



# Staff Memorandum

**HOUSE OF DELEGATES  
Agenda Item # 8**

To supplement the materials you previously received, attached are comments from the Bar Association of Erie County and the Dispute Resolution Section.



## DISPUTE RESOLUTION SECTION

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To: Committee on Standards of Attorney Conduct  
From: Deborah Masucci, Chair of the Dispute Resolution Section  
Re: Proposed Changes to New York Rule 3.4 (e)  
Date: January 7, 2019

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The Executive Committee of the New York State Bar Association's Dispute Resolution Section ("the Section"), and the Section's Ethics Committee, reviewed the Committee on Standards of Attorney Conduct's ("COSAC") proposed change to New York Rule 3.4(e).

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The Section lauds the efforts of COSAC to clarify the obligations of counsel under the Rules of Professional Conduct. This area involves competing considerations. On one hand, principled bargaining, whether in negotiation or mediation, can involve coordinated discussions with an eye towards satisfying the interests of all parties. On the other hand, threatening disciplinary or criminal action could generate a counterproductive culture of coercion, manipulation and recrimination.

Rule 3.4(e) is significant to the field of Dispute Resolution, which includes negotiation and mediation. It is the experience of members of this Section that threats of this kind do, in fact, surface, at times, during negotiations and mediations. For purposes of regulating the culture of negotiation and mediation in which counsel are involved, and to retain or enhance the civility of those proceedings while also furthering the interests of all parties and the legitimate interests of counsel, the Section provides the following comment.

First, the Section supports the inclusion of the phrase "**or disciplinary**" in the Rule. Prohibition of a threat of this kind is entirely apt. In this context, it can be helpful to consider all pertinent and material information, including the risk of discipline or criminal action.

Second, the Section recommends that the balance of the proposed change should be withdrawn for further study. Recognizing that there are challenges on either side of this equation -- and that this is an area with serious impact on the domains of dispute resolution with potentially criminal legal implications -- the Section recommends that the additional changes be withdrawn for further study. The Section, in particular, recommends study and comment by the Criminal Justice Section of the NYSBA. The Section offers a representative to study the potential changes and its impact on negotiations within the context of mediation and settlement discussion.



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January 8, 2019

*Via email*

Kathleen Baxter, Esq., General Counsel  
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*Re: COSAC Proposals Regarding Conflict of Interest Provisions*

Dear Ms. Baxter:

The Board of Directors for the Bar Association of Erie County and our Professional Ethics Committee has reviewed the proposed amendments of the New York Rules of Professional Conduct. I write to convey our concern with one of the proposals. The BAEC believes the proposed amendment of Rule 1.11 regarding conflicts of interest for judicial law clerks does not go far enough. We favor greater transparency. The current proposal provides that a law clerk, who applies for employment with one of the parties or its counsel, while the clerk is personally and substantially working on the litigation, need only disclose this fact to his or her judge. The BAEC proposes that the rule require that the parties be advised of the employment application to allow the parties to make such motions as they deem advisable.

We have no objection to the other proposals and thank the NYSBA Committee on Standards of Attorney Conduct for their work on this matter.

Best Regards,

MARIANNE MARIANO  
President

cc: Anne M. Noble, Executive Director