraph (c)(2), the screening measures set forth in subparagraphs (c)(2)(i)-(iv) of this Rule are not available to prevent imputation of conflicts where the matter is a litigation, arbitration or other adjudicative proceeding for which the newly associated lawyer had primary responsibility at the prior firm.

....

~~(h) [Moved to Rule 1.8(l).] A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.~~

(i) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11 and not by this Rule.<sup>8</sup>

#### Comment

....

#### Principles of Imputed Disqualification

....

[3] ~~[Reserved.]~~ The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. For example, where one lawyer in a firm could not provide competent and diligent representation to a given client because of strong political beliefs, but that lawyer will do no work on the matter and the political beliefs of that lawyer are unlikely to materially limit the representation by others in the firm or to adversely affect their independent professional judgment, the firm should not be disqualified. On the other hand, if an opposing corporate party in a matter were owned by a lawyer in the law firm, and there is a significant risk that others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

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

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<sup>8</sup> New paragraph (i) in Rule 1.10 is explained below in the section of this report focusing on COSAC's recommended amendments to Rule 1.11.

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

### Lawyers Moving Between Firms

....

[5] Paragraph (b) permits a law firm, under certain circumstances, to represent a client with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, under Rule 1.7 the law firm may not represent a client with interests directly adverse to those of a current client of the firm. Moreover, the firm may not represent the client where the matter is the same or substantially related to a matter in which (i) the formerly associated lawyer represented the client, and (ii) the firm or any lawyer currently in the firm has actual knowledge of, or has accessed, information protected by Rule 1.6 ~~and~~ or Rule 1.9(c) that is material to the matter.

[5A] If all lawyers who have worked on a matter or have confidential information about a matter have left a firm, then the fact that the law firm retains confidential information in its electronic databases or paper files regarding the matter will not by itself give rise to a conflict as long as (i) no lawyer currently in the firm has reviewed that information, and (ii) the firm takes appropriate steps to limit access to such information. Merely accessing files to determine whether information exists, without reading the confidential information, would not ordinarily constitute reviewing confidential information material to the matter. ~~In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter.~~

[5B] Rule 1.10(c) permits a law firm to represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or the firm with which the lawyer was previously associated, represented a client whose interests are materially adverse to that client, provided that either (i) the newly associated lawyer did not acquire any confidential information of the previously represented client that is material to the current matter, or (ii) the newly associated lawyer is timely and effectively screened from the work on the current matter pursuant to Rule 1.10(c)(2). Situations in which a lawyer may accept employment from an adversary's law firm may arise in many circumstances, such as law firm mergers or geographical moves, or desires for changes in practice areas dictated by personal circumstances and may involve future assignment to matters unrelated to the lawyer's previous work on the matters creating adversity. Nevertheless, despite the possibility of subsequent screening, lawyers must continue to consider the ethical implications of discussing employment with an adversary's counsel while a matter is pending. See Comment [10] to Rule 1.7.

[5C] Paragraph (c)(2) contemplates the use of screening procedures that permit the law firm of a personally disqualified lawyer to avoid imputed disqualification. See Rule 1.0(t) for the definition of "screened" and "screening." A firm seeking to avoid disqualification

under this Rule should consider its ability to implement, maintain, and monitor the screening procedures described by paragraph (c)(2) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. Although the size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (c)(2).

[5D] In order to prevent any lawyer in the firm from acquiring confidential information about the matter from the newly associated lawyer, it is essential that notification be given and screening procedures implemented promptly. If the matter requiring screening is already pending before the personally disqualified lawyer joins the firm, the procedures required by this Rule should be implemented before the lawyer joins the firm. If a newly associated lawyer joins a firm before a conflict requiring screening arises, the requirements of this Rule should be satisfied as soon as practicable after the conflict arises. Except as these Rules would permit or require with respect to a current client or when information has become generally known, if any lawyer in the firm acquires confidential information material to the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not avoid the firm's disqualification. Other factors may affect the likelihood that screening procedures will be effective in preventing the flow of confidential information between the personally disqualified lawyer and other lawyers in the firm in a given matter.

[5E] To enable the former client to determine compliance with the Rule, notice to the former client generally should be given as soon as practicable after the need for screening becomes apparent. Where the notice would disclose confidential information of the firm's current client, however, the firm may postpone providing the required notice until the information is disclosed to the former client or is otherwise no longer protected under Rule 1.6. The notice must be given promptly thereafter in order to obtain the protection from imputation provided by Rule 1.10(c)(2).



*[Note from COSAC: Below is proposed new Comment [5F], which should be adopted only if the House of Delegates also approves both subparagraph (c)(2)(i)-(iv) and new subparagraph (c)(3) (the limiting paragraph). In other words, if the House of Delegates approves subparagraph (c)(2)(i)-(iv) plus subparagraph (c)(3), then COSAC also recommends that the House approve the following new Comment [5F] to explain subparagraph (c)(3).]*

[5F] Paragraph (c)(3) makes clear that the screening procedures set forth in paragraph (c)(2) are ineffective to prevent the imputation of conflicts where a lawyer having primary responsibility for a litigation, arbitration or other adjudicative proceeding moves during the proceeding to a law firm representing a party whose interests are materially adverse to the interests of that lawyer’s former client in the same or a substantially related matter. Screening under the terms described in paragraph (c)(2) and Comments [5C]-[5E] remains available to cure conflicts, however, in (i) all non-litigated matters and (ii) litigated matters where a law firm is hiring lawyers (such as associates or collaterally involved partners) who worked on the matter at the opposing law firm matter but did not have “primary responsibility” for the matter. The lawyer with primary responsibility for the matter will generally be the lawyer who had the primary decision-making role in the matter.

....

#### **Current and Former Government Lawyers**

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

## **Rule 1.11:** **Special Conflicts of Interest for Former and** **Current Government Officers and Employees**

COSAC recommends changes to Rule 1.11 and various Comments. We explain each of these changes below.

### **Proposal to delete Rule 1.11(b)(2) and amend Comment [6] to Rule 1.11**

COSAC proposes the elimination of 1.11(b)(2), which requires that “there are no other circumstances in the particular representation that create an appearance of impropriety” in order for a firm’s screening of a disqualified former government lawyer to prevent imputation. The “appearance of impropriety” standard was intentionally omitted from the ABA Model Rules and has drawn criticism from courts and commentators due to its vagueness and the difficulty of providing any definition, and therefore its inherently subjective and unpredictable application.

The rationale for deleting the phrase from the ABA Model Rules was explained by one commentator as follows:

When it comes to disciplining a lawyer for an appearance of impropriety, the primary criticism is that the standard is too vague and its contours are too difficult to define. The Restatement (Third) of the Law Governing Lawyers asserts that the breadth of the provision “creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it.” Courts in several jurisdictions concurred.

Kathleen Maher, *Keeping Up Appearances*, available at <http://bit.ly/2C2CkXQ>.

COSAC agrees and now recommends that the appearance of impropriety standard be eliminated from Rule 1.11(b). Courts that apply the appearance of impropriety standard in deciding motions for disqualification may still, of course, continue to do so as their jurisdictions’ jurisprudence allows. However, we do not think it advisable to make lawyers and firms subject to discipline under an ethical standard that provides so little guidance as to the contours of its scope. (On the same basis, we also recommended the elimination of Rule 1.12(d)(2)’s reference to “the appearance of impropriety” in the context of various former judges, arbitrators, mediators or other third-party neutrals.)

In tandem with the proposed elimination of 1.11(b)(2) and its reference to an “appearance of impropriety,” we propose the removal of the second, third, and fourth sentences of Comment [6].

#### **Proposal to amend Comment [7A] to Rule 1.11**

The fourth sentence of Comment [7A] to Rule 1.11 currently provides: “If *any* lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of the Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm’s disqualification.” (Emphasis added.) For the reasons set forth in connection with the parallel language in the new proposed Comment [5D] to Rule 1.10, COSAC proposes that this sentence be amended by providing an exception for disclosures required or permitted by other Rules (such as Rules 1.6(b)(4), 1.9, and 3.3(a)-(b)).

Similarly, Rule 1.9(b)(2) provides that a lawyer who changes law firms is barred from representing a client who is adverse to a former client on the same or a substantially related matter only if the lawyer has acquired confidential information “material to the matter,” and Rule 1.9(c)(2) permits a lawyer who has formerly represented a client to “reveal confidential information of the former client protected by Rule 1.6 *except as these Rules would permit or require with respect to a current client.*” (Emphasis added.)

In COSAC's view, the Rules should not require screening procedures to provide greater protection for confidential information than Rules 1.6 and 1.9 provide.

The language of Comment [7A] to Rule 1.11 is repeated in Comments [4C] to Rule 1.12 and [7C] to Rule 1.18. COSAC is making the same recommendation with respect to those Comments, and proposes the same revised language for the new Comment [5D] to Rule 1.10 discussed above.

**Proposal to amend Rule 1.11(d) and Comments [2], [3], [5], [9] and [9A] to Rule 1.11**

The text of the present Rules does not address the extent to which Rules 1.7, 1.9 and 1.10 apply to current government lawyers. The ABA Model Rules provide in Rules 1.10(d) and 1.11(d) that current government lawyers are governed by Rule 1.7 and 1.9 but not by Rule 1.10. Comment [2] to ABA Rule 1.11 explains,

[2] ... Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

There is no parallel language in the New York Rules. As a result, Comment [9B] to the New York Rules provides that all three Rules apply fully to current government lawyers, which means that if a lawyer enters a government office that is conducting a matter adverse to the lawyer's former client and the entering lawyer is conflicted from working on the matter, then the entire government office is disqualified unless the former client consents. While this parallels the treatment of private lawyers, it has at least two anomalous effects: (1) lawyers *leaving* government jobs for private practice can resolve conflicts by screening and providing notice to the agency under Rule 1.11(b), while lawyers *entering* government must obtain consent from their former client or the entire office is conflicted; and (2) there is no applicable rule of necessity by which the particular lawyer or anyone in the government office could work on the matter if no one else would be authorized to act, notwithstanding that Rule 1.11 has a so-called "rule of necessity" exception for a closely analogous situation. Specifically, Rule 1.11(d) bars a government lawyer from working on any matter on which he worked personally and substantially in private practice "unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter."

Further, COSAC believes that government law offices in New York do not agree with (or rigorously apply) the interpretation of the Rule in Comment [9B], but rather often simply recuse an incoming lawyer who worked on conflicting matters in private practice. This recusal practice is common even if the government office is directly and materially adverse to the incoming lawyer's former private client. New York case law seems to be consistent with this recusal practice. Taking into account the nature of the conflict and the size of the government law office, New York courts have frequently declined to disqualify counsel, or have declined to

reverse convictions, where a conflicted government lawyer did not participate in the matter causing a conflict in a government law office.<sup>9</sup>

In 2008, COSAC proposed an approach stating that Rules 1.7 and 1.9 apply to current government lawyers, but Rule 1.10 does not. As a corollary, COSAC also provided for screening within a government office to cure any conflicts, with notice to any affected former client of the government lawyer. The New York Courts declined to adopt this change at that time, but COSAC believes the Courts should reconsider that position in view of the anomalies set forth above.

COSAC thus proposes to amend Rule 1.11(d) as follows:

- (1) state explicitly that Rules 1.7 and 1.9 apply to government lawyers (so, for example, government lawyers may not act if they have a personal conflict or former-client conflict), but also state explicitly that Rule 1.10 does not apply to government lawyers;
- (2) make clear that a conflict under Rules 1.7 and 1.9 can be overridden in the case of necessity (*i.e.*, where no one else can act); but
- (3) provide for screening procedures within the government law office that parallel those applicable to former government lawyers in private law firms; and
- (4) insert into a new black letter paragraph into Rule 1.10 making clear that in private firms and in government law offices, disqualification based on the presence of current or former government lawyers is governed by Rule 1.11 and not by Rule 1.10.

These changes will avoid confusion about which Rules apply to lawyers currently and formerly employed in government.

The new black letter paragraph that COSAC recommends adding to Rule 1.10 is modeled on ABA Model Rule 1.10(d). This new paragraph will make clear that when former or current government lawyers are associated in a firm (including a government law office), disqualification is governed by Rule 1.11 and not by Rule 1.10 (a position now stated only in the Comments to New York Rule 1.10). The new paragraph would duplicate the proposed new provision in Rule 1.11(d)(2), but it would also make clear that imputation of the conflicts of former government lawyers is governed by Rule 1.11(b) and not by Rule 1.10. This new provision, and an accompanying change to Comment [7] to Rule 1.10, are set forth above together with other proposed changes to Rule 1.10.

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<sup>9</sup> See, e.g., *People v. English*, 88 N.Y.2d 30, 34 (1996) (no reversal of conviction where defendant's former lawyer was employed by a "huge" metropolitan DA's office and assigned to bureaus that had nothing to do with prosecution); *People v. Dennis*, 141 A.D.3d 730, 733 (2d Dep't 2016) (same); *In re Stephanie X*, 6 A.D.3d 778, 780 (3d Dep't 2004) (concluding that former-client conflicts of current government lawyers not imputed under the former Code of Professional Responsibility). Cf. *People v. Gaines*, 277 A.D.2d 900, 901(4th Dep't 2000) (conviction reversed where conflicted lawyer joined a smaller DA's office).

In its Public Comment Conflicts Report, COSAC recommended that there be no provision for screening in a government law office to cure a conflict arising from Rule 1.9. This position was driven by the fact that the New York Courts had rejected the screening proposal when COSAC proposed it in 2008. The NYSBA Ethics Committee commented that the Courts' rejection appears to have been based on (i) a misapprehension that conflicts would not be imputed within government law offices, which is the approach in the ABA Model Rules, and on (ii) a concern about the requirement that a government lawyer's former clients be notified of screening procedures being implemented. We are persuaded by the NYSBA Ethics Committee's comment, and we conclude that government law offices hiring private lawyers should be placed in the same position as private law firms hiring government lawyers: any conflicts arising out of their former work can be cured by screening, with notice to affected clients where possible.

After this Report was presented to the House of Delegates for informational purposes in November 2018, COSAC refined the proposed screening provisions in proposed Rule 1.11(e) in one respect. As originally proposed, the provisions would have limited the notice requirements to situations in which the conflict arose under Rule 1.9, which addresses conflicts with former clients. The intention was to avoid imputation of personal-interest conflicts under Rule 1.7(a)(2), where the government lawyer is barred from working on the matter in the government law office because of a risk that the lawyer's professional judgment will be adversely affected by the lawyer's own financial, business, property or other personal interests. But in New York many part-time government lawyers conduct a private law practice as well, and a conflict with a current client could arise between the lawyer's part-time private practice and the lawyer's part-time government service. *See, e.g.*, N.Y. State Ethics Op. 859 (2011) (discussing conflicts arising from part-time practice as a government lawyer). In such cases, the lawyer's current private client should receive notice of the screening procedures put in place within the government law office, just as a former private client would receive such notice. A current private client of a part-time government lawyer should not have lesser rights than a former client of that same lawyer. COSAC has thus eliminated language in the prior draft of Rule 1.11(e) that had limited the notice requirement to former-client conflicts arising under Rule 1.9.

The NYSBA Ethics Committee proposed a slightly different screening procedure from the procedure applicable to government lawyers who transfer to a private law firm. The difference is that the NYSBA Ethics Committee's proposed procedure for government law offices would include (in addition to screening protocols and notice to the affected former client) an express requirement that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation." The NYSBA Ethics Committee apparently believes that this additional requirement (which was part of COSAC's 2008 proposals) would serve as a reminder that screening will not work if, for example, the conflicted lawyer occupies a senior position in the agency, so that other lawyers might be influenced by the screened lawyer's loyalty to, or information about, a former client.

COSAC has weighed these considerations and concludes that this additional requirement regarding competent and diligent representation is unnecessary, because Rules 1.1 and 1.3

already require lawyers in all circumstances to provide competent and diligent representation. COSAC also concludes that the additional requirement is unwise, because no such requirement appears in Rule 1.11(b) (which applies to conflicts arising when former government lawyers transition to private law practice) or in Rule 1.9 (which applies when lawyers obtain consent to a waive a former-client conflict under Rule 1.9). COSAC believes there is no reason to have a more stringent screening procedure for government law offices than for private law firms in similar circumstances. Moreover, COSAC is also proposing new Comments [9B] and [9C], modeled on COSAC's 2008 proposals, to explain the government agency screening procedures.

**Proposal to modify the notice requirement of Rule 1.11(b) and Comment [7B] to protect confidential information**

For the reasons set forth above in connection with Rule 1.10 above, COSAC proposes to modify Rule 1.11(b) and the accompanying Comment [7B] to permit the law firm to postpone sending the required notice of screening to the lateral-hire's former government employer if the notice would disclose confidential information protected by Rule 1.6. But the notice must be sent promptly after such confidential information becomes known to the government agency, or after the information ceases to be protected under Rule 1.6 for some other reason.

**Proposal to insert a reference to law clerk employment applications**

For the reasons set forth below in connection with Rule 1.12 , COSAC proposes to add a provision to Rule 1.12(c) to specifically address employment applications by law clerks to parties or counsel involved in a matter in which the law clerk is participating, in line with the ABA Model Rules. COSAC also proposes to include in Rule 1.11(d) a reference to that new provision, as in the ABA Model Rules.

*Redlined proposals to amend Rule 1.11(b) and (d) and Comments [2], [3], [5], [6], [7A], [7B], [9], [9A] and [9B] and add Comment [9C] to Rule 1.11*

Thus, COSAC recommends that Rule 1.11(b) and (d) and the accompanying Comments ~~should~~ be amended to provide as follows:

**(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless the firm acts promptly and reasonably to:**

**~~(1) the firm acts promptly and reasonably to:~~**

~~(i)~~ (1) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

~~(ii)~~ (2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

~~(iii)~~ (3) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

~~(iv)~~ (4) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6, then the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the government agency or is otherwise no longer protected by Rule 1.6.; ~~and~~

~~(2) there are no other circumstances in the particular representation that create an appearance of impropriety.~~

....

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee ~~shall not~~:

(1) is subject to Rules 1.7 and 1.9 but is not subject to Rule 1.10;

~~(1)(2) shall not~~ participate in a matter, unless under applicable law no one is (or by lawful delegation may be) authorized to act in the lawyer's stead in the matter, in which if the lawyer either (i) has a conflict under Rule 1.7 or 1.9, or (ii) participated personally and substantially in the matter while in private practice or nongovernmental employment; and unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

~~(2)(3) shall not~~ negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment as permitted by Rule 1.12(c) and subject to the conditions stated therein.

(e) When a lawyer is disqualified from representation under paragraph (d), no lawyer serving in the same government office, agency or department may

knowingly undertake or continue representation in the matter unless the office, agency or department acts promptly and reasonably to:

(1) notify, as appropriate, lawyers and nonlawyer personnel within the office, agency or department that the personally disqualified lawyer is prohibited from participating in the matter;

(2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the office; and

(3) give written notice to any affected current or former client to enable it to ascertain compliance with the provisions of this Rule, except (i) if the notice to such client is prohibited by law no notice shall be given or (ii) if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to such client or is otherwise no longer protected by Rule 1.6.

*[Note from COSAC: To make room for new paragraph (e), existing subparagraphs (e) and (f) in Rule 1.11 would be re-designated as subparagraphs (f) and (g).]*

## Comment

....

[2] Paragraphs (a), (d), (e) and (f) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 does not apply to the conflicts of interest addressed by this Rule. Rather, pParagraph (b) sets forth special imputation rules for former government lawyers, with screening and notice provisions, ~~and Rule 1.10 is not applicable to these conflicts.~~ See Comments [6]-[7B] concerning imputation of the conflicts of former government lawyers.

[3] Paragraphs (a)(2), (d), (e) and (f) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so.



[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a municipality and subsequently is employed by a federal agency. The question whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. *See* Rule 1.13, Comment [9].

### **Former Government Lawyers: Using Screening to Avoid Imputed Disqualification**

[6] Paragraphs (b) and (c) contemplate the use of screening procedures that permit the law firm of a personally disqualified former government lawyer to avoid imputed disqualification. ~~Nevertheless, there may be circumstances where, despite screening, representation by the personally disqualified lawyer's firm could still undermine the public's confidence in the integrity of the legal system. Such a circumstance may arise, for example, where the personally disqualified lawyer occupied a highly visible government position prior to entering private practice, or where other facts and circumstances of the representation itself create an appearance of impropriety. Where the particular circumstances create an appearance of impropriety, a law firm must decline the representation.—~~*See* Rule 1.0(t) for the definition of “screen” and “screening.”

....

[7A] ... Except as these Rules would permit or require with respect to a current client or when information has become generally known, ~~I~~if any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of the Rule cannot be met, and any subsequent efforts to institute or maintain screening will not ~~be effective in~~ avoiding the firm's disqualification.

[7B] To enable the government agency to determine compliance with the Rule, notice to the appropriate government agency generally should be given as soon as practicable after the need for screening becomes apparent. Where the notice would disclose confidential information of the firm's current client, however, the firm may postpone providing the required notice until the information is disclosed to the government agency or is otherwise no longer protected under Rule 1.6. The notice must be given promptly thereafter in order to obtain the protection from imputation provided by Rule 1.11(b).

...

[9] Paragraphs (a) and (d) ~~do~~es not prohibit a lawyer from representing a private party and a government agency jointly when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

### **Current Government Lawyers: Using Screening to Avoid Imputed Disqualification**

[9A] Under paragraph (d), Rule 1.9 applies to a lawyer currently serving as a government officer or employee. The lawyer is therefore barred from participating in a matter in which the government agency is proceeding adversely to the lawyer's former

client if the lawyer previously represented the former client in the same or a substantially related matter, unless the former client consents in accordance with Rule 1.9(a). However, under paragraph (d)(2)(i), the lawyer would not be barred from participating in a matter adverse to the former client where, under applicable law no one else is, or by lawful designation could be, authorized to act in the lawyer's stead. (This exception is often called the "Rule of Necessity.") Separately, pParagraph (d)(12)(ii) prohibits a lawyer who is currently serving as a government officer or employee from participating in a matter in which the lawyer participated personally and substantially while in private practice or other non-governmental employment, unless, again, under applicable law no one else is, or by lawful designation could be, authorized to act in the lawyer's stead. Informed consent on the part of the government agency is not required where such necessity exists. ~~Conversely~~, but informed consent does not suffice to overcome the conflict in the absence of necessity.

[9B] Paragraph (e) permits a current government lawyer to undertake or continue a representation notwithstanding the disqualification of another lawyer in the same office, agency or department if the office acts promptly and reasonably to comply with the notice and screening requirements of paragraph (e).

[9C] If the conflict arises from the government lawyer's former representation of a client, or if the conflict arises from a part-time government lawyer's current representation of another client, then the government office, agency or department is required to notify the affected other client of the circumstances warranting the use of screening and the actions that have been taken to comply with the requirements of this Rule, unless providing notice would violate a law or would violate Rule 1.6. The requirement that the government lawyer's former client or other current client be notified is suspended if notice would make information public that the agency is required to keep secret. For example, a prosecutor's office would not be required to notify a personally disqualified lawyer's former client if that former client is now the subject of a pending grand jury investigation.

~~[9B] Unlike paragraphs (a) and (e), paragraph (d)(1) contains no special rules providing for imputation of the conflict addressed in paragraph (d)(1) to other lawyers in the same agency. Moreover, Rule 1.10 by its terms does not apply to conflicts under paragraph (d)(1). Thus, even where paragraph (d)(1) bars one lawyer in a government law office from working on a matter, other lawyers in the office may ordinarily work on the matter unless prohibited by other law. Where a government law office's representation is materially adverse to a government lawyer's former private client, however, the representation would, absent informed consent of the former client, also be prohibited by Rule 1.9. Rule 1.10 remains applicable to that former client conflict so as to impute the conflict to all lawyers associated in the same government law office. In applying Rule 1.10 to such conflicts, see Rule 1.0(h) (defining "firm" and "law firm").~~

## **Rule 1.12**

### **Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals**

COSAC recommends changes to Rule 1.12(c) and (d) and to Comment [4C] to Rule 1.12. We explain each of these changes below.

#### **Proposal to amend Rule 1.12(c) to address law clerk employment applications**

COSAC recommends including a provision addressing law clerk employment negotiations or applications with a party, law firm, or lawyer currently involved in a matter before the law clerk's employer (such as a judge or arbitrator). Currently, New York Rule 1.12(c) is silent on law clerks—it simply provides that a lawyer “shall not negotiate for employment with parties or their lawyers in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.” This same language appears in the ABA Model Rules, but the ABA Rules go on to address law clerk employment applications in a separate sentence.

As commentators have noted, the ABA Model Rule provision for law clerks is more relaxed than the rule for judges. Unlike judges, law clerks can “negotiate over future employment even when they are personally involved in a matter, but they are required to disclose these negotiations to the current employer ... [in order to] allow the judge to factor in the possibility of bias in the clerk's work and to respond accordingly”. GEOFFREY HAZARD, WILLIAM HODES & PETER JARVIS, *THE LAW OF LAWYERING* § 17.06 (4th ed. 2017). COSAC proposes adopting an additional sentence from the ABA Rules, with one modification, which is to add a reference to any rules that tribunals or agencies may have adopted to deal with law clerk employment negotiations and applications. COSAC suggests adding the reference, because court rules and rules of other tribunals and agencies frequently address this issue.

The new sentence in Rule 1.12(c) would say:

A lawyer serving as a law clerk to a judge or other adjudicative officer may, subject to any applicable tribunal or agency rules, negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

The NYSBA Ethics Committee proposed three further revisions to the proposed new sentence and accompanying Comment: (i) add a reference in the Rule to lawyers in a pool serving multiple judges or other adjudicative officers; (ii) add a sentence to the Rule specifying that the law clerk must abide by any determination of the appropriate judge requiring that the clerk be screened from a particular matter; and (iii) add a Comment to the Rule noting, among other

things, that the Office of Court Administration’s Advisory Committee on Judicial Ethics has published opinions recommending that a law clerk be “insulated” or “screened” from the matter.

COSAC does not believe these additional features are necessary or appropriate. The rule change that COSAC recommends simply leaves the requirements for law clerks applying or negotiating for jobs in the hands of the judge for whom the law clerk works. The extent of the ethical requirement is that the law clerk must inform the judge. We believe this is the appropriate extent of regulation. In COSAC’s view, the ethics rules should not urge the judge to take any particular step, such as screening, and should not otherwise interfere in how judges run their chambers. We also think law clerks working in pools are clearly already covered by the language in COSAC’s proposal, and we think that the pool situation is not prominent enough to warrant specifically addressing.

**Proposal to modify the notice requirement of Rule 1.12(d) and Comment [5] to protect confidential information**

For the reasons set forth above in connection with Rule 1.10 above, COSAC proposes to modify Rule 1.12(d) and the accompanying Comment [5] to Rule 1.12 to permit the law firm to postpone sending the required notice of screening to the parties and the tribunal if the notice would disclose confidential information protected by Rule 1.6.

**Proposal to amend Rule 1.12(d) to remove the “appearance of impropriety” standard**

For the reasons set forth in connection with the proposed amendment to Rule 1.11(b) above, COSAC recommends deleting the reference to the “appearance of impropriety” as one ground for disqualifying a firm that otherwise maintains a screen adequate to protect against disqualification under Rule 1.12(d). No Comment requires amendments on account of removing this language.

**Proposal to amend Comment [4C] to Rule 1.12**

For the reasons set forth in connection with the parallel language in the new proposed Comment [5D] to Rule 1.10, COSAC recommends that the fourth sentence of Comment [4C] to Rule 1.12, dealing with arguable breaches of screening procedures, be amended to provide an exception for disclosures required or permitted by other Rules (such as Rules 1.6(b)(4), 1.9, and 3.3).

*Redlined proposal to amend Rule 1.12(c) and (d) and Comments [4C] and [5]*

Thus, COSAC recommends that Rule 1.12(c) and (d), the fourth sentence of Comment [4C] and Comment [5] should provide as follows:

- (c) **A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may, subject to any applicable tribunal or agency rules, negotiate for employment with a party or lawyer involved in a**

matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless the firm acts promptly and reasonably to:

~~(1) the firm acts promptly and reasonably to:~~

~~(i) (1) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;~~

~~(ii) (2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;~~

~~(iii) (3) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and~~

~~(iv) (4) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the parties and tribunal or is otherwise no longer protected by Rule 1.6; and~~

~~(2) there are no other circumstances in the particular representation that create an appearance of impropriety.~~

#### Comment

....  
[4C] ...Except as these Rules would permit or require with respect to a current client or when information has become generally known, If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of the Rule cannot be met, and any subsequent efforts to institute or maintain screening will not ~~be effective in~~ avoid~~ing~~ the firm's disqualification.

...  
[5] To enable the tribunal to determine compliance with the Rule, notice to the parties and any appropriate tribunal generally should be given as soon as practicable after the need for screening becomes apparent. Where the notice would disclose confidential information of the firm's current client, however, the firm may postpone providing the required notice until the information is disclosed to the parties and the tribunal or is

otherwise no longer protected under Rule 1.6. The notice must be given promptly thereafter in order to obtain the protection from imputation provided by Rule 1.12(d).

## **Rule 1.18**

### **Duties to Prospective Clients**

For the reasons set forth above in connection with Rule 1.10, *supra*, COSAC proposes to modify Rule 1.18(d) and the accompanying Comment [8] to permit the law firm to postpone sending the required notice of screening to the prospective client if the notice would disclose confidential information protected by Rule 1.6. Thus, Rule 1.18(d)(2)(iv) and Comment [8] would read:

**(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:**

...

**(iv) written notice is promptly given to the prospective client, except that if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the prospective client or is otherwise no longer protected by Rule 1.6; and**

...

[8] Notice under paragraph (d)(2), including a general description of the subject matter about which the lawyer was consulted and of the screening measures employed, generally should be given as soon as practicable after the need for screening becomes apparent. Where the notice would disclose confidential information of the firm's current client, however, the firm may postpone providing the required notice until the information is disclosed to the prospective client or is otherwise no longer protected under Rule 1.6. The notice must be given promptly thereafter in order to obtain the protection from imputation provided by Rule 1.18(d).

For the reasons set forth with respect to the the parallel language in the new proposed Comment [5D] to Rule 1.10, *supra*, COSAC also recommends amending Comment [7C] to Rule 1.18 to read as follows:

[7C] ... Except as these Rules would permit or require with respect to a current client or when information has become generally known, if any lawyer in the firm acquires confidential information about the matter from the disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not ~~be effective in~~ avoiding the firm's disqualification.

## **Rule 6.5**

### **Participation in Limited Pro Bono Legal Services Programs**

COSAC proposes the following changes to Rule 6.5 and its Comments:

#### **Proposal to eliminate references to Rule 1.8 in Rule 6.5(a)(1)**

Rule 6.5 provides that Rule 1.8 does not apply to a short-term limited representation unless the lawyer knows of a conflict at the *outset* of the representation. Rule 1.8, however, contains a set of rules that deal with conflicts arising out of conduct by a lawyer *during* the course of a representation, such as business transactions with the client, advancing financial assistance to a client in litigation, and soliciting gifts from a client. All of these and other restrictions in Rule 1.8 should apply to a short-term limited scope representation, regardless of whether the lawyer knew that there was a conflict at the outset.

#### **Proposal to delete “conflicts as ... defined in these Rules” in Rule 6.5(a)(1)**

COSAC proposes to eliminate from Rule 6.5(a)(1) the explanatory reference “concerning restrictions on representations where there are or may be conflicts of interests *as that term is defined in these Rules.*” (Emphasis added.) That reference is incorrect. The term “conflicts of interest” is not defined anywhere in the New York Rules. Moreover, the words are inconsistent with the style of the Rules, which nowhere else contain a short-hand description of the conflicts rules.

#### **Proposal to change “actual knowledge” to “knows” in Rule 6.5(a)(1) and (a)(2)**

Rule 6.5(a)(1)-(2) refers to a lawyer having “actual knowledge” of certain conflicts. Because Rule 1.0(k) defines “know” or “knows” to mean “*actual knowledge* of the fact in question,” COSAC proposes to replace the phrase “if the lawyer *has actual knowledge*” with the phrase “if the lawyer *knows.*”

#### **Proposal to change “affected by” to “disqualified by” in Rule 6.5(a)(2)**

Rule 6.5(a)(2) refers to knowledge that “another lawyer associated with the lawyer in a law firm is *affected by* Rules 1.7, 1.8 and 1.9.” ABA Model Rule 6.5 uses the term “disqualified by,” which is a more precise and accurate term. The term “affected by” in Rule 6.5(a)(2) made sense when Rule 6.5 referred to Rule 1.8, because the provisions of Rule 1.8 “affect” a lawyer’s conduct without disqualifying the lawyer – but if the reference to Rule 1.8 is deleted from Rule 6.5 as we recommend, then the word “disqualified” is more accurate than the word “affected.”

#### **Proposal to change “Rules 1.7 and 1.9” to “Rule 1.7 or 1.9” in Rule 6.5(a)(2)**

If the references to Rule 1.8 are deleted, Rule 6.5(a)(2) will end with the phrase “disqualified by Rules 1.7 and 1.9.” COSAC proposes changing the phrase “Rules 1.7 *and* 1.9” to the phrase

“Rule 1.7 *or* 1.9,” because the disqualification would likely be under either Rule 1.7 or Rule 1.9, but not both.

**Proposal to change “Rules 1.7 and 1.9” to “Rule 1.10.” in Rule 6.5(b)**

Rule 6.5(b) states: “Except as provided in paragraph (a)(2), Rules 1.7 and 1.9 are inapplicable to a representation governed by this Rule.” The reference to paragraph (a)(2) is in error, because Rule 6.5(a)(2) does not provide that Rules 1.7 and 1.9 would apply to the representation. Rather, Rule 6.5(a)(2) deals with whether *Rule 1.10* applies to the representation. COSAC therefore proposes inserting Rule 1.10 in place of the reference to Rules 1.7 and 1.9.

As so amended, Rule 6.5(b) would make clear that any conflicts arising out of a short-term limited representation ordinarily would not be imputed to other lawyers in the firm. That is consistent with the likely reading of Rule 6.5(a) even absent Rule 6.5(b), because Rule 6.5(a) expressly eliminates conflicts under Rule 1.7 and 1.9 that would otherwise disqualify the short-term-limited-representation lawyer. Nevertheless, Rule 6.5(b) serves a useful purpose by emphasizing the lack of imputation. (Also, amended Rule 6.5(b) would complement the amendments COSAC proposes to Rule 6.5(e) below.)

**Proposal to address situations not clearly dealt with in Rule 6.5(e)**

Rule 6.5(e) addresses what happens if, during the course of a short-term limited scope representation, a lawyer providing short-term services becomes aware of a conflict of interest under Rule 1.7 or 1.9 that precludes further representation. In that circumstance, Rule 6.5(e) currently says: “This Rule shall not apply.” That leaves an ambiguity as to whether Rule 1.10 would apply with full force in that circumstance.

If Rule 1.10 would apply with full force (as the current language seems to suggest), that would require the short-term lawyer’s firm to enter the short-term limited scope representation into the firm’s conflict checking system, as required by Rule 1.10(e), even though the lawyer may not have gathered the information necessary to do that. It would also mean that, to comply with Rules 1.9 and 1.10(a), the firm would need to obtain the informed consent of its now-former short-term client before continuing to represent the firm’s ongoing client. COSAC does not believe that the drafters (the New York Courts) intended that harsh result. The likely intent was simply that Rule 6.5 would *no longer* apply (*i.e.*, would “cease to apply”) and would thus no longer allow the short-term limited representation to *continue* without appropriate a waiver (*i.e.*, informed consent) from the former client pursuant to Rule 1.9. The changes we propose make this result clear.

In addition, a New York State Bar Association ethics committee opinion, N.Y. State 1012 (2014), raised two situations that are not clearly dealt with in Rule 6.5(e): (i) the situation where the *short-term lawyer* later undertakes a new representation that is both adverse to the former client and substantially related to the former representation, and (ii) the situation where *another lawyer* in the firm undertakes such a new representation. Opinion 1012 concluded that the short-term lawyer personally should be precluded from participating in such a new adverse and substantially related representation, but that other lawyers in the firm should not be precluded. (In other words, the short-term lawyer’s conflict would not be imputed to the entire firm.)



Nothing in the language of Rule 6.5 makes that result clear, however, if no conflict existed *during* the limited short-term representation.

Indeed, because Rule 6.5(a)(1) states that Rule 1.9 does not apply to the representation in that circumstance, nothing appears to prevent the short-term lawyer from taking on a new engagement adverse to the former short-term client. COSAC's proposed revision of Rule 6.5(e) remedies this problem as well, so that the short-term lawyer is personally barred from representing another client adverse to the former short-term client in a substantially related matter, but other lawyers in the firm (except any who have learned confidential information of the former client) are not barred. A new Comment [4A] to Rule 6.5 would explain the operation of Rule 6.5(e).

In addition, COSAC proposes to replace the narrow term "court" in Rule 6.5(e) with the broader term "tribunal," a term defined in Rule 1.0(w) to include not only courts but also arbitrators, administrative agencies, and other bodies "acting in an adjudicative capacity." Using the word "tribunal" reflects that the short-term representation might be before, for example, an administrative tribunal, such as an unemployment compensation hearing officer, that might not be considered a "court."

The changes that COSAC proposes would align New York's Rule 6.5 more closely with ABA Model Rule 6.5, thus giving New York lawyers access to a wider range of ethics opinions and other sources interpreting Rule 6.5.

*Redlined proposal to amend Rule 6.5 and Comments [3], [4], [4A] and [5]*

Thus, COSAC recommends that Rule 6.5 and accompanying Comments (in relevant part) read as follows:

**(a) A lawyer who, under the auspices of a program sponsored by a court, government agency, bar association or not-for-profit legal services organization, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:**

**(1) shall comply with Rules 1.7, ~~1.8~~ and 1.9, ~~concerning restrictions on representations where there are or may be conflicts of interest as that term is defined in these Rules,~~ only if the lawyer ~~has actual knowledge~~ knows at the time of commencement of representation that the representation of the client involves a conflict of interest; and**

**(2) shall comply with Rule 1.10 only if the lawyer ~~has actual knowledge~~ knows at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is ~~affected~~ disqualified by Rules 1.7, ~~1.8 and~~ or 1.9.**

**(b) Except as provided in paragraph (a)(2), ~~Rule 1.7 and Rule 1.9 are~~ Rule 1.10 is inapplicable to a representation governed by this Rule.**

(c) Short-term limited legal services are services providing legal advice or representation free of charge as part of a program described in paragraph (a) with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance.

(d) The lawyer providing short-term limited legal services must secure the client's informed consent to the limited scope of the representation, and such representation shall be subject to the provisions of Rule 1.6.

(e) This Rule shall ~~not cease to~~ apply where the ~~court-tribunal~~ before which the matter is pending determines that a conflict of interest exists or, if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation, but Rule 1.10 shall remain inapplicable to the representation conducted under this Rule.

(f) A lawyer who has represented a client under this Rule, or who has obtained confidential information of the client as a result of such representation, shall not thereafter represent another client if the lawyer knows that the subsequent representation would violate Rule 1.9.

#### Comment ....

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7,~~1.8~~ and 1.9 only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and requires compliance with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is ~~affected~~ disqualified by these Rules.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rules ~~1.7 and 1.9 are~~ 1.10 is inapplicable to a representation governed by this Rule, except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 only when the lawyer knows at the time of commencement of the representation that the lawyer's firm is ~~affected~~ disqualified by Rules 1.7,~~1.8~~ or 1.9.

[4A] If a tribunal determines or a lawyer comes to know during the course of the short-term limited representation that a conflict exists precluding continued representation, then Rule 6.5 will cease to provide a safe-harbor for the short-term limited representation, but the conflict arising from the short-term limited representation will not be imputed to other lawyers associated in the firm. Thus, a law firm need not record short-term limited representations in the conflicts-checking system that Rule 1.10(e) requires the law firm to maintain, and conflicts discovered during short-term limited

representations will not restrict lawyers who are associated in the firm from representing other clients. But in these circumstances, or where the lawyer learns later of a conflict created by the short-term limited representation, the lawyer who personally rendered legal services during a short-term limited representation (and any other lawyer associated in the firm who obtained any of the short-term client's confidential information) will continue to be restricted by Rule 1.9 from knowingly undertaking a future representation that creates a conflict with the former short-term client, unless the former short-term client provides informed consent to the conflict pursuant to Rule 1.9.







# **MEMORANDUM**

January 3, 2019

**To:** NYSBA Executive Committee

**Cc:** Kathy Baxter, NYSBA General Counsel

**From:** NYSBA Committee on Standards of Attorney Conduct (“COSAC”)  
Roy D. Simon, Co-Chair of COSAC  
Barbara S. Gillers, Co-Chair of COSAC  
Joseph E. Neuhaus, Chair of COSAC Review Committee

**Subject:** COSAC Proposals Regarding Rules 1.16, 3.3, 3.4, and 3.6

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The New York State Bar Association’s Committee on Standards of Attorney Conduct (“COSAC”) is engaged in a comprehensive review of the New York Rules of Professional Conduct (the “Rules”). On July 19, 2018, COSAC circulated for public comment the proposals below to amend the Rules 1.16, 3.3, 3.4, and 3.6 of the New York Rules of Professional Conduct and related Comments. COSAC did not receive any public comments during the 90-day comment period.

COSAC presented the proposals to the House of Delegates at its November 2018 meeting for informational purposes. During the discussion in the House of Delegates, one member of the House expressed opposition to COSAC’s proposal (pp. 4-7 below) to insert a new clause into Rule 3.3(c) providing that a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct before a tribunal ends at the conclusion of the proceeding. (The current version of Rule 3.3(c) does not specify any termination date for that duty.) COSAC acknowledges this member’s concern but has not revised its proposal. Another House member pointed out the significance of COSAC’s proposed amendments to Rule 3.4(e) (pp. 8-9 below) but did not take a position on it.

COSAC is now forwarding this report to the Executive Committee of the Association for consideration by the House of Delegates at its January 2019 Meeting. Below are COSAC’s proposals in the same form in which they were circulated for public comment and presented to the House of Delegates in November 2018. We summarize the issues that led COSAC to propose each particular amendment, and set out the proposed amendments in legislative style, striking out deleted language (in red) and underscoring added language (in blue).

## **Summary of Proposals**

COSAC proposes the following changes to the black letter Rules, along with corresponding changes to the Comments:

- **Rule 1.16(c)(5).** Amend the test for when a lawyer may withdraw because a client has failed to pay fees. The existing test permits withdrawal only when a client “deliberately disregards” an agreement or obligation to the lawyer as to expenses or fees. The amended test would instead permit a lawyer to withdraw if “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.”
- **Rule 3.3(c).** Insert a proviso that a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct before a tribunal ends at the conclusion of the proceeding.
- **Rule 3.4(a).** Insert a new provision prohibiting a lawyer from knowingly participating in or counseling the “the unlawful destruction or unlawful deletion of any document having potential evidentiary value.”
- **Rule 3.4(e).** Amend the existing prohibition on presenting or threatening “criminal charges solely to obtain an advantage in a civil case” so that it prohibits presenting “criminal *or disciplinary* charges to obtain an advantage in a civil matter, *if those charges are not advanced in good faith or are unrelated to the civil matter.*”
- **Rule 3.6(c).** Amend the introduction to the list of permitted forms of trial publicity in Rule 3.6(c) so that it reads “*Notwithstanding* paragraph (a)” rather than “Provided that the statement complies with paragraph (a).” The amendment will make Rule 3.6(c) a true safe harbor.

## **Rule 1.16**

### **Declining or Terminating Representation**

New York Rule 1.16(c)(5) currently provides that a lawyer may withdraw from representing a client (with court permission, if necessary) when “the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.” When read literally, this standard can prevent an attorney from seeking to withdraw if a client cannot afford to pay fees or expenses. In *United States v. Parker*, 439 F.3d 81 (2d Cir. 2006), for example, the court said: “Non-payment of legal fees, without more, is not usually a sufficient basis to permit an attorney to withdraw from representation.” *See also* N.Y. State 783 n.2 (2005) (withdrawal may “not necessarily be appropriate where the client is financially unable to pay”); N.Y. State 719 (“Mere failure to pay an agreed fee, which is not deliberate, is not a ground for requesting” permission to withdraw). The “deliberately disregards” standard thus has the potential to create a hardship on an attorney where a client is willing, but nonetheless unable, to meet financial obligations to the attorney.

However, many courts and ethics opinions have recognized this potential hardship for attorneys who are not getting paid and have interpreted the phrase “deliberately disregards” in a manner more favorable to attorneys. The most expansive discussion of “deliberately” appears in N.Y. State 598 (1989), where the question was: “May an attorney withdraw from employment in a litigated matter because of nonpayment of fees where the client is financially unable to make



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payment?” The Committee recognized that “a client’s “mere failure to pay an agreed fee, which is not deliberate,” does not warrant withdrawal by the attorney (*citing* N.Y. State 212 (1971)). Nevertheless, the Committee said:

[W]e conclude that *a client’s non-payment of fees because of an inability to pay may in certain circumstances be deemed a “deliberate” breach of the client’s obligation* to counsel and, therefore, warrant permissive withdrawal from the representation by counsel. Such withdrawal will be appropriate in a litigated matter only if the attorney has provided clear notice to the client of the attorney’s desire to withdraw, taken reasonable steps to avoid foreseeable prejudice to the client and obtained permission from the tribunal to withdraw .... [Emphasis added.]

Noting that the “key word is ‘deliberately,’” the Committee in N.Y. State 598 elaborated on the meaning of that word, stating:

... We believe that a client “deliberately disregards an agreement or obligation” to pay legal fees whenever the failure is conscious rather than inadvertent, and is not *de minimus* in either amount or duration. A client’s knowing and substantial failure to satisfy his or her financial obligations to a lawyer would justify the lawyer’s withdrawal from employment .... *This would be so even where the failure results from inability to pay.* [Emphasis added.]

N.Y. State 598 also cited and expressly agreed with half a dozen judicial decisions that had expressed the same position, including two New York decisions, *Boyle v. Revici*, 1987 WL 28707 (S.D.N.Y. Dec. 16, 1987) (permitting withdrawal where clients had owed lawyers \$25,000 for several months and had “not been able to assure them that the \$25,000 or amounts due for future work will be paid at any time”), and *Cullen v. Olins Leasing*, 91 A.D.2d 537, 457 N.Y.S.2d 9 (1st Dep’t 1982) (law firm retained by insurance company to defend insureds was permitted to withdraw after insurance company was placed in liquidation and could not pay fees).

More recent cases are in accord with the cases cited in N.Y. State 598 – *see, e.g., Aveos Fleet Performance Inc. v. Vision Airlines, Inc.*, 2013 WL 12250347 (N.D.N.Y. March 19, 2013) (client’s “inability to make significant contributions to a large, outstanding debt for a term of several months” is “sufficient to satisfy good cause” for withdrawal, *citing Boyle* and N.Y. State 598); *Riverside Capital Advisers, Inc. v. First Secured Capital Corp.*, 2010 WL 4167222 (Nassau County Sup. Ct. Oct. 5, 2010) (granting motion to withdraw where “the non-payment issue has existed for some time” but client “cannot pay”).

Although N.Y. State 598 was decided based on DR 2-110(C)(1)(f), which was the predecessor to current Rule 1.16(c)(5), it remains the leading ethics opinion on the meaning of “deliberately,” and it continues to be cited. *See, e.g., N.Y. State 1061* (2015) (noting that “lawyers are not compelled to provide free legal services to all clients,” *citing* N.Y. State 598 for the proposition that “client’s knowing and substantial failure to satisfy his or her financial obligations to a lawyer would justify lawyer’s withdrawal from employment”); N.Y. State 910 (2012) (*citing* N.Y. State 598 for discussion of “when a failure to pay a legal fee is ‘deliberate’”).

To bring the wording of Rule 1.16(c)(5) more closely into line with the interpretation by courts and ethics committees, and to avoid financial hardship to attorneys while also remaining fair to clients, COSAC proposes to amend Rule 1.16(c)(5) as follows:

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when . . . (5) the client ~~deliberately disregards an agreement or obligation to the lawyer as to expenses or fees~~ fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

This change makes New York's provision nearly identical to ABA Model Rule 1.16(b)(5). (The only difference is that the ABA lead-in clause uses the word "if" instead of "when" – a difference in style, not substance.) This formulation reflects the conclusion in N.Y. State 598 that a "knowing and *substantial failure* to satisfy his or her financial obligations to a lawyer would justify the lawyer's withdrawal from employment ... even where the failure results from inability to pay" (emphasis added). It also enhances protection of clients by adding the condition that a lawyer seeking to withdraw for nonpayment of fees must first give the client "reasonable warning that the lawyer will withdraw unless the obligation is fulfilled." Where a client is unable to pay, the "warning" clause will give the client a reasonable time to borrow money, solicit financial support from relatives, or otherwise find a way to pay past due and future fees.

In litigation matters, current Rule 1.16(d) will provide an additional safeguard for clients. In matters pending before a tribunal, lawyers will ordinarily need to obtain court permission to withdraw pursuant to Rule 1.16(d), which provides: "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission." Thus, courts will be able to ensure that lawyers do not abandon clients without substantial financial cause.

In non-litigation matters, a lawyer will have the option to withdraw when a client substantially fails to pay fees when due or otherwise substantially fails to abide by financial obligations in a retainer agreement or letter of engagement. COSAC does not think lawyers will abuse this right any more than lawyers abuse the dozen other grounds for optional withdrawal in Rule 1.16(c). Moreover, lawyers will often have a financial incentive to work out a payment plan or other arrangement that will enable the lawyers to get paid and keep the client rather than withdraw.

To preserve consistency with the amended text, COSAC also suggests amending current New York Comment [8] to match the ABA Model Rule version of Comment [8] to Rule 1.16. New York Comment [8] to Rule 1.16 would thus be modified to provide as follows:

[8] A lawyer may withdraw if the client ~~refuses~~ fails substantially to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

### **Rule 3.3**

## **Conduct Before a Tribunal**

Rule 3.3(a)(3) and Rule 3.3(b) both obligate lawyers, in specified narrow circumstances, to reveal information to remedy misconduct by a client or other person, even if the revelation would otherwise be prohibited by Rule 1.6. If a lawyer comes to know that the client or another witness called by the lawyer “has offered material evidence” and “the lawyer comes to know of its falsity,” *see* Rule 3.3(a)(3), or if a lawyer who represents a client before a tribunal “knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding,” *see* Rule 3.3(b), then the lawyer “shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal,” *see* Rule 3.3(a) and (b). Disclosure to the tribunal is a momentous step, fraught with serious consequences for both lawyer and client, and even less drastic remedial measures can telegraph problems with a case. Therefore, it is important for lawyers to know when the duty to make disclosure or take other remedial measures ends.

ABA Model Rule 3.3(c) addresses the end point by providing that the duties in paragraphs (a) and (b) “continue to the conclusion of the proceeding.” COSAC recommended that language to the Courts in 2008, but the Courts declined to adopt that recommendation, and did not substitute any alternative end point. Thus, New York Rule 3.3 does not specify when a lawyer’s duty to take reasonable remedial measures under Rules 3.3(a) and 3.3(b) terminates. Rather, New York Rule 3.3(c) says only that the duties stated in paragraphs (a) and (b) of Rule 3.3 “apply even if compliance requires disclosure of information otherwise protected by Rule 1.6” (New York’s basic confidentiality rule).

Various New York ethics opinions have attempted to interpret Rule 3.3 to articulate a workable and practical time limit under Rule 3.3(c). These opinions have done so by limiting the phrase “remedial measures” to situations where disclosure or other measures will actually remedy the problem of false evidence. In N.Y. State 831 n.4 (2009), for example, the Committee said:

We believe the obligation extends for as long as the effect of the fraudulent conduct on the proceeding can be remedied, which may extend beyond the end of the proceeding — but not forever. If disclosure could not remedy the effect of the conduct on the proceeding, we do not believe the Rule 3.3 disclosure duty applies.

N.Y. State 837 (2010) revisited this issue and said:

16. ... [T]he duration of counsel's obligation under New York Rule 3.3(c) as adopted may continue even after the conclusion of the proceeding in which the false material was used. ... *[T]he endpoint of the obligation nevertheless cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available*, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3. [Emphasis added; citations omitted.]

N.Y. City 2013-2 (2013) reached a similar conclusion, saying:

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[T]he obligations under Rule 3.3(a)(3) survive the “conclusion of a proceeding” where the false evidence was presented. ABA Rule 3.3, cmt. [13] clarifies that the phrase “conclusion of a proceeding” means “when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.” We believe that the courts’ rejection of an explicit statement that the obligation ends when the proceeding ends, makes this evident.

N.Y. City 2013-2 thus concluded that Rule 3.3(c) requires a lawyer to disclose false evidence (i) to the tribunal to which the evidence was presented “as long as it is still possible to reopen the proceeding based on this disclosure,” or (ii) “to opposing counsel where another tribunal could amend, modify or vacate the prior judgment.”

COSAC believes that these tests inject too much uncertainty into determining whether disclosing false testimony to a tribunal or to opposing counsel, or taking other remedial measures, is still required after the conclusion of a proceeding. For the same reason, COSAC rejected the Texas version of Rule 3.3(c), which provides that a lawyer’s duties continue until remedial legal measures are “no longer reasonably possible.” See Texas Rule 3.03(c) (“The duties stated in paragraphs (a) and (b) continue until remedial legal measures are no longer reasonably possible”). Comment [14] to Texas Rule 3.04 elaborates on this test by saying: “The time limit on the obligation to rectify the presentation of false testimony or other evidence varies from case to case but continues as long as there is a reasonable possibility of taking corrective legal actions before a tribunal.”

In COSAC’s view, Rule 3.3(c) should articulate a bright line to mark the end point of the duty to take remedial measures under Rule 3.3(a) and (b). The certainty of a bright line is necessary both (i) to protect clients against belated accusations of perjury that may have no appreciable effect beyond damaging a client’s reputation, and (ii) to protect lawyers against discipline for failing to attempt remedial measures when a lawyer believes in good faith that remedial measures are no longer possible. COSAC therefore recommends that New York amend Rule 3.3(c) to match ABA Model Rule 3.3(c), which ends the lawyer’s obligation upon the “conclusion of the proceeding.” On balance, COSAC believes this bright line termination of the duty – at the conclusion of the proceeding – is preferable to New York’s current open-ended formulation, and is preferable to alternative formulations based on when remedial measures are no longer possible.

COSAC recognizes that, under the proposed formulation, some fraud on tribunals may go unremedied because the false evidence or other impropriety will not be discovered until after the conclusion of a proceeding. New York has a long tradition of a strong duty of confidentiality. Indeed, DR 7-102(B) in the old New York Code of Professional Responsibility did not ordinarily allow disclosure even to remedy a client’s fraud on a court if the information to be disclosed was protected as a confidence or secret.<sup>1</sup> New York did not appear to suffer from frequent unremedied

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<sup>1</sup> DR 7-102(B) provided as follows:

B. A lawyer who receives information clearly establishing that:

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fraud on tribunals under the Code. Nevertheless, COSAC is separately considering whether Rule 1.6 should include a discretionary exception to the duty of confidentiality that would permit (but not require) a lawyer to disclose confidential information to the extent the lawyer reasonably believes necessary to remedy a fraud on a tribunal or a wrongful conviction based upon such a fraud.

In any event, COSAC believes that a lawyer who has offered false evidence will most often come to know of its falsity per Rule 3.3(a)(3) before the conclusion of the proceeding (perhaps when an opposing party's cross-examination exposes the false evidence). Likewise, COSAC believes that a lawyer usually will learn before the conclusion of a proceeding that a person has engaged in criminal or fraudulent conduct related to the proceeding. Although no empirical evidence is available on these points, COSAC believes that the potential damage to confidentiality by *requiring* disclosure (or other remedial measures) after the conclusion of a proceeding outweighs the potential gain to the system of justice by retaining New York's current version of Rule 3.3(c). Trust is the fundamental bedrock of a strong attorney-client relationship, and the broader the exceptions to the duty of confidentiality, the more difficult it will be for attorneys to gain and maintain the trust of their clients.

Thus, although there are arguments that requiring a lawyer to take remedial measures beyond the conclusion of the proceeding furthers the interests of justice, COSAC believes that adopting the ABA version of Rule 3.3(c) and the related Comments strikes a better balance and will provide needed clarity and certainty in this important area. In reviewing the Rules of Professional Conduct adopted by other states, COSAC noted that only three other states (Florida, Texas, and Wisconsin) require remedial measures after the close of proceedings. In contrast, more than thirty jurisdictions terminate Rule 3.3 remedial duties under Rule 3.3(a) and (b) at the conclusion of the proceeding, in line with ABA Model Rule 3.3(c) – see [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_3\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_3_authcheckdam.pdf) or <https://bit.ly/2kfYBpx> .

Accordingly, COSAC recommends amending Rule 3.3(c) as follows:

- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

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1. The *client* has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer *shall reveal the fraud* to the affected person or tribunal, *except when the information is protected as a confidence or secret*.
  2. A person *other than the client* has perpetrated a fraud upon a tribunal *shall reveal the fraud* to the tribunal. [Emphasis added.]

COSAC also recommends adopting ABA Comment [13] as new Comment [13] to New York Rule 3.3, with revisions to refer not only to “when a final judgment in the proceeding has been affirmed on appeal,” as in the ABA Comment, but also more broadly to “when a final judgment or order in the proceeding has been entered after appeal.” Thus, new Comment [13] would explain the time limit in Rule 3.3(c) as follows:

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment or order in the proceeding has been entered after appeal or the time for review has passed.

(Existing New York Comment [13] to Rule 3.3, which is on a different topic and has no equivalent in the ABA Model Rules, would be renumbered as New York Comment [13B]. That renumbering would maintain consistency with ABA numbering and would continue New York’s convention of using capital letters to mark Comments adopted by New York but not by the ABA.)

### **Rule 3.4**

#### **Fairness to Opposing Party and Counsel**

COSAC has two recommendations for changes to Rule 3.4.

*First*, amend Rule 3.4(a) to add the following new subparagraph (a)(6):

A lawyer shall not . . . (6) knowingly participate in or counsel the unlawful destruction or unlawful deletion of any document or material having potential evidentiary value.

The reason for the additional language is that Rule 3.4(a) currently prohibits *creating* false evidence, but does not prohibit *destroying* evidence. It should prohibit both, and should also prohibit the destruction of documents or materials that are not technically “evidence” but that have potential evidentiary value.

The recommended amendment would also align New York Rule 3.4(a) more closely with ABA Model Rule 3.4(a), which provides that a lawyer shall not “(a) unlawfully obstruct another party’s access to evidence or *unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. . .*” (Emphasis added.)

However, despite the general advantages of uniformity with the ABA (and with jurisdictions that have adopted ABA Model Rule 3.4), COSAC does not recommend adding the ABA clause “unlawfully obstruct another party’s access to evidence.” COSAC does not recommend adopting that clause because it duplicates other subparagraphs of New York Rule 3.4(a) not found in ABA Model Rule 3.4. For example, New York Rule 3.4(a)(1) provides that a lawyer shall not “suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce,” and New York Rule 3.4(a)(3) provides that a lawyer shall not “conceal or knowingly fail to

disclose that which the lawyer is required by law to reveal.” New York subparagraphs (a)(1) and (a)(3) of Rule 3.34 thus already effectively prohibit a lawyer from unlawfully obstructing another party’s access to evidence.

(Current New York Rule 3.4(a)(6), which prohibits a lawyer from knowingly engaging in “other illegal conduct or conduct contrary to these Rules,” would be moved to Rule 3.4(a)(7), since a catch-all provision should come at the end of a rule.)

*Second*, COSAC recommends amending Rule 3.4(e) by expanding the rule to cover disciplinary charges and by narrowing the rule via adding two qualifying phrases. As amended, Rule 3.4(e) would provide:

A lawyer shall not ... (e) present, participate in presenting, or threaten to present criminal or disciplinary charges to obtain an advantage in a civil matter, if those charges are not advanced in good faith or are unrelated to the civil matter.

COSAC believes that, in its current form, Rule 3.4(e) is both too broad and too narrow. It is too broad because it might preclude a threat to honestly report a crime in an effort to obtain restitution for the harm done by the crime, something that Comment [5] to Rule 3.4 expressly says would not be improper. Comment [5] says:

[5] The use of threats in negotiation may constitute the crime of extortion. However, not all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), *the lawyer’s threat to report the crime does not constitute extortion when honestly claimed in an effort to obtain restitution or indemnification for the harm done.* But extortion is committed if the threat involves conduct of the third person *unrelated* to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute). [Emphasis added.]

Since COSAC believes that Comment [5] correctly states the law, COSAC also believes that the current blanket ban on threatening to present criminal charges is too broad.

Rule 3.4(e) is also too narrow because it does not prohibit threatening meritless or unrelated *disciplinary* charges in ways that might be as improperly coercive as a threat to present criminal charges and might also pressure lawyers who are the target of such charges to act in ways that conflict with their clients’ best interests. For example, a lawyer who has been threatened with disciplinary charges might seek to settle litigation or might yield to a negotiating demand in a transaction on terms unfavorable to the lawyer’s client in the hope (or on the express condition) that the opposing lawyer would then drop the threat to file meritless disciplinary charges.

COSAC’s proposed changes to Rule 3.4(e) attempt to rectify these two problems.

## **Rule 3.6**

### **Trial Publicity**

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COSAC recommends a small but significant amendment to Rule 3.6(a). Unlike the ABA Model Rule, New York Rule 3.6(a) prohibits *all* extrajudicial statements (with one exception, discussed below) that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” A lawyer violates this rule if the lawyer knows, or reasonably should know, that the lawyer’s statement (a) will be disseminated by public communication and (b) will meet the “substantial likelihood” test just quoted.

ABA Model Rule 3.6(a) uses the same overarching “substantial likelihood” test, but creates a safe harbor for an enumerated list of certain types of statements that the ABA Rule says do not run afoul of the proscription, “notwithstanding” the “substantial likelihood” test above. The types of statements listed in the ABA Model Rule for both civil and criminal cases are either innocuous or necessary types of statements, boiling down in essence to:

- charge and defense information, including names of key people involved
- anything in a public record
- the fact of a pending investigation
- scheduling matters
- requests for assistance in obtaining evidence, and
- warnings of danger about people involved in litigation

Additionally, in criminal cases only, the following fall within the ABA safe harbor:

- pedigree information about the accused
- information necessary to aid in apprehending the accused
- the fact, time and place of arrest, and
- the identity of investigating and arresting officers or agencies involved

New York Rule 3.6(b) contains a nearly identical list, but instead of permitting extrajudicial statements regarding the items on the list “*notwithstanding*” the “substantial likelihood” test of 3.6(a), New York instead dictates that the statements on the list may be made only “[p]rovided that the statement complies with” the “substantial likelihood” test. New York’s “provided that” language deprives lawyers of a useful bright-line test and safe harbor, and therefore chills public statements of the type that are included on the list, for fear that even public statements falling within the safe harbors might be second-guessed based on the “substantial likelihood” test. Providing this safe harbor without the qualification would allay that fear, and would also help harmonize the New York Rules with the ABA Model Rules.

Accordingly, COSAC recommends the following change to Rule 3.6(c):

~~(c) Provided that the statement complies with paragraph (a),~~ Notwithstanding paragraph (a), a lawyer may state the following without elaboration ....







## MEMORANDUM

**To:** Committee on Standards of Attorney Conduct (COSAC)

**From:** NYCLA Committee on Professional Ethics

**Date:** December 19, 2018

**Re:** Proposed Amendments to Rules 1.16, 3.3, 3.4, and 3.6 of the New York Rules of Professional Conduct

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The NYCLA Committee on Professional Ethics (the “Committee”) has reviewed COSAC’s Proposed Amendments and has compiled the comments summarized below.<sup>1</sup>

1. Rule 3.3(c): The Committee is in favor of clarifying when a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct ends. This has been a point of confusion for New York lawyers for quite some time, and only slightly alleviated by opinions acknowledging that under the current rule, the obligation extends beyond the conclusion of a proceeding but prior to the point when remedial measures are no longer reasonably available. N.Y. State 837 (2010); N.Y. City 2013-2 (2013).

We note, however, that providing a bright line that ends the obligation at the conclusion of the proceeding could permit some fraudulent conduct to go unremedied where there may still be an opportunity for redress. For example, while a proceeding may have been concluded, there still may be a procedural mechanism to reopen the earlier proceeding and address the late-discovered fraud. Therefore, we recommend that COSAC implement the rule change, but suggest that either the Rule or a comment to the rule make clear that a lawyer may still seek to redress a late-discovered fraud after the conclusion of the proceedings, but will not be subject to possible discipline for failing to pursue remedial measures if the proceeding has concluded.

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<sup>1</sup> The New York County Lawyers Association was founded in 1908 as one of the first major bar associations in the country that admitted members without regard to race, ethnicity, religion or gender. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence, including through the work of its many committees that provide in-depth analysis and insight into legal practice areas. The views expressed are those of the NYCLA Committee on Professional Ethics only and approved for dissemination by the President; these views have not been approved by the New York County Lawyers Association Board of Directors, and do not necessarily represent the views of the Board.

2. Rule 3.4(e): COSAC has recommended amending the current prohibition on presenting or threatening “criminal charges solely to obtain an advantage in a civil case” to prohibit presenting “criminal or disciplinary charges” to obtain an advantage in a civil matter” if those charges are not advanced in good faith or are unrelated to the civil matter.” Our Committee agrees with the expansion to include a threat of disciplinary charges in the prohibition, but is concerned about authorizing a lawyer to threaten criminal charges to obtain an advantage in a civil case as long as the criminal charges and civil case are unrelated. While we appreciate that this narrowing is consistent with Comment [5] to the Rule, which describes the crime of extortion, we believe the Rule is intended to require that ethical conduct by lawyers encompass more than that which is already a crime, and therefore no narrowing is either necessary or desirable. Accordingly, with respect to COSAC’s proposed modification of Rule 3.4(e), we would delete the words “or are unrelated to the civil matter, and instead would provide “A lawyer shall not . . . (e) present, participate in presenting, or threaten to present criminal or disciplinary charges to obtain an advantage in a civil matter, if those charges are not advanced in good faith.”

Respectfully submitted,  
James Q. Walker, *Chair, NYCLA Committee on Professional Ethics*

From: "Larson Jr., Wallace L." <wlarson@cgsh.com>  
Subject: NYC Bar Professional Responsibility Committee - support for recent COSAC proposed changes to NY Rules of Professional Conduct  
Date: August 10, 2018 at 11:05:29 AM EDT  
To: "roy.simon@hofstra.edu" <roy.simon@hofstra.edu>  
Cc: "aroffi@orrick.com" <aroffi@orrick.com>, Maria Cilenti <MCILENTI@NYCBAR.org>, Mary Margulis-Ohnuma <MMargulis-Ohnuma@nycbar.org>, Elizabeth Kocienda <ekocienda@nycbar.org>

## EXTERNAL MESSAGE

Roy –

The New York City Bar Association's Professional Responsibility Committee supports the COSAC Proposals Regarding Conflict of Interest Provisions set forth in its memorandum for public comment dated May 3, 2018 (attached for reference). The Committee welcomes further efforts at improving and updating the New York Rules of Professional Conduct and stands ready to assist in such efforts.

Wally Larson

Chair of the NYC Bar Association's Professional Responsibility Committee

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### **Wallace L. Larson Jr.**

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## MEMORANDUM

Dated: July 24, 2018

To: NYSBA Committee on Standards of Attorney Conduct

From: NYSBA Committee on Professional Ethics

Re: COSAC May 3, 2018 Proposals Regarding Conflict of Interest Provisions

The Committee on Professional Ethics (the “Ethics Committee”) is pleased to provide these comments on COSAC’s May 3, 2018 Proposals Regarding the Conflict of Interest Provisions of New York’s Rules of Professional Conduct. Although several members of COSAC are also members of the Ethics Committee, they did not participate in voting on these comments.

### **Rule 1.7.**

We support the proposal to eliminate the term “differing interests” in Rule 1.7 and adopt a modified version of the ABA’s formulation instead. The ABA replaces the concept of an adverse effect on the lawyer’s professional judgment with the concept of a “material limitation” on the lawyer’s representation of the client. It replaces the concept of an adverse effect on the “loyalty” of the lawyer by stating that the lawyer may not accept a representation that is “directly adverse” to the client. We believe it is significant that New York is the only state to retain the differing interest standard. We believe the ABA’s tests strike an appropriate balance and will be easier for lawyers to apply than the “differing interests” test.

We agree with COSAC’s recommendation to amend Rule 1.7 to allow for screening of lateral hire attorneys. We agree that enabling lawyer mobility is an important goal. However, while we agree that there should be an exception for “disclosures required or permitted by other rules,” we disagree with the language in proposed Comment [5D] to Rule 1.10 (and similar comments to Rules 1.11 (Comment [7A]), Rule 1.12 (Comment [4C]) and Rule 1.18 (Comment [7C]) limiting disqualification to situations where the confidential information is “material to the matter.”

Comment [7A] to Rule 1.11 currently provides “If any lawyer in the firm acquires confidential information about the matter from the personally disqualified lawyer, the requirements of this Rule cannot be met, and any subsequent efforts to institute or maintain screening will not be effective in avoiding the firm’s disqualification.” COSAC proposes to amend this standard so that a leak that is not “material” to the matter would not disqualify the firm. The Ethics Committee believes that both lawyers and the public are already skeptical about the efficacy of information walls. This amendment seems to be a recognition that information does indeed regularly cross the walls. We believe adopting the “materiality” standard will weaken the incentive of law firms to make sure their walls are impermeable.

COSAC justifies the new standard by pointing out that the definition of “screening” only requires procedures that are “reasonably adequate” to protect information that the isolated lawyer or the firm is obligated to protect. Rule 1.6(c) similarly requires a lawyer to make “reasonable efforts” to prevent the inadvertent or unauthorized disclosure or use of information protected by Rules 1.6, 1.9() or 1.18. We believe these “reasonableness” standards ensure that the lawyer or firm is not subject to discipline where there is a failure despite reasonable precautions. However, the sanction of disqualification is entirely appropriate for wall violations. We are not aware that the stricter standard currently applicable has been impossible to meet. We would therefore retain the current language of Comment [5D], in all three places.

We approve COSAC’s recommendation to amend comment [21] to deal with the effect of one client’s revocation of a previously given consent to a conflicted representation.

#### **Rule 1.8.**

COSAC recommends amending Rule 1.8(c)(1) to limit the bar on soliciting a gift from a client to “substantial” gifts. The term “substantial” is not defined in the proposal and there is no existing definition in the NY Rules. The ABA Model Rules contain a definition of “substantial” in the definition section and which is referred to in the “definitional cross-reference” listing under Rule 1.8. Although the Bar Association approved this change in 2008, we do not agree with it.

Before 2009, the ethical rules in New York prohibited a lawyer from suggesting that the client make a gift to the lawyer. EC 5-5 allowed a lawyer to accept an unsolicited gift from a client, but commented: “If a lawyer accepts gift from the client, the lawyer is peculiarly susceptible to the charge that he or she unduly influenced or overreached the client.” We believe allowing lawyers to solicit gifts – even ones that are not “substantial”, however defined – is likely to put lawyers in a bad light. We would therefore retain Rule 1.8(c)(1) as it currently exists.

#### **Rule 1.10.**

We agree with the proposal to remove imputation for most personal conflicts. Where the relationship between the first and second lawyers is such that the second lawyer’s professional judgment on behalf of the client would be affected, the second lawyer would be disqualified by the personal interest conflict. Imputed disqualification in this circumstance is not necessary. Where the second lawyer has no such personal interest conflict, imputed disqualification is unnecessary.

#### **Rule 1.11.**

We disagree with COSAC’s proposal to eliminate imputation of conflicts of lawyers entering or serving in government offices without requiring screening of the disqualified lawyer. Before 2009, the general rule in New York was that, when one lawyer in a firm is disqualified, all lawyers in the firm are disqualified. The definition of “firm” has always included a government law office.

Immediately before the Rules were adopted in 2009, DR 5-105(D) provided: While lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of

them practicing alone would be prohibited from doing so under . . . DR 9-101(B) . . . . In 2003, COSAC recommended (and in 2008, the House of Delegates adopted) that the imputation with respect to government lawyers be eliminated in Rule 1.10, but that the imputation be included in Rule 1.11(e). The proposal adopted by the Bar Association was as follows:

(e) When a lawyer is disqualified from representation under paragraph (d), no lawyer serving in the same government office, agency or department may knowingly undertake or continue representation in the matter unless:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation; and

(2) the office, agency or department acts promptly and reasonable to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the office, agency or department that the personally disqualified lawyer is prohibited from participating in the matter;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the office; and

(iii) where the disqualification is based on the application of Rule 1.9, advise the personally disqualified lawyer's former client in writing of the circumstances that warranted implementation of the screening procedures requires by this Rule and of the actions taken to comply with this Ryle, unless notice to the former client is prohibited by law or Rule 1.6.

COSAC knew that its proposal differed from that of the ABA:

"¶(e) represents a middle ground between the ABA position that conflicts of current government lawyers are not imputed and the existing New York Rule, DR 5-105(D), which imputes the conflicts of current government lawyers to other lawyers employed by the same government office, agency or department on the same basis as lawyers in private law firms but addresses the special problems created by intra-government imputation through . . . the "rule of necessity" provision. . . . [T]he ABA's no-imputation provision was also unsatisfactory because it failed to fully respect the legitimate interests of the government lawyer's former client. The Proposed Rule represents an attempt to reconcile these competing interests."

Unfortunately, the Administrative Board rejected the COSAC proposal for Rule 1.11(e) without restoring imputed disqualification of government lawyers in Rule 1.10. The Interim Report, dated September 11, 2008, of the Administrative Board's Ochs Committee explains the Ochs Committee's proposal to the Administrative Board:

Rule 1.11(d) is essentially identical to DR 9-101(B)(3). The Committee rejected three significant changes contained in the State Bar version. First, the State Bar deleted the "rule of necessity" language contained in (B)(3)(a) [now proposed (d)(1)] in exchange for a "consentability" option provided to the government agency. . . . Third, the State Bar version included a special imputed disqualification rule for government lawyers not found in the existing Disciplinary Rules [this is obviously incorrect; it was in DR 5-105 rather than in DR 9-101(b)] or in the ABA version. The Rule would apply the same screening requirements set forth in 1.11(b) to lawyers moving from

government to private employment, but also further requires the government agency to advise the personally disqualified lawyer's former client in writing of the circumstances regarding the conflict and screening. No justification for this added requirement is set forth in the comments or the Reporter's Notes.

Thus, the conclusion that government lawyers should not be subject to imputed disqualification is based on a misunderstanding of DR 5-105(D) and the conclusion as to screening seems to have been based on an objection to notifying the private client.

The Administrative Board adopted the Ochs Committee recommendation without change. To deal with the differences between the original COSAC proposal and what the Administrative Board adopted, COSAC made a number of changes in late 2008 to the comments to Rule 1.11, which stressed that Rule 1.10 did not apply to conflicts under Rule 1.11. However, on April 10, 2012, COSAC recommended to the House of Delegates that they add Comments 9A and 9B to Rule 1.11. Comment [9B] pointed out that imputation still applies in limited circumstances:

Where a government law office's representation is materially adverse to a government lawyers former private client, however, the representation would, absent informed consent of the former client, also be prohibited by Rule 1.9. Rule 1.10 remains applicable to that former client conflict so as to impute the conflict to all lawyers associated in the same government law office.

COSAC's report on the change explained:

As proposed by the State Bar Rule 1.11(d) would have prohibited a current government official from participating in a matter in which the lawyer participated while in private practice, unless the government agency gives its written consent. As adopted by the Appellate Divisions, Rule 1.11(d) retains the slightly different rule of DR 9-101(B)(3), which prohibited a government lawyer from participating in a matter in which the lawyer was personally and substantially involved while in private practice unless no one is legally authorized to act in the lawyer's place in the matter. Paragraph (d) does not provide for informed consent by the government agency to overcome the conflict. After the new Rules were adopted, COSAC struck the proposed Comment that had addressed these provisions because that Comment had interpreted the COSAC proposal rather than the Rule as adopted by the Appellate Divisions.

The proposed Comment above fills the resulting gap. First, it restated the central elements of the Rule. Second, it notes the absence of any provision for the government agency to consent. Third, it addresses the imputation of conflicts under paragraph (d) to other lawyers in the government agency. On this last point, as proposed by COSAC, Rule 1.11(d) stated that current government lawyers are not subject to Rule 1.10, the general rule on imputation of conflicts, and Rule 1.11(e) permitted screening to avoid imputation of conflicts created by Rule 1.11(d) to other lawyers at the lawyer's agency. The Courts deleted both the proposed express exemption of current government lawyers from Rule 1.10 and the screening procedures. Rule 1.10 by its terms does not apply to conflicts arising under paragraph (d) – Rule 1.10 applies only to conflicts arising under Rules 1.7, 1.8 or 1.9 – but lawyers in government offices are still governed by Rules Rule 1.7, 1.8 and 1.9. As the proposed Comment explains, this means that, while the lawyer's conflict arising under paragraph (d)(1) is not imputed to other lawyers in the same government

law office the lawyer cannot act adversely to his or her former client, and *that* conflict is imputed to other lawyers in the government law office by Rule 1.10.

While Comment [9B] is perfectly correct, it represents a somewhat convoluted, back-door approach to reaching the right result and is not clear from black letter Rule 1.11, which is where a government lawyer would naturally look for the applicable rule. The Ethics Committee maintains that the position of the Administrative Board in 2008 should not be dispositive of the outcome now. The Bar now has another opportunity to fix this problem through the front door. We disagree with continuing to utilize the back door approach.

COSAC does not explain in its report why it should now be sufficient if the lawyer with the actual conflict is disqualified from the representation (other than the fact that it's the ABA approach). It also does not explain why, if screening is not required by the black letter rule, Comment [2] to Rule 1.10 should be amended to say "ordinarily it will be prudent to screen such lawyers." We believe that public confidence in the integrity of government requires that a personally-disqualified lawyer be screened for all the reasons set forth in the 2008 COSAC report. We would recommend adoption of the 2008 State Bar proposal. The language would read as follows:

(e) When a lawyer is disqualified from representation under paragraph (d), no lawyer serving in the same government office, agency or department may knowingly undertake or continue representation in the matter unless:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation; and

(2) the office, agency or department acts promptly and reasonable to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the office, agency or department that the personally disqualified lawyer is prohibited from participating in the matter;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the office; and

(iii) where the disqualification is based on the application of Rule 1.9, advise the personally disqualified lawyer's former client in writing of the circumstances that warranted implementation of the screening procedures requires by this Rule and of the actions taken to comply with this Rule, unless notice to the former client is prohibited by law or Rule 1.6.

We would also adopt the comments originally proposed by COSAC in 2005.

**Rules 1.11(d)(2) and 1.12(c).**

We would go farther in imposing conditions on a law clerk who negotiates for employment with a party or lawyer with a matter on which the law clerk is working. We believe the clerk should not only inform the judge but follow any instruction from the judge that the clerk should be screened from the matter. We agree with the opinions of the OCA's Advisory Committee on Judicial Conduct that the judge is in the best position to determine the point at which the clerk should be screened. Below, we suggest a revision to Rule 1.12 (c) and a new comment.

There are several opinions of the Advisory Committee on Judicial Conduct that hold that a judge in this circumstance should screen the affected clerk. See Joint Opinion 07-87/07-95 (June 7, 2007) (judge who learns that law clerk has been contacted by a law firm about post-clerkship employment should insulate the law clerk from any matters involving the firm and disclose such insulation to the parties); Opinion 07-174 (October 18, 2007) (it is discretionary for a criminal court judge to disclose that the judge's court attorney has applied for employment with a district attorney's office staffed by hundreds of assistant district attorneys, or to insulate the court attorney from all matters the DA's office prosecutes; but if the DA's office has offered employment to the court attorney, the judge should insulate the court attorney); Opinion 15-15 (the judge does not need to insulate the law clerk until the judge learns the prospective employer offered employment to the law clerk or they are engaged in negotiations).

In any event, we believe that the second sentence of Rule 1.11(c) should be amended to include law clerks who serve a pool of judges (with the consent of the administrative judge to whom the pool reports) as well as to clerks to individual judges. The amended proposal would read:

A lawyer serving as a law clerk to a judge or other adjudicative officer or in a pool serving multiple judges or other adjudicative officers may, subject to any applicable tribunal or agency rules, negotiate for employment with a party or lawyer involved in a matter in which he clerk is participating personally and substantially, but only after the lawyer has notified the relevant judge or other adjudicative officer. The law clerk must abide by any determination of the appropriate judge requiring that the clerk be screened from any matter in which such party or lawyer is involved.

We also recommend the following new Comment [3A] to Rule 1.12.

[3A] Law clerks to state court judges may have a conflict of interest when they apply for a position with a party or lawyer involved in a matter in which they are personally and substantially involved. Those interests are covered by Rule 1.12(c) rather than Rule 1.7(a). In addition, the actions of a law clerk may reflect on the judge, particularly under Rule 3E of the Code of Judicial Conduct, which requires the recusal of a judge in any proceeding where the judge's impartiality might reasonably be questioned. The OCA's Advisory Committee on Judicial Conduct has published several opinions discussing what a judge should do when the judge's clerk applies for another position, interviews for such a position, receives an offer of subsequent employment or is negotiating the terms of such employment. The Advisory Committee recommends that the law clerk be "insulated" or "screened" from the matter, no later than the time employment is offered to the clerk, but leaves it to the discretion of the judge when

screening should be initiated. At the time when discussions between the law clerk and a prospective employer become serious, screening will be appropriate. The judge is in the best position to determine when the discussions have reached this point.

**Rule 1.8(l).**

COSAC proposes to move from Rule 1.10(h) to Rule 1.8(l) the rule with respect to conflicts of related lawyers. We do not object to the move; however, we believe the section (which is one sentence with many clauses) would benefit by changing the phrase “the other lawyer” to “the related lawyer.”