



October 23, 2018

To: Members of the House of Delegates

Re: November 3, 2018 meeting

Enclosed are the agenda and related background materials for the upcoming meeting of the House of Delegates scheduled to begin at 9:30 a.m. on Saturday, November 3, 2018 at the Bar Center in Albany. The enclosed background materials cover agenda items 1-4, 6, 7, and 12.

We look forward to seeing you in Albany.

Michael Miller
President

Henry M. Greenberg
President-Elect



**NEW YORK STATE BAR ASSOCIATION
MEETING OF THE HOUSE OF DELEGATES
BAR CENTER, ALBANY, NEW YORK
SATURDAY, NOVEMBER 3, 2018 – 9:30 A.M.**

AGENDA

1. Approval of minutes of June 16, 2018 meeting 9:30 a.m.
2. Report of Treasurer – Mr. Scott M. Karson 9:35 a.m.
3. Report and recommendations of Finance Committee re proposed 2019 income and expense budget– Mr. T. Andrew Brown 9:45 a.m.
4. Report and recommendations of Committee on Bylaws – Mr. Robert T. Schofield, IV 10:00 a.m.
5. Memorial for Past President Henry L. King – Mr. Henry G. Miller 10:15 a.m.
6. Report and recommendations of Committee on Mandated Representation – Ms. Linda Gehron 10:25 a.m.
7. Report of Committee on Standards of Attorney Conduct – Mr. David M. Schrauer 10:45 a.m.
8. Report of President – Mr. Michael Miller 11:00 a.m.
9. Report of Nominating Committee – Mr. David P. Miranda 11:15 a.m.
10. Address by. Hon. Rolando T. Acosta – Presiding Justice, Appellate Division, First Department 11:25 a.m.
11. Report of Task Force on Wrongful Convictions – Hon. Barry Kamins 11:40 a.m.
12. Report and recommendations of Local and State Government Law Section 11:55 a.m.
13. Report of The New York Bar Foundation – Ms. Lesley Rosenthal 12:15 p.m.
14. Update re Women in Law Section – Ms. Susan L. Harper 12:25 p.m.
15. Report of Committee on Membership – Mr. Thomas J. Maroney 12:35 p.m.
16. Administrative items – Mr. Henry M. Greenberg 12:40 p.m.

17. New business 12:50 p.m.
18. Date and place of next meeting:
Friday, January 18, 2019
New York Hilton Midtown, New York City

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
JUNE 16, 2018
THE OTESAGA, COOPERSTOWN, NEW YORK**

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PRESENT: Alsina; Battistoni; Baum Bauman; Behrins; Belowich; Berman; Billings; Bowler; Braunstein; Brown, E.; Brown, T.; Buholtz; Burke; Carola; castellano; Chambers; Christensen; Coffey; Cohen, D.; Cohen, O.; Connery; Dean; Di Pietro; Doerr; Dozey; Effman; Eng; Entin Maroney; Fallek; Fay; Fernandez; Finerty; Fishberg; Foley; Freedman, H.; Friedman; Frumkin; Galvan; Genoa; Gerstman; Getnick; Gingold; Gold; Goldberg; Grady; Grays; Greenberg; Grimmick; Gutekunst; Gutenberger Grossman; Gutierrez; Haig; Heath; Hersh; Hurteau; Hyer; Jaglom; Kamins; Karson; Kean; Kearns; Kelly; Kendall; Kirby; Kobak; Lawrence; Levin Wallach; Levy; Lewis; Lindenauer; Lugo; MacLean; Madden; Maldonado; Mancuso; Mandell; Mariano; Marinaccio; Markowitz; Maroney; Martin; Matos; May; McCann; McDonald; McGinn; McGowan; McNamara, T.; Meyer; Miller, C.; Miller, M.; Miller, R.; Millett; Millon; Minkoff; Moretti; Moskowitz; Murphy; Napoletano; Nowotarski; O'Donnell; Onderdonk; Ostertag; Palermo, C.; Perlman; Pitegoff; Pleat; Radick; Richman; Richter; Rodriguez; Rosenthal; Rosner; Ryder; Salch; Samant; Santiago; Scheinkman; Schofield; Schraver; Schriever; Scott; Shafer; Shamon; Champnoi; Sharkey; Sigmond; Skidelsky; Slavit; Stanclift; Standard; Strong; Strenger; Sweet; Tarver; Taylor; Tennant; Triebwasser; van der Meulen; Vigdor; Weathers; Weiss; Westlake; Weston; Wimpfheimer; Witmer; Wolff; Young; Younger.

Mr. Greenberg presided over the meeting as Chair of the House.

1. Call to order, introduction of new members. The meeting was called to order and the Pledge of Allegiance was recited, and Mr. Greenberg welcomed the new members of the House.
2. Minutes of April 14, 2018 meeting. The minutes were accepted as previously distributed.
3. Report of the Treasurer. Scott M. Karson, Treasurer, updated the House with respect to the results of operations for the first four months of 2018. Through April 30, 2018, the Association's total revenue was \$16 million, an increase of approximately \$528,000 over the previous year, and total expenses were \$8.2 million, a decrease of approximately \$476,000 over 2017. The report was received with thanks.
4. Presentation of Root-Stimson Award. President Miller presented the Root-Stimson Award, which honors members of the profession for outstanding community service, to James O'Neal of Long Island City. The founder of Legal Outreach, he was honored for his work in assisting underprivileged youth to attend and graduate from college.
5. Installation of President. Mr. Miller was formally installed as President. The oath of office was administered by Hon. Sherry Klein Heitler, Chief of Policy and Planning of the Office of Court Administration, who also read a congratulatory message from

NYSBA Past President Maryann Saccomando Freedman. Mr. Miller then addressed the House with respect to his planned initiatives for his term as President.

6. Report of President. Mr. Miller highlighted the information contained in his printed report, a copy of which is appended to these minutes.
7. Report and recommendations of Criminal Justice Section and Committee on Mandated Representation. Norman P. Effman, past chair of the Committee on Mandated Representation, outlined a report recommending an increase in the rates paid to private attorneys under County Law article 18-B. After discussion, a motion was adopted to approve the following resolution:
 1. Legislation should be enacted to increase assigned counsel rates. This increase should apply to all assignments as defined under “ Definition” in the NYSBA 2015 Revised Standards for providing Mandated Representation, which reads:

Mandated Representation - Legal representation of any person financially unable to obtain counsel without substantial hardship who is (1) accused of an offense punishable by incarceration; (2) entitled to or is afforded representation under §249, §262 or §1120 of the Family Court Act; Judiciary Law §35 including child custody and habeas corpus cases; Article 6-C of the Correction Law; §407 of the Surrogate’s Court Procedure Act; §259-i of the Executive Law; or §717 of the County Law; or (3) otherwise entitled to counsel pursuant to constitutional, statutory or other authority.
 2. The rates of compensation should be comparable to the percentage increase of judicial and elected district attorney salaries.
 3. The legislation should provide for an annual review and adjustment as needed of assigned counsel rates based on a formula using comparable compensation rates similar to the formula utilized by the Federal Criminal Justice Act.
 4. The increase in rates should not result in an unfunded mandate to the counties and should be a state expense.
8. Address by Hon. Alan D. Scheinkman – Presiding Justice, Second Department. Mr. Greenberg reported that he planned to ask each of the Presiding Justices to address the House in the coming year with respect to initiatives and activities in their respective Departments. Presiding Justice Schenkman, a member of the House, reviewed initiatives being undertaken in the Second Department and efforts to promote a close relationship between bench and bar. The Chair received the report with thanks.
9. Report and recommendations of New York City Bar Association. Roger Juan Maldonado, President of the New York City Bar Association, presented a report recommending that Puerto Rico receive a permanent exemption from the Jones, Act, 46

U.S.C. §§5501 et seq. After discussion, a motion was adopted to approve the report and recommendations.

10. Report and recommendations of Committee on Women in the Law. Susan L. Harper, chair of the Committee on Women in the Law, outlined a proposal to convert the committee to a Women in Law Section. After discussion, a motion was adopted to create the proposed section.
11. Report of Committee on Continuing Legal Education. James R. Barnes, chair of the Committee on Continuing Legal Education, presented an informational report on the status of the Association's CLE programming. The chair received the report with thanks.
12. Report of The New York Bar Foundation. Lesley Friedman Rosenthal, President of The Foundation, presented an informational report on recent developments with respect to The Foundation, including new and departing Board members; an update on the Catalyst Public Service Program; and fundraising. The report was received with thanks.
13. Report re Nominating Committee. In a pre-recorded video, Nominating Committee Chair David P. Miranda reviewed the Nominating Committee process and encouraged interested members to submit nominations. The chair received the report with thanks.
14. Administrative items. Mr. Greenberg reported on the following:
 - a. Bar Leaders Retreat. The Committee for Bar Leaders of New York State will host a retreat on September 28-29 at the Bar Center in Albany.
 - b. Following the meeting, the Committee on Leadership Development will host a luncheon for first-time House members to review the House meeting.
15. New Business.
16. Date and place of next meeting. Mr. Greenberg announced that the next meeting of the House of Delegates would take place on Saturday, November 3, 2018 at the Bar Center in Albany.
17. Adjournment. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



Sherry Levin Wallach
Secretary



Michael Miller

President

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**President's Report
to the House of Delegates
June 16, 2018**

We members of this great profession of ours, particularly the members of the organized bar, stand on the front lines protecting, defending - and yes, even expanding - our precious civil liberties and the administration of justice. Our emphasis at the State Bar in the coming year will be on a broad range of topics relevant to those liberties and the effective administration of justice which I will briefly describe. But first, I will provide a brief summary of actions and activities since the last meeting of the House of Delegates.

You may have read in the New York Times last week about the refusal to disclose the disciplinary records of the policeman who choked Eric Garner to death because of a previously obscure section of New York's Civil Rights Law, section 50-a. We have established a Working Group to explore whether that law should be amended, revised or revoked. Catherine Christian and NYSBA VP from the 8th Judicial District (Buffalo) Norman Effman will co-chair that effort. As a result of the Garner case, NYSBA's Media Law Committee and Civil Rights Committee had asked NYSBA's Executive Committee to adopt a legislative proposal to repeal Civil Rights Law §50-a. Our Executive Committee decided to create a Working Group with representation from the two committees and members from or collaboration with the Labor and Employment Law Section, the Criminal Justice Section, and the State and Local Government Law Section to examine the issues raised by the report and asked the two committees to refrain from issuing comments on the proposed legislation until the working group reports back to the Executive Committee.

NYSBA and the New York State Bar Foundation have joined forces to file an amicus brief in a case before the U.S. Supreme Court *Frank v. Gaos*, that challenges the award of cy pres funds in a class action to not-for-profits. We will

be challenging the argument that the settlements should not transfer money to charities and nonprofits that have not been injured by the conduct that sparked the lawsuit. An Executive Committee subcommittee consisting of William Russell, Erica Hines and Scott Karson will coordinate our efforts with the New York State Bar Foundation in preparing and filing an amicus brief concerning the challenge to cy pres distributions and the Nixon Peabody firm has generously agreed to represent NYSBA and the NYSBF pro bono.

In a substantial departure from past years, the annual Section Leaders Conference was held over a two-day period at the Bar Center in Albany instead of a one-day session at the Harvard Club in Manhattan. Also, in a departure from past years, I asked Jean Gerbini, the chair of the Section Leaders Conference, to co-chair the conference with me. The conference was well-attended by section officers and we provided a significantly more robust and in-depth curriculum for attendees. Additionally, attendees had meaningful opportunities to socialize and share common interests and challenges. An added fiscal benefit is that having our two-day program at the Bar Center where we served five meals and had a wonderful cocktail reception for attendees on our patio, compared to just breakfast and lunch at the Harvard Club, resulted in total savings of approximately \$22,000. While there are areas to be improved upon, I believe that by any measure, this conference was a significant success.

In previous years, New York State Bar Association section, committee and task force reports have been trusted and widely-used sources of insights and information, and have served as the basis for legislative and other proposals. The coming year will be no exception. Our emphasis in the coming year will be on a broad range of topics relevant to the effective administration of justice in the 21st century. We will focus on important criminal justice issues; explore the criteria and best practices for screening candidates for election to judicial office; discuss important law practice management matters; and address America's scourge of mass shootings, assault weapons and related legal issues. And we will take a look at how, through the law, we might assist our fellow Americans in Puerto Rico.

Personal attacks on members of the judiciary have increased exponentially and as you all know, the judiciary is constrained from responding. In order to help us respond more quickly and effectively during the 24-hour news cycle when judges are unfairly attacked, or other matters call for prompt response, we are establishing a **Rapid Response Advisory Group**, which will be led by NYSBA Past President David Miranda.

There is no more important pillar to the foundation of our justice system than the quality of our judiciary. It has long been the policy of NYSBA to advocate for the

selection of judges by appointment, rather than by election. However, as long as there are judicial elections, it is vitally important that the process of evaluation is fair and fosters the best judiciary possible. I have heard from the highest levels of the court system that there are significant concerns regarding the existing evaluation system. Therefore, we have established the **Task Force on the Evaluation of Candidates for Election to Judicial Office**, co-chaired by Robert L. Haig, and former Court of Appeals Judge Susan Phillips Read. This task force will review the various vetting structures that exist throughout New York and will propose best practices, guidelines and minimum standards for review of candidates for election to judicial office and will make recommendations to assist local bar associations and good government groups to ensure that we have the best possible judicial evaluation efforts throughout the State. The task force is already hard at work, developing surveys for current and former members of the Independent Judicial Election Qualifications Commissions as well as of elected judges; a questionnaire for bar associations, good government groups and others interested in judicial elections; public hearings and focus groups; and interviews and polls. Its first full meeting will be held on August 1.

A decade ago, former President Bernice Leber established the **Task Force on Wrongful Convictions** which, under the leadership of former Judge Barry Kamins, issued a truly ground-breaking report in 2009. Judge Kamins and former Court of Appeals Judge Robert Smith are co-chairing a newly empaneled task force to update the 2009 report with recommendations based upon new developments, technology, science, experience, and judicial decisions, and make affirmative recommendations to reduce the likelihood of wrongful convictions. The members of the task force include representatives from the legal aid society, the attorney general's office, the defenders office, law schools, the federal bench and district attorneys. Martin Tankleff, who spent 17 years in prison before his conviction for his parents' murders in Suffolk County [was overturned](#), will also serve on the task force.

To build upon the excellent work of our Special Committee on Re-Entry, we are establishing the **Task Force on Incarceration Release Planning and Programs**, which will be co-chaired by Scott Karson and Sherry Levin Wallach. This task force will conduct an investigation and recommend state and national policy changes and best practices to help better prepare those released from incarceration to re-enter the community and reduce the rate of recidivism.

Massacres at Columbine, Las Vegas, Orlando, San Bernardino, Sandy Hook, Parkland and so many others... the epidemic of mass shootings continues unabated. We have established the **Task Force on Mass Shootings and Assault Weapons**, co-chaired by former Criminal Court Judge Margaret Finerty and

NYSBA Past President David Schraver. This task force will consider the connection between mental health and mass shootings; the relationship between domestic violence and mass shootings; whether assault weapons belong in civilian hands; and will make appropriate recommendations.

In 1997, NYSBA issued guidelines for the use of paralegals -- a lot has changed since 1997. **The Task Force on the Role of Paralegals**, co-chaired by former NYSBA President Mary Ann Saccamando Freedman, Margaret Phillips and Vincent Chang, will update the 1997 report, explore relevant issues and make recommendations for best practices for the use of paralegals in the context of the modern 21st century law office.

There is a humanitarian crisis in Puerto Rico of historic proportions. We have established a **Working Group on Puerto Rico** to explore ways through enactment or modification of laws we might be able to assist our fellow Americans in Puerto Rico who are suffering so grievously. Because of the urgency of the situation, I will ask that they report to our Executive Committee as soon as possible with any affirmative recommendations. In the meantime, I have already begun to reach out to bar leaders throughout NY to join me in contacting NY's Congressional delegation to express our profound concern regarding the crisis in Puerto Rico.

All of these groups have hit the ground running, and they plan to report regularly to both the House and the Executive Committee throughout the year.

You often have heard me say, "All roads lead to membership." Our association's greatest strength rests with its diverse, engaged members. Increasing membership is a top priority for our officers and for me. In addition to the policy initiatives described above, we will also be focusing on a challenge that is shared by most voluntary bar associations – and indeed most professional associations – across the country: attracting new members and retaining existing ones. In the coming year, as we continue our work to improve membership development in all areas, we will embark on a vigorous campaign focusing on providing a more meaningful membership experience for our out-of-state members, who comprise almost one-fourth of our membership. I have asked our Membership Committee to develop new outreach programming for these members, in conjunction with functions being held by our sections outside New York State. In addition, I have asked the committee to consider other tools to meet the needs of this important constituency.

During the coming months, I plan to attend a number of section and local bar association meetings. I look forward to seeing many of you at these events.

I am deeply honored to serve as the president of the New York State Bar Association. Thank you for the opportunity to serve you and the State Bar.

A handwritten signature in black ink that reads "Michael Miller". The signature is written in a cursive style with a prominent underline for the first name.



Staff Memorandum

**HOUSE OF DELEGATES
Agenda Item #2**

Attached for your reference are the financial statements for the period ending September 30, 2018.

**NEW YORK STATE BAR ASSOCIATION
2018 OPERATING BUDGET
NINE MONTHS OF CALENDAR YEAR 2018**

REVENUE

	2018 BUDGET	ADJUST- MENTS	2018 BUDGET AS ADJUSTED	UNAUDITED RECEIVED 9/30/2018	% RECEIVED 9/30/2018	2017 BUDGET	UNAUDITED RECEIVED 9/30/2017	% RECEIVED 9/30/2017
MEMBERSHIP DUES	10,050,000		10,050,000	9,883,978	98.35%	10,925,000	10,040,712	91.91%
SECTIONS:								
Dues	1,341,574		1,341,574	1,292,391	96.33%	1,411,600	1,306,494	92.55%
Programs	2,894,561		2,894,561	2,372,794	81.97%	2,763,550	2,282,974	82.61%
INVESTMENT INCOME	477,000		477,000	261,775	54.88%	345,000	263,221	76.30%
ADVERTISING	296,000		296,000	162,791	55.00%	133,000	33,940	25.52%
CONTINUING LEGAL EDUCATION	3,635,000		3,635,000	2,542,479	69.94%	3,900,000	2,318,872	59.46%
USI AFFINITY PAYMENT	2,262,000		2,262,000	1,647,577	72.84%	2,269,000	1,653,717	72.88%
ANNUAL MEETING	930,000		930,000	838,838	90.20%	869,500	897,247	103.19%
HOUSE OF DELEGATES & COMMITTEES	211,500		211,500	177,877	84.10%	108,100	64,221	59.41%
PUBLICATIONS, ROYALTIES AND OTHER	296,500		296,500	208,388	70.28%	274,200	127,540	46.51%
REFERENCE MATERIALS	1,310,000		1,310,000	659,498	50.34%	1,350,000	725,435	53.74%
TOTAL REVENUE	23,704,135	0	23,704,135	20,048,386	84.58%	24,348,950	19,714,373	80.97%

EXPENSE

	2018 BUDGET	ADJUST- MENTS	2018 BUDGET AS ADJUSTED	UNAUDITED EXPENDED 9/30/2018	% EXPENDED 9/30/2018	2017 BUDGET	UNAUDITED EXPENDED 9/30/2017	% EXPENDED 9/30/2017
SALARIES & FRINGE	10,105,550		10,105,550	6,843,532	67.72%	10,409,950	7,158,693	68.77%
BAR CENTER:								
Rent	287,000		287,000	208,066	72.50%	305,000	208,066	68.22%
Building Services	238,250		238,250	155,309	65.19%	283,250	155,037	54.74%
Insurance	142,000		142,000	127,056	89.48%	142,000	124,242	87.49%
Taxes	5,250		5,250	260	4.95%	5,250	4,949	94.27%
Plant and Equipment	904,600		904,600	608,774	67.30%	858,500	683,066	79.57%
Administration	607,600		607,600	278,515	45.84%	543,500	398,802	73.38%
SECTIONS	4,198,850		4,198,850	3,199,271	76.19%	4,171,175	3,128,675	75.01%
PUBLICATIONS:								
Reference Materials	389,050		389,050	123,230	31.67%	430,150	222,543	51.74%
Journal	378,200		378,200	288,464	76.27%	431,200	324,713	75.30%
Law Digest	187,800		187,800	124,747	66.43%	187,800	121,218	64.55%
State Bar News	242,300		242,300	102,636	42.36%	247,300	169,848	68.68%
MEETINGS:								
Annual Meeting	345,800		345,800	269,736	78.00%	348,200	337,841	97.02%
House of Delegates, Officers and Executive Committee	526,950		526,950	401,758	76.24%	520,600	404,448	77.69%
COMMITTEES:								
Continuing Legal Education	1,711,950		1,711,950	1,154,317	67.43%	1,767,875	1,128,996	63.86%
LPM / Electronic Communication Committee	72,800		72,800	40,607	55.78%	86,250	60,207	69.81%
Marketing / Membership	798,100		798,100	438,498	54.94%	971,200	464,132	47.79%
Media Services	98,900		98,900	29,302	29.63%	115,300	30,397	26.36%
All Other Committees and Departments	2,556,410		2,556,410	1,805,035	70.61%	2,489,075	1,818,846	73.07%
TOTAL EXPENSE	23,797,360	0	23,797,360	16,199,113	68.07%	24,313,575	16,944,719	69.69%
BUDGETED SURPLUS	(93,225)	0	(93,225)	3,849,273		35,375	2,769,654	

NEW YORK STATE BAR ASSOCIATION
STATEMENTS OF FINANCIAL POSITION
AS OF SEPTEMBER 30, 2018

<u>ASSETS</u>	<u>UNAUDITED</u> 9/30/2018	<u>UNAUDITED</u> 9/30/2017	<u>UNAUDITED</u> 12/31/2017
<u>Current Assets:</u>			
General Cash and Cash Equivalents	9,541,951	8,656,898	13,900,890
Accounts Receivable	164,558	95,822	135,391
Prepaid expenses	715,487	537,397	1,212,640
Royalties and Admin. Fees receivable	485,375	466,640	710,605
Total Current Assets	10,907,371	9,756,757	15,959,526
<u>Board Designated Accounts:</u>			
<u>Cromwell Fund:</u>			
Cash and Investments at Market Value	2,428,412	2,281,755	2,365,477
Accrued interest receivable	0	0	0
	2,428,412	2,281,755	2,365,477
<u>Replacement Reserve Account:</u>			
Equipment replacement reserve	1,117,225	1,116,890	1,117,002
Repairs replacement reserve	794,123	793,904	793,964
Furniture replacement reserve	219,882	219,822	219,839
	2,131,230	2,130,616	2,130,805
<u>Long-Term Reserve Account:</u>			
Cash and Investments at Market Value	24,071,357	22,042,948	22,901,794
Accrued interest receivable	0	0	123,864
	24,071,357	22,042,948	23,025,658
<u>Sections Accounts:</u>			
Section Accounts Cash equivalents and Investments at market value	3,634,868	3,630,987	3,629,262
Cash	487,638	460,793	76,245
	4,122,506	4,091,780	3,705,507
<u>Fixed Assets:</u>			
Furniture and fixtures	1,432,266	1,344,474	1,377,127
Leasehold Improvements	1,368,781	1,368,781	1,368,781
Equipment	8,240,197	8,352,125	8,298,344
Telephone	107,636	107,636	107,636
	11,148,880	11,173,016	11,151,888
Less accumulated depreciation	9,077,786	8,789,769	8,839,286
Net fixed assets	2,071,094	2,383,247	2,312,602
Total Assets	45,731,970	42,687,103	49,499,575
<u>LIABILITIES AND FUND BALANCES</u>			
<u>Current liabilities:</u>			
Accounts Payable & other accrued expenses	467,832	580,583	1,247,871
Deferred dues	687,371	124,027	7,717,027
Deferred income special	749,999	980,769	923,076
Deferred grant revenue	32,406	55,413	34,630
Other deferred revenue	81,076	179,019	852,291
Unearned Income - CLE	21,487	54,864	47,819
Payable To The New York Bar Foundation	17,609	970	0
Total current liabilities & Deferred Revenue	2,057,780	1,975,645	10,822,714
<u>Long Term Liabilities:</u>			
Accrued Pension Costs	0	0	0
Accrued Other Postretirement Benefit Costs	7,776,026	7,437,723	7,551,026
Accrued Supplemental Plan Costs and Defined Contribution Plan Costs	270,000	299,200	309,739
Total Liabilities & Deferred Revenue	10,103,806	9,712,568	18,683,479
<u>Board designated for:</u>			
Cromwell Account	2,428,412	2,281,755	2,365,477
Replacement Reserve Account	2,131,230	2,130,616	2,130,805
Long-Term Reserve Account	16,025,331	14,306,025	15,041,029
Section Accounts	4,122,506	4,091,780	3,705,507
Invested in Fixed Assets (Less capital lease)	2,071,094	2,383,247	2,312,602
Undesignated	8,849,591	7,781,112	5,260,676
Total Net Assets	35,628,164	32,974,535	30,816,096
Total Liabilities and Net Assets	45,731,970	42,687,103	49,499,575

New York State Bar Association
Statement of Activities
For the Nine Months Ending September 30, 2018

	September 2018	September 2017	December 2017
REVENUES AND OTHER SUPPORT			
Membership dues	9,883,978	10,040,712	10,053,580
Section revenues			
Dues	1,292,391	1,306,494	1,306,781
Programs	2,372,794	2,282,974	2,464,057
Continuing legal education program	2,542,479	2,318,872	3,154,300
Administrative fee and royalty revenue	1,832,939	1,773,390	2,475,953
Annual meeting	838,838	897,247	897,247
Investment income	512,647	512,712	1,034,947
Reference Books, Formbooks and Disk Products	659,498	725,435	1,204,335
Other revenue	401,517	102,855	167,602
	<u>20,337,081</u>	<u>19,960,691</u>	<u>22,758,802</u>
PROGRAM EXPENSES			
Continuing legal education program	1,767,243	1,713,195	2,449,563
Graphics	1,406,133	1,397,781	1,795,789
Government relations program	368,726	478,721	614,867
Law, youth and citizenship program	56,432	150,896	181,679
Lawyer assistance program	75,943	154,232	173,693
Lawyer referral and information services	92,598	138,906	173,154
Law practice management services	61,884	84,991	94,752
Media / public relations services	256,288	325,276	424,720
Marketing and Membership services	1,055,219	1,029,816	1,554,945
Pro bono program	159,239	162,993	222,562
Local bar program	79,533	78,124	103,500
House of delegates	354,052	357,575	480,754
Executive committee	47,706	46,874	57,647
Other committees	506,900	495,685	589,813
Sections	3,199,271	3,128,675	3,694,593
Section newsletters	125,629	111,842	144,813
Reference Books, Formbooks and Disk Products	548,566	726,715	965,600
Publications	515,848	615,780	789,495
Annual meeting expenses	269,736	337,841	338,205
	<u>10,946,946</u>	<u>11,535,918</u>	<u>14,850,144</u>
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	2,662,235	2,595,447	3,893,223
Pension plans and other employee benefit plan costs	493,917	498,252	651,939
Rent and equipment costs	819,950	764,542	1,047,999
Consultant and other fees	647,140	749,530	1,004,809
Depreciation and amortization	506,700	565,200	722,019
Other expenses	122,228	235,834	312,701
	<u>5,252,170</u>	<u>5,408,805</u>	<u>7,632,690</u>
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS			
	4,137,965	3,015,968	275,968
Realized and unrealized gain (loss) on investments	674,142	2,219,582	2,790,613
CHANGES IN NET ASSETS			
	4,812,107	5,235,550	3,066,581
Net assets, beginning of year	<u>30,816,103</u>	<u>27,749,522</u>	<u>27,749,522</u>
Net assets, end of year	<u>35,628,210</u>	<u>32,985,072</u>	<u>30,816,103</u>



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #3

REQUESTED ACTION: Approval of the 2019 Association income and expense budget.

Attached is the 2019 proposed Association operating budget. The budget has projected income of \$23,006,890 and expense of \$23,006,588, leaving a projected surplus of \$302.

The budget will be presented by T. Andrew Brown, chair of the Finance Committee.

2019 PROPOSED BUDGET

**THE ASSOCIATION HAS PROJECTED REVENUE OF \$23,006,890 AND
EXPENSE OF \$23,006,588 LEAVING A PROJECTED SURPLUS OF \$302.**

2019 NYSBA PROPOSED BUDGET

2019 PROPOSED INCOME BUDGET

ITEM	2018 BUDGET	RECEIVED TO 6/30/18	PROJECTED YEAR END	2019 PROPOSED BUDGET	2017 ACTUAL	2016 ACTUAL	2015 ACTUAL
Membership Dues	10,050,000	9,795,895	9,875,000	10,050,000	10,044,393	10,537,010	10,882,248
Continuing Legal Education	3,635,000	1,953,378	3,145,000	3,130,000	3,154,300	3,631,127	3,633,014
Investment Income	477,000	136,485	478,000	478,000	480,953	472,795	376,796
Advertising (MCI) **	276,000	97,992	219,000	219,000	63,218	154,428	143,584
Reference Materials	1,310,000	423,397	1,190,000	1,274,000	1,204,335	1,256,741	1,253,532
Publications and Miscellaneous	316,500	104,333	275,400	268,200	251,556	266,170	282,103
Insurance Program	2,262,000	1,098,385	2,196,800	2,196,800	2,258,770	2,269,769	2,081,758
Annual Meeting	930,000	839,253	839,253	850,000	897,247	865,217	812,353
House of Delegates	36,500	32,650	36,050	36,250	36,945	27,205	34,100
Committees	175,000	36,320	142,000	42,000	42,176	190,483	77,700
Sections	4,236,135	3,174,874	4,193,150	4,462,640	3,770,838	3,578,816	3,542,066
TOTAL	23,704,135	17,692,961	22,589,653	23,006,890	22,204,731	23,249,761	23,119,254

** Please note that several advertising lines are included in other items. These include sponsorship for CLE programs and committees as

2019 NYSBA PROPOSED BUDGET

EXPENSE BUDGET

ITEM	2018 BUDGET	EXPENDED TO 6/30/18	PROJECTED YEAR END	2019 PROPOSED BUDGET	2017 ACTUAL	2016 ACTUAL	2015 ACTUAL
Salaries and Frindge Benefits	10,105,550	4,478,775	9,195,486	9,377,242	9,884,497	9,432,132	9,678,527
Less: Allocations	(10,100,500)	(4,476,380)	(9,191,386)	(9,373,142)	(9,880,612)	(9,428,589)	(9,734,847)
Bar Center Operations	2,334,700	954,116	2,052,950	2,080,600	2,114,998	1,955,359	1,990,122
Publications and Meetings	1,681,050	1,010,618	1,476,650	1,525,600	1,666,100	1,601,073	1,767,763
Committees	15,545,160	6,989,538	14,530,811	14,924,349	14,757,950	14,714,391	15,111,987
Sections	4,231,400	2,531,648	4,091,500	4,471,940	3,730,254	3,600,564	3,486,713
TOTAL	23,797,360	11,488,314	22,156,011	23,006,588	22,273,187	21,874,930	22,300,265

2019 NYSBA PROPOSED BUDGET

2019 MEMBERSHIP DUES

CLASS	DUES	MEMBERS	AMOUNT
Regular Membership:			
Sustaining Members	400	712	284,800
Members admitted 2011 and Prior	275	25,969	7,141,475
Members admitted 2012-2013	185	1,407	260,295
Members admitted 2014-2015	125	1,707	213,375
Members admitted 2016 -2018	60	1,568	94,080
Special Dues Classes	70	1,163	81,410
Newly admitted	-	8,060	-
Law students	-	8,591	-
		49,177	8,075,435
Out-of-State Members:			
Sustaining Members	400	134	53,600
Members admitted 2011 and Prior	180	8,826	1,588,680
Members admitted 2012-2013	150	777	116,550
Members admitted 2014-2015	120	1,048	125,760
Members admitted 2016 -2018	60	818	49,080
Newly admitted	-	5,309	-
		16,912	1,933,670
TOTAL		66,089	10,009,105
Amount for Changes in Dues Category			40,895
PROPOSED DUES REVENUE			10,050,000

2019 NYSBA PROPOSED BUDGET

CLE INCOME BUDGET

ITEM	2018 BUDGET	RECEIVED TO 6/30/18	PROJECTED YEAR END	2019 PROPOSED BUDGET	2017 ACTUAL	2016 ACTUAL	2015 ACTUAL
560-4700 Programs	1,800,000	924,148	1,650,000	1,900,000	1,453,864	1,661,165	1,887,298
572-4700 Webcast Program Income	650,000	280,985	300,000	-	485,487	600,248	660,987
573-4700 LPM Program Income	75,000	17,050	40,000	-	84,341	87,013	99,588
568-4780 On-Line	850,000	533,476	850,000	1,000,000	849,200	844,225	610,792
569-4790 Audio Compact Disk (CD)	150,000	114,799	150,000	50,000	170,067	272,864	231,124
561-4710 Course Book	35,000	15,569	30,000	30,000	28,115	41,152	41,976
571-4715 DVD	75,000	67,351	125,000	150,000	83,226	124,460	101,249
TOTAL	3,635,000	1,953,378	3,145,000	3,130,000	3,154,300	3,631,127	3,633,014

CLE GENERAL DEPARTMENT

ITEM	2018 BUDGET	EXPENDED TO 6/30/18	PROJECTED YEAR END	2019 PROPOSED BUDGET	2017 ACTUAL	2016 ACTUAL	2015 ACTUAL
504-5020 Training and Professional Development	5,000	765	3,000	5,000	3,580	2,899	5,054
504-5070 Salary and Fringe Allocation	854,100	389,826	875,856	827,904	880,649	768,007	912,056
504-5130 Dues and Subscriptions	3,500	2,915	3,500	3,500	3,500	3,044	2,896
504-5230 Bank and Investment Fees	103,000	57,493	103,000	103,000	88,759	98,598	98,625
560-5480 Programs	1,200,000	662,239	1,200,000	1,450,000	1,076,558	1,158,517	1,284,819
572-5480 Webcast	200,000	138,687	150,000	-	254,405	170,914	175,686
573-5480 LPM Programs	50,000	33,387	50,000	-	86,276	48,529	54,116
568-5480 Hosting	70,000	33,916	45,000	35,000	67,572	90,414	68,847
504-5100 Postage and Shipping	1,000	(1,992)	1,000	1,000	1,132	(1,350)	623
504-5110 Supplies	5,000	4,951	13,000	3,000	14,894	3,394	2,913
569-5480 Compact Disc	15,000	2,954	6,000	6,000	11,115	20,080	22,406
561-5480 Course Book	2,200	-	1,000	1,000	1,088	2,204	6,438
571-5180/570 DVD	12,000	8,294	11,000	12,000	13,622	16,159	13,071
504-5370 Misc. Service/Professional Fees	3,000	-	600	1,000	1,591	2,532	2,616
504-5470 / 910-5470/5475/5700 Committee Meeting	9,500	6,405	9,500	9,500	5,228	9,146	7,838
504-5700 Graphics Department	2,750	2,888	4,000	4,000	11,893	8,761	1,313
504-5270 Travel Costs	30,000	13,627	30,000	25,000	23,750	42,316	19,015
TOTAL	2,566,050	1,356,355	2,506,456	2,486,904	2,545,612	2,444,164	2,678,332

BAR CENTER OPERATIONS AND ADMINISTRATIVE EXPENSE

ITEM	2018 BUDGET	EXPENDED TO 6/30/18	PROJECTED YEAR END	2019 PROPOSED BUDGET	2017 ACTUAL	2016 ACTUAL	2015 ACTUAL
Rent	287,000	132,509	284,000	284,000	283,623	285,078	285,078
Building Services	238,250	90,327	225,500	230,750	210,549	227,752	266,454
Insurance	142,000	81,674	162,000	162,000	169,687	141,781	153,194
Taxes	5,250	(1,485)	2,750	2,750	13,884	23,148	12,079
Plant and Equipment	904,600	409,589	853,000	862,000	886,025	754,394	675,902
Office Administration	34,500	(48,025)	35,000	35,000	(8,253)	(18,089)	113,396
Other	723,100	289,528	490,700	504,100	559,482	541,295	484,019
TOTAL	2,334,700	954,116	2,052,950	2,080,600	2,114,998	1,955,359	1,990,122

2019 NYSBA PROPOSED BUDGET

PUBLICATIONS AND MEETINGS

PUBLICATIONS

ITEM	2018 BUDGET	EXPENDED TO 6/30/18	PROJECTED YEAR END	2019 PROPOSED BUDGET	2017 ACTUAL	2016 ACTUAL	2015 ACTUAL
New York State Bar Journal	378,200	246,540	378,150	360,200	410,666	418,138	464,084
New York State Law Digest	187,800	85,949	170,300	172,300	161,153	187,721	145,080
State Bar News	242,300	72,363	127,700	135,300	217,676	173,259	256,857
TOTAL PUBLICATIONS	808,300	404,851	676,150	667,800	789,495	779,118	866,021

MEETINGS

Annual Meeting	345,800	268,549	268,700	338,500	338,205	321,137	377,577
Executive Committee	49,200	44,922	68,000	70,500	57,647	46,196	48,596
House of Delegates and Officer's Expense	477,750	292,295	463,800	448,800	480,754	454,622	475,569
TOTAL MEETINGS	872,750	605,767	800,500	857,800	876,605	821,955	901,742
TOTAL	1,681,050	1,010,618	1,476,650	1,525,600	1,666,100	1,601,073	1,767,763

2019 NYSBA PROPOSED BUDGET

COMMITTEES

ITEM	2018 BUDGET	EXPENDED TO 6/30/18	PROJECTED YEAR END	2019 PROPOSED BUDGET	2017 ACTUAL	2016 ACTUAL	2015 ACTUAL
Committees \$25,000 and/or more	417,875	161,457	401,750	313,955	300,064	432,556	315,473
Committees \$2,501 - \$24,999	215,525	106,712	194,625	220,550	150,925	175,741	176,297
Non-Line Items Committees and Other	126,850	59,354	103,850	130,600	110,195	124,969	111,803
Departments	14,784,910	6,662,014	13,830,586	14,259,244	14,196,767	13,981,125	14,508,414
TOTAL	15,545,160	6,989,538	14,530,811	14,924,349	14,757,950	14,714,391	15,111,987

SECTION DUES INCOME

ITEM	2018 BUDGET	RECEIVED TO 6/30/18	PROJECTED YEAR END	2019 PROPOSED BUDGET	2017 ACTUAL	2016 ACTUAL	2015 ACTUAL
Antitrust	13,200	11,865	12,000	12,000	12,273	13,335	13,140
Business Law	75,000	72,207	72,500	68,500	75,676	75,676	81,314
Commercial & Federal Litigation	70,000	67,541	68,000	68,000	70,360	74,330	76,004
Corporate Counsel	38,000	35,468	35,500	36,000	35,893	37,300	39,745
Criminal Justice	35,000	34,517	34,600	34,500	35,389	36,615	37,995
Dispute Resolution	37,724	38,401	38,500	37,800	38,259	41,510	41,882
Elder Law and Special Needs	80,000	73,492	74,000	80,000	74,845	77,960	78,366
Entertainment Law	36,000	33,911	34,000	34,500	34,703	36,914	41,103
Environmental Law	29,450	28,219	28,300	28,200	28,656	29,725	31,353
Family Law	75,000	74,009	74,100	74,000	74,960	75,873	77,916
Food, Drug	4,600	5,038	5,100	5,000	4,888	5,193	5,238
General Practice	32,500	29,347	30,000	30,000	31,508	34,410	38,236
Health Law	34,000	32,508	32,600	34,000	33,583	34,053	35,005
Intellectual Property Law	40,500	35,557	36,000	35,500	37,518	40,951	45,604
International Law	50,000	44,202	44,300	48,000	45,044	49,261	49,550
Judicial	10,000	9,572	9,600	10,000	9,681	8,345	8,025
Labor & Employment	68,000	62,477	62,500	62,000	65,666	67,969	68,751
Local State Government	31,500	28,417	28,600	30,000	29,550	29,962	27,778
Real Property	139,000	138,557	138,600	139,000	140,271	142,853	153,646
Senior Lawyers	45,000	48,264	48,300	47,000	44,120	47,080	33,769
Tax	55,000	49,770	50,000	53,000	50,189	53,699	54,854
Torts, Insurance and Compensation	76,000	72,430	72,500	73,000	75,705	77,310	83,740
Trial Lawyers	70,500	62,072	62,500	62,000	66,687	69,098	72,960
Trusts and Estates	165,600	161,950	162,000	160,000	165,713	170,977	170,316
Women in Law	-	-	-	12,000	-	-	-
Young Lawyers	30,000	27,468	27,500	28,000	25,649	24,800	29,243
TOTAL	1,341,574	1,277,258	1,281,600	1,302,000	1,306,781	1,355,198	1,395,531

SECTION OTHER INCOME

ITEM	2018 BUDGET	RECEIVED TO 6/30/18	PROJECTED YEAR END	2019 PROPOSED BUDGET	2017 ACTUAL	2016 ACTUAL	2015 ACTUAL
Antitrust	218,400	192,220	210,900	220,400	159,987	147,275	171,257
Business Law	127,500	13,244	65,400	113,100	19,333	28,466	21,385
Commercial & Federal Litigation	184,000	168,220	200,500	175,500	188,625	178,090	170,114
Corporate Counsel	25,400	836	10,000	28,300	17,002	10,421	32,924
Criminal Justice	22,200	22,720	30,600	22,150	28,178	17,525	25,140
Dispute Resolution	136,376	74,531	90,300	169,005	71,952	98,745	86,565
Elder Law and Special Needs	240,000	96,706	211,500	303,500	228,167	201,905	223,475
Entertainment Law	62,800	20,710	58,000	67,800	52,115	43,669	40,133
Environmental Law	55,350	31,891	65,500	70,000	68,280	45,265	62,432
Family Law	278,800	358,635	359,750	319,050	330,256	290,308	191,071
Food, Drug	1,300	2,210	2,400	2,000	1,310	585	-
General Practice	49,400	1,801	53,400	68,050	2,735	2,420	3,472
Health Law	37,800	18,355	59,400	39,200	39,052	32,591	29,378
Intellectual Property Law	40,000	16,440	42,100	45,250	37,660	33,138	34,442
International Law	290,800	132,081	293,700	298,000	279,336	249,017	216,914
Judicial	18,100	15,290	15,650	15,500	21,725	13,530	13,730
Labor & Employment	115,150	27,352	85,150	106,700	85,579	71,497	79,091
Local State Government	32,700	185	20,800	21,700	17,480	11,730	7,226
Real Property	82,500	40,978	112,000	107,000	58,033	48,929	47,182
Senior Lawyers	45,200	405	16,200	45,000	3,273	15,632	9,960
Tax	218,150	177,340	216,750	212,400	160,955	154,825	145,292
Torts, Insurance and Compensation	80,135	56,245	110,200	90,135	108,419	102,346	63,568
Trial Lawyers	76,500	20,148	86,950	59,000	49,825	23,357	65,655
Trusts and Estates	277,900	266,292	333,600	366,500	258,929	257,733	294,870
Women in Law	-	10,500	10,500	25,500	-	-	-
Young Lawyers	178,100	132,284	150,300	169,900	175,851	144,620	111,260
TOTAL	2,894,561	1,897,616	2,911,550	3,160,640	2,464,057	2,223,619	2,146,535

2019 NYSBA PROPOSED BUDGET

SECTIONS EXPENSE

ITEM	2018 BUDGET	RECEIVED TO 6/30/18	PROJECTED YEAR END	2019 PROPOSED BUDGET	2017 ACTUAL	2016 ACTUAL	2015 ACTUAL	
Antitrust	231,600	171,642	222,900	232,400	252,101	193,013	175,371	620
Business Law	202,500	74,084	137,900	181,600	122,457	123,254	143,991	621
Commercial & Federal Litigation	254,000	225,841	268,500	243,500	246,413	259,822	249,894	631
Corporate Counsel	63,400	17,731	44,500	64,300	55,022	57,926	71,754	622
Criminal Justice	55,200	47,938	65,200	56,650	58,421	70,867	66,558	623
Dispute Resolution	174,100	77,343	128,800	206,805	140,149	106,861	103,022	644
Elder Law and Special Needs	320,000	130,381	285,500	383,500	250,205	285,817	265,096	632
Entertainment Law	98,800	49,438	92,000	102,300	96,275	76,962	68,635	630
Environmental Law	84,800	55,241	83,550	88,500	78,674	65,935	65,163	624
Family Law	353,800	188,877	374,700	393,050	401,451	378,011	285,451	625
Food, Drug	5,900	6,608	6,800	7,000	8,635	6,037	8,993	626
General Practice	81,900	50,809	83,400	98,050	57,962	44,377	44,878	627
Health Law	71,800	49,206	92,000	73,200	92,465	69,241	58,304	633
Intellectual Property Law	80,500	51,290	78,100	80,750	64,527	64,563	86,187	634
International Law	309,700	166,073	338,000	335,300	218,335	242,216	265,438	629
Judicial	27,050	18,859	23,600	25,100	27,275	19,645	20,235	635
Labor & Employment	183,150	73,520	125,500	168,700	118,660	115,728	124,770	636
Local State Government	64,200	21,885	49,400	51,700	27,079	23,257	20,113	637
Real Property	221,500	110,477	250,600	246,000	234,481	240,235	202,787	638
Senior Lawyers	90,200	31,974	64,500	92,000	28,646	30,572	26,214	645
Tax	273,150	222,504	266,750	265,400	232,303	198,767	208,368	639
Torts, Insurance and Compensation	153,000	69,873	149,000	163,135	150,104	145,414	149,689	628
Trial Lawyers	147,000	56,497	149,450	121,000	129,707	97,413	148,944	640
Trusts and Estates	443,500	409,439	495,600	526,500	400,746	484,772	446,652	641
Women in Law	32,550	31,429	37,450	67,600	35,661	24,385	41,297	646
Young Lawyers	208,100	122,691	177,800	197,900	202,499	175,475	138,911	642
TOTAL	4,231,400	2,531,648	4,091,500	4,471,940	3,730,254	3,600,564	3,486,713	



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #6

REQUESTED ACTION: Approval of an amendment to the NYSBA *2015 Revised Standards for Providing Mandated Representation*.

Attached is a memorandum from the Committee on Mandated Representation recommending an amendment to the NYSBA Standards for Providing Mandated Representation, last revised in 2015. The proposed amendment, to Standard B-1(a), would provide for the pre-petition representation of parents in child welfare cases modifying the current provision mandating representations at the “early stages” of a Family Court proceeding.

Also attached for your reference are the 2015 Standards.

The report and recommendations will be presented by Linda Gehron, a member of the Committee on Mandated Representation.

**Memorandum in Support of an Amendment to the
NYSBA Standards For Providing Mandated Representation**

**New York State Bar Association
Committee on Mandated Representation
3/26/18**

The Committee on Mandated Representation urges the New York State Bar Association to adopt a Resolution revising Section B-1(a) of the NYSBA *2015 Revised Standards for Providing Mandated Representation* to provide: “Effective representation includes representation during both the pre- and post-petition stages of a Family Court case, including, but not limited to representation in emergency removal hearings and advocacy for the provision of social work, counseling, mental health, and other services”.

The objective of the *Standards for Providing Mandated Representation* issued by the NYSBA Committee on Mandated Representation is to ensure quality representation in both criminal and family court cases. Quality of legal representation at the pre-petition stage of child welfare cases is critical for the protection of the fundamental and due process rights of families. During the pre-petition period, life-altering decisions are made that can result in the traumatic separation of a child from his or her parent and possibly the permanent destruction of the parent-child relationship.

Research has shown a direct connection between such enhanced representation of parents and improved results leading to permanency for children. When parents’ attorneys provide representation early in the case, they are able to work closely with the family and the social services agency to identify and access appropriate services. Under such circumstances, parents have a better chance for keeping their children out of foster care by maintaining them safely in their care at home. In many New York State jurisdictions, millions in foster care costs can be saved by preserving the family.

The proposed revision seeks to provide the same emphasis on the importance of pre-petition representation of parents in child welfare cases as the NYS Office of Indigent Legal Services *Standards for Parental Representation in State Intervention Matters* and thereby lend much needed support to practitioners who routinely face vigorous opposition and even hostility when defending family rights.

For all of the reasons given above, the Committee on Mandated Representation enthusiastically supports this Resolution, respectfully requesting a revision of the New York State Bar Association’s *2015 Revised Standards For Providing Mandated Representation* providing for the pre-petition representation of parents to preserve the fundamental and due process rights of New York State parents.



NYSBA

2015 Revised Standards for Providing Mandated Representation

Prepared by the Committee to Ensure
Quality of Mandated Representation
Approved as Revised by the New York
State Bar Association House of Delegates,
March 28, 2015



PREFACE

The 2015 Revised Standards for Mandated Representation reflect changes approved by the House of Delegates of the New York State Bar Association on March 28, 2015. Changes were made to Section I-7 Criminal Matters and Section I-10 Criminal Appeals.

New subdivisions (h) and (l) were added to Section I-7, resulting in the re-lettering of former subdivisions (h)-(j) which will now be (i)-(k). New subdivision (h) corrects an oversight in the original standards which failed to require trial counsel to preserve the record. New subdivision (l) codifies existing Court of Appeals case law which holds that the case file maintained by counsel belongs to the client and that (i) counsel has a duty to maintain the file under reasonably secure conditions for that period of time as required by law; and (ii) to promptly give the file to successor counsel upon request.

Ministerial changes made to former subdivisions I-7(i)(iv) and (j)(iii) were intended to better facilitate the appointment of appellate counsel. Previously, these provisions required only that counsel “assist” the client in applying for appellate counsel. The phrase “assisting the client” was removed from each subdivision to clarify that counsel has an affirmative duty to apply on behalf of the client for poor person relief so that appellate counsel may be assigned to represent the client either on direct appeal from a judgment of conviction or in an appeal brought by the prosecution. This change not only conforms to the Second Department’s rule (22 N.Y.C.R.R. § 671(b)(3)-(4)), but removes a substantial barrier to the appointment of appellate counsel, particularly for those individuals with limited comprehension or low literacy skills.

Three new subdivisions were added to Section I-10 Criminal Appeals. The new subdivisions (i) – (k) address: assigned counsel’s responsibility to the client if the case is remanded for other proceedings during or after the appeal; appellate counsel’s responsibility in the event s/he becomes aware of a credible claim of actual innocence during the course of appellate representation; and appellate counsel’s availability if asked by the trial court to represent a pro se defendant in an Article 440 or other post-conviction proceeding which would be compensated pursuant to Article 722 of the County Law. None of these issues were previously addressed in the original or Amended Standards.

Earlier revisions to the original 2005 Standards were made in 2010, and 2013. The 2010 revisions were the result of statutory changes in the Family Law which eliminated the designation of “Law Guardian” which was replaced with “attorney for the child”. 2010 revisions also were necessitated due to the promulgation of the New York Rules of Professional Conduct, effective April 1, 2009 which replaced the former Lawyers Code of Professional Responsibility. Another important change which occurred was that the Office of Court Administration (“OCA”) promulgated caseload standards for attorneys representing children in Family Court proceedings.

The Standards were revised again in 2013 to incorporate references to the Conflict Defender Standards which were developed by the Office of Indigent Legal Services and later made applicable to all delivery systems. The Conflict Defender Standards were in large part based on the NYSBA 2010 Revised

Standards. The 2013 Revised Standards adopted language from the ILS Standards where that language amplified or supplemented the language of the 2010 Revised Standards.

Consistent with each revision, the 2015 Revised Standards for Mandated Representation are intended to apply in any provider system, whether Criminal, Civil, or Family Court and whether the mandated provider is an attorney for the defendant, respondent/petitioner, parent or child, except where explicitly limited to a particular type of provider.

The Committee to Ensure Quality of Mandated Representation (CEQMR) is committed to undertaking periodic review of the Standards and will continue to revise same so as to reflect best practices.

The Committee is especially grateful to CEQMR member Robert S. Dean who worked tirelessly to revise Sections I-7 and I-10 so that they were consistent with case law and best practices.

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INTRODUCTION

Both constitutional and statutory laws require New York to provide counsel to certain individuals financially unable to obtain counsel. Most “mandated representation” is provided under a representation plan devised by each county in the state, and the City of New York,¹ pursuant to County Law Article 18-B.

County Law Article 18-B authorizes each county to choose one or a combination of several options for providing representation to eligible clients: a public defender office; a private legal aid bureau or society or, in Family Court matters, any corporation or voluntary association or organization permitted to practice law under Judiciary Law §495(7); or the assignment of private practitioners pursuant to an assigned counsel plan. County Law §722. The statute for providing representation to juveniles in various matters provides other options, including allowing the appropriate Appellate Division department to contract with one or more qualified attorneys to act as attorney for the child or establish panels to represent children, and provides for the Office of Court Administration to enter into contracts with legal aid organizations for children’s representation. *See*, Family Court Act §243. Other statutory directives mandating representation or governing its provision include Judiciary Law §§35, 35-a and 35-b and Surrogate’s Court Procedure Act §407.

The objective of any representation plan should be to ensure high quality legal services for every individual represented under the plan. A county or other governmental entity is entitled to consider costs as a relevant factor in devising its representation plan, but it cannot ignore its constitutional, statutory and moral duty to provide quality counsel to those who cannot afford representation.

Although the County Law currently allows each county to devise its own configuration for an adult provider system, in a great majority of cases, a proper representation plan will establish a mixed representation system that integrates the use of institutional providers and assigned counsel. Such mixed representation systems can combine the advantages of institutional providers with the advantages of assigned counsel plans to engage a broad segment of the bar in achieving the objective of the plan.

The following standards are designed for those devising, reviewing and working within representation plans to provide mandated representation. Unless a specific application or limitation is noted, these standards apply to all mandated representation, except capital defense, which has special requirements. The standards are designed to apply in any provider system, except where explicitly limited to a particular type of provider. The standards are designed to apply to representation by providers of mandated representation in existing systems and in systems developed in the future. It is the intention of the drafters that these standards be viewed and implemented as a whole. These standards do not define the ideal system or attempt to establish the norm. Rather they establish the minimum requirements for a mandated representation system.

The standards are also intended to apply to Family Court cases in which counsel is assigned to represent an adult or to represent a child. In Family Court proceedings, proceedings which differ significantly from criminal proceedings,

1. *Hereinafter the term “counties” includes the City of New York.*

such as child protective, child custody and juvenile delinquency, the duration of representation may be extremely lengthy, spanning several years including permanency hearings, modifications, and extensions of placement or supervision. In addition, the focus frequently relates to family treatment and other support services, the proceedings are divided into discrete fact-finding and dispositional phases, jury trials are unavailable, and, except in juvenile delinquency and persons in need of supervision cases, a civil standard of proof is applied.

Historically, the largest impediment to the provision of quality mandated representation is under-funding of the provider. It is vital that funding sources provide funding adequate to enable providers to meet or exceed the requirements of these standards.

DEFINITIONS

Mandated Representation - Legal representation of any person financially unable to obtain counsel without substantial hardship who is (1) accused of an offense punishable by incarceration; (2) entitled to or is afforded representation under §249, §262 or §1120 of the Family Court Act; Judiciary Law §35 including child custody and habeas corpus cases; Article 6-C of the Correction Law; §407 of the Surrogate's Court Procedure Act; §259-i of the Executive Law; or §717 of the County Law; or (3) otherwise entitled to counsel pursuant to constitutional, statutory or other authority.

Providers of Mandated Representation - Attorneys who, or organizations of any form, that provide mandated representation, including, but not limited to, individual attorneys; public defender offices; legal aid bureaus or societies; corporations, voluntary associations or organizations permitted to practice law under the authority of Judiciary Law §495(7); and assigned counsel plans. The term "providers of mandated representation" includes both the individual attorneys and whatever entity employs those attorneys or by which those attorneys are assigned to provide mandated representation.

Institutional Providers of Mandated Representation - Providers of mandated representation identified in County Law §722(1) and (2), including public defenders; legal aid bureaus or societies; any corporation, voluntary association or organization permitted to practice law under the authority of Judiciary Law §495(7); and any legal aid organization, attorney or attorneys with whom an Appellate Division, The Office of Court Administration or any other governmental entity has contracted for the provision of mandated representation under the authority of Family Court Act §243. The term "institutional provider of mandated representation" is used to distinguish the institutions from the individual attorneys working for the institutional providers. An assigned counsel plan is not an "institutional provider of mandated representation."

Assigned Counsel Plan - A plan for the assignment of private attorneys pursuant to County Law §722(3).

Assigned Counsel - Private attorneys assigned to provide mandated representation pursuant to County Law §722(3).

A. INDEPENDENCE

A-1. Providers of mandated representation shall be guided at all times by a commitment to quality representation of all clients and the integrity of the attorney-client relationship. The function of providing mandated representation, including the selection, funding and payment of counsel, shall be independent. In the performance of their legal duties, providers of mandated representation should therefore be free from political influence or any influences other than the interests of the client that erode the ability to provide quality representation,² and should be subject to judicial supervision only in the same manner and to the same extent as all other practicing lawyers. Each provider of mandated representation shall have an independent board or other entity to protect professional independence.

A-2. The selection of providers of mandated representation, including the head of any institutional provider of mandated representation, shall be made solely on the basis of merit.

A-3. The selection of the individual attorney as part of an assigned counsel plan shall be made by someone outside the court system in order to ensure the independence of counsel. Assignments should be made on a rotational basis from a list created pursuant to a plan established under County Law Article 18-B and shall be motivated by the goal of providing high quality mandated representation. Where mandated representation is to be provided by assigned counsel, the selection of the individual attorney to whom cases are to be assigned shall not be made by a judge or court official except in an emergency or in exceptional circumstances.

B. EARLY ENTRY OF REPRESENTATION

B-1. Effective representation should be available for every eligible person whenever counsel is requested during government investigation or when the individual is in custody. Provision of counsel shall not be delayed while a person's eligibility for mandated representation is being determined or verified.

B-1(a). Effective representation includes representation at the early stage of a Family Court proceeding, including the provision of social work, counseling, mental health, and other services.

B-1(b). Counsel must be present at arraignment or the first appearance in court in criminal cases.³

B-2. Eligible persons shall have counsel available for any court appearance.

B-3. Counsel shall be available when a person reasonably believes that a process will commence that could result in a proceeding where representation is mandated.

B-4. Systematic procedures shall be implemented to ensure that prompt mandated representation is available to all eligible persons, particularly those held in detention facilities and where a child has been removed by a governmental agency from the person's home.

2. *ILS 1*

3. *ILS 5a*

C. ELIGIBILITY OF CLIENT

C-1. Any person who is financially unable to obtain counsel without substantial hardship or entitled to assigned counsel regardless of financial circumstances shall be eligible to receive mandated representation in all situations in which a constitutional, statutory or other right to counsel exists.

C-2. Mandated representation shall not be denied because of a person's ability to pay part of the cost of representation, because friends or relatives have resources to retain counsel or because bond has been or can be posted.

C-3. A judge shall decide a person's initial eligibility and continuing eligibility for mandated representation.

C-4. Rules, regulations and procedures concerning the determination of initial eligibility and continuing eligibility for mandated representation shall be designed so as to protect the client's privacy and constitutional rights and to not interfere with the attorney's relationship with his or her client.

C-5. Provision of counsel shall not be delayed while a person's eligibility for mandated representation is being determined or verified.

C-6. Any attempts to obtain partial payment from any person for the costs of mandated representation or associated services shall be made in accordance with County Law §722-d.

D. PARTIAL PAYMENT

D-1. No person shall be subject to a partial payment order under County Law §722-d⁴, unless that person was informed, prior to the offer of mandated representation, of any possible obligation to make any payment, as well as the standards that permit the court to order any such payment. No advice about partial payment shall be given in a way that discourages exercise of the right to counsel.

D-2. Partial payment shall not be imposed if doing so would cause financial hardship to the person or the person's dependents and unless satisfactory safeguards are provided.

D-3. Where partial payment pursuant to County Law §722-d is appropriate, the court shall determine the amount to be paid and such payment shall be made directly to the general fund of the county or other appropriate funding agency.

4. *This section of the County Law reads as follows:*

Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise.

Though the statute suggests that "counsel may report" information about the defendant's financial ability to the court, the Committee notes that the Rules of Professional Conduct prohibit an attorney from revealing "confidential information"; see Rule 1.6(a). Such confidences or secrets could include information regarding the client's financial status, which therefore cannot be revealed by a lawyer unless the client consents or some other exception exists under the Rules of Professional Conduct: Rules 1.6(a), 1.6(b), 3.3(c).

D-4. The amount of payment to be made shall be decided objectively on a case-by-case basis in accordance with predetermined standards. The predetermined standards shall take into account the cost of living in the particular community in which the person provided mandated representation resides and in which the case is pending and shall also consider all aspects of the person's family circumstances, including but not limited to number of dependents, employment status, housing and health care costs and indebtedness. The standards shall be adjusted periodically to reflect increases in the cost of living. At a minimum, the person seeking counsel shall be given an opportunity to be heard and to present information to the court concerning whether the person can afford the partial payment.

D-5. No provider of mandated representation shall be responsible for collection of payment.

D-6. Payment toward the cost of representation shall never be a factor in the determination of bail and shall never be made a condition of probation or other sentence.

D-7. Failure to make any ordered payment shall not result in the denial of counsel at any stage of proceedings.

D-8. Partial payment shall only be ordered based on existing circumstances during the pendency of the matter for which mandated representation has been provided and shall not be ordered based on future ability to pay.

E. QUALIFICATION OF COUNSEL

E-1. Attorneys who provide mandated representation shall have sufficient qualifications and experience to enable them to render quality representation to a client in each particular case. Providers of mandated representation shall never allow an attorney to accept a case if that attorney lacks the ability,⁵ experience or training to handle it competently, unless the attorney is associated with another attorney on the case who does possess the necessary experience and training.

E-2. Institutional providers of mandated representation and assigned counsel plans shall have written minimum qualifications for attorneys who provide mandated representation. If mandated representation is to be provided in more than one category of cases, then, to the extent appropriate, there shall be different minimum qualifications for each category and, if appropriate, for different levels of cases within each category.

F. TRAINING

F-1. All attorneys and staff who provide mandated representation shall be provided with entry-level and⁶ continuing legal education and training sufficient to ensure that their skills and knowledge of the substantive and procedural law and ethical rules relevant to the area of law in which they are or will be practicing are sufficient to enable them to provide quality representation.

5. *ILS 7a*

6. *ILS 7d*

F-2. Continuing legal education and training programs shall be made available and affordable for attorneys and staff providing mandated representation, and public funds shall be provided to enable all attorneys and staff to attend such programs.

F-3. Attorneys who provide mandated representation shall allocate a significant portion of their annual mandatory continuing legal education credit requirement toward courses directly related to the subject matter of the mandated representation they provide.

G. WORKLOADS

G-1. The objective of providing high quality mandated representation to all eligible persons cannot be accomplished by even the ablest and most industrious attorneys in the face of excessive workloads. To permit counsel to satisfy their ethical obligations to their clients, every institutional provider of mandated representation and every assigned counsel plan shall establish workload limits for individual attorneys. Workloads shall be at a level to allow counsel to meet the Performance Standards set forth herein and in Family Court cases shall comply with the Office of Court Administration workload standards for attorneys for the child (*see*, §127.5 of the rules of the Chief Administrator of the Courts) and for attorneys in criminal cases in New York City (*see*, §127.7 of the rules of the Chief Administrator of the Courts).

G-2. Where OCA has not promulgated a workload standard, each institutional provider and assigned counsel plan shall develop local numerical workload standards, taking into consideration different procedures, policies and circumstances in each locality. Among the factors that shall be considered in establishing maximum workloads are (a) the types of cases being handled; (b) the qualifications and experience of the attorney; (c) the workload and resources of the prosecutor or other attorney(s) handling such cases for the government; (d) the distance between court(s) and attorney offices; (e) the time needed to interview clients and witnesses, taking into consideration the travel time and the location of confidential interview facilities; (f) any other factors relevant to the local practice or the types of cases being handled; and (g) existing national and other recognized workload standards.

In no event, however, shall the local workload standards exceed the national workload standards established in criminal cases by the National Advisory Commission on Criminal Justice Standards and Goals (Task Force on Courts, 1973) Standard 13.12, which sets forth the following maximum cases per year: 150 felonies or 400 misdemeanors or 200 mental health matters or 25 appellate assignments.⁷

In cases other than criminal and juvenile delinquency proceedings, each provider of mandated representation is responsible to set its own numerical workload limits based on the factors noted above.

7. These numerical standards do not apply to the defense of capital cases, which are unique. See, Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation (Judicial Conference of the United States, 1998); see also, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. 2003).

Each provider's workload must be reviewed on a regular basis to ensure that the provider is not responsible for more cases than it can reasonably be expected to handle effectively, bearing in mind the factors set forth above.

G-3. Each provider's workload should be continuously monitored, assessed and predicted so that whenever possible, excessive workload problems can be anticipated and preventive action taken.

G-4. Whenever the workload of a provider of mandated representation exceeds maximum workload standards, it is the obligation of the provider to take appropriate steps, which may include, but are not limited to (a) declining additional cases; (b) seeking leave to withdraw from existing cases; (c) seeking additional funding to hire additional attorneys and/or support staff; (d) actively seeking the support of the judiciary, the private bar and the community in the resolution of the workload problem; and/or (e) seeking assistance from an appropriate state or national organization as a means of independently documenting the problem.

G-5. Courts shall not require providers of mandated representation to accept excessive workloads and shall take all steps necessary to ensure that excessive workloads are not imposed.

G-6. Government funders shall not require providers of mandated representation to accept excessive workloads and shall take all steps necessary to ensure that excessive workloads are not imposed.

H. SUPPORT SERVICES/RESOURCES

H-1. The institutional provider of mandated representation shall provide counsel with the investigatory, expert, and other support services necessary to provide quality legal representation, including, but not limited to, social work, mental health and other relevant social services. The institutional service shall also provide secretarial, interpretation and other support services and facilities necessary to provide quality legal representation.

H-2. The facilities provided to counsel by institutional providers of mandated representation shall include professional quality office facilities that are comparable to a similarly sized private law firm, such as adequate working space for each attorney and staff member, private office and conference room space in which attorneys can meet with clients, sufficient library facilities and/or access to online legal research materials, and computers and other necessary technical and communication equipment.

H-3. The support services and facilities provided to counsel at institutional providers of mandated representation shall be at least comparable to the support services and facilities provided to attorneys for the government.

H-4. The administrative office of an assigned counsel plan shall be equipped with suitable staff, space, equipment and supplies to carry out its duties under County Law §722(3).

H-5. Assigned counsel plans shall ensure that assigned counsel have the investigatory, expert, and other support services, including, but not limited to, so-

cial work, mental health and other relevant social services, and facilities necessary to provide quality legal representation. Such services and facilities shall include access to meeting facilities that ensure confidentiality, sufficient library facilities and/or online legal research materials, any necessary foreign language interpretation services, and sufficient technical and communications equipment and means, including a means for clients to contact the attorney telephonically without incurring long-distance charges. This does not mean that the assigned counsel plan itself is obligated to provide these support services and/or facilities.

H-6. Because persons eligible for mandated representation have the right to all appropriate investigatory and expert services, courts should routinely grant requests for such services made by assigned counsel. In Family Court expert services, including social worker, family treatment, and forensics, are often crucial at the outset and should be requested by counsel prior to fact finding. In Family Court, attorneys should also ensure to the extent feasible that social worker and mental health personnel possess adequate qualifications, experience and training.

H-7. Institutional providers of mandated representation and assigned counsel plans shall establish means by which incarcerated clients can have confidential communication with their counsel, telephonically or otherwise. Correctional and detention facilities shall cooperate in establishing such means.

H-8. Support services and resources shall be available to all clients and used as needed and shall not be restricted by type or level of case.⁸

H-9. Providers of mandated representation shall establish and maintain data collection and evaluation systems.⁹

I. PERFORMANCE

I-1. An attorney can provide zealous, effective and high quality representation only if the attorney has the time, resources, knowledge and expertise that a conscientious and professional attorney familiar with the particulars of the case would consider necessary.

I-2. If at any time during the representation the attorney concludes that he or she is not able to provide zealous, effective and high quality representation, the attorney must immediately seek to withdraw from the case, unless the attorney can associate with another attorney and thereby be able to provide zealous, effective and high quality representation.

The following are basic Performance Standards and are not intended to be exhaustive.

General Performance Standards

I-3. An attorney must (a) interview the client as soon as possible, and in a setting in which client confidentiality can be maintained and an attorney-client relationship can be established;¹⁰ (b) communicate with his or her client on a regular basis during the course of representation, preferably in a private face-to-face discussion; (c) communicate with family or friends of the client, to the extent that the client

8. ILS 3,4

9. ILS 10a

10. ILS 5b

waives the attorney-client privilege as to such communication; (d) communicate with professionals and service providers relevant to the case, including, but not limited to, physicians, mental health workers and caseworkers; (e) inform the client on a regular basis of the progress of the case; (f) ensure that the client sees copies of all documents prepared or received by the attorney and provide copies of such documents where appropriate;¹¹ and (g) provide the client with the opportunity to make an intelligent and well-informed decision in those instances when a decision is to be made by the client (e.g., whether to plead guilty or enter an admission, whether to be tried by a jury or judge and whether to testify).

I-4. An attorney shall abide by the Rules of Professional Conduct (Part 1200 of Title 22 of the New York Codes, Rules and Regulations), and in particular those Rules concerning conflicts of interest (Rules 1.7, 1.8, 1.9, 1.10, 1.11).

I-5. Under an assigned counsel plan, the assignment procedures must ensure that the same counsel will represent the client continuously from the inception of the representation until the initiation of the appellate proceeding, if any, unless a court determines that (a) there is a conflict of interest; (b) there is a breakdown in the attorney-client relationship that interferes with counsel's ability to provide zealous, effective and high quality representation; or (c) some unforeseen circumstance, such as illness, prevents counsel from continuing to provide zealous, effective and high quality representation. Similarly, counsel assigned at the appellate, post-conviction or post-disposition stage shall provide continuity of representation during that proceeding.

I-6. When a client has multiple pending proceedings, the attorney on any one of them shall immediately and thereafter regularly communicate with the attorney(s) on the other matter(s), to the extent that the client waives the attorney-client privilege as to such communication. If feasible, and with the approval of the client, the attorneys shall make every effort to transfer the representation on all pending matters to a single attorney.

Specific Types of Matters

I-7. Criminal Matters

No attorney shall accept a criminal case unless that attorney can provide, and is confident that he or she can provide, zealous, effective and high quality representation. Such representation at the trial court stage means, at a minimum:

a. Obtaining at the earliest possible time¹² all available information concerning the client's background and circumstances for purposes of (i) obtaining the client's pretrial release on the most favorable terms possible; (ii) negotiating the most favorable pretrial disposition possible, if such a disposition is in the client's interests, including dismissal or pretrial diversion;¹³ (iii) presenting character evidence at trial if appropriate; (iv) advocating for the lowest legally permissible sentence, if that becomes necessary; and (v) avoiding, if at all possible, collateral consequences including but not limited to deportation or eviction;

b. Investigating the facts concerning the offense charged, including: (i) interviewing the client; (ii) aggressively¹⁴ seeking discovery and disclosure of the

11. ILS 6

12. ILS 5

13. ILS 5d

14. ILS 5e

People's evidence, exculpatory information and impeaching material; (iii) obtaining relevant information from other sources; (iv) interviewing witnesses to the relevant events; and (v) obtaining corroborating evidence for any relevant defenses;

c. Researching the law, including, as appropriate, state statutory and constitutional law and federal constitutional law relevant to (i) the offenses charged (and any lesser included offenses); (ii) any possible defenses; (iii) relevant sentencing provisions; and (iv) other matters such as issues concerning the accusatory instrument, the admissibility of evidence, the prosecutor's obligations, speedy trial rights and any other relevant federal or state, constitutional, common law or statutory issue;

d. Preserving the client's options at all stages of the proceedings, such as (i) to seek a jury trial; (ii) to proffer a defense; (iii) to seek dismissal of the indictment; (iv) to seek dismissal of the charges for denial of statutory or constitutional speedy trial rights; (v) to seek preclusion or suppression of evidence; (vi) to seek discovery, exculpatory and impeaching information; and (vii) to seek an appropriate disposition consistent with the client's best interests and instructions;

e. Providing the client with full information concerning such matters as (i) potential defenses and their viability; (ii) the weaknesses and strengths in the People's case; (iii) plea offers; (iv) potential sentence exposure under all possible eventualities, including the relationship to any other sentences, potential release dates and available correctional programs; and (v) immigration, motor vehicle licensing and other collateral consequences under all possible eventualities;

f. Filing prompt and¹⁵ appropriate pretrial motions for, among other things, (i) dismissal of the charging instrument for facial or evidentiary insufficiency; (ii) joinder or severance; (iii) dismissal of the charges for denial of statutory or constitutional speedy trial rights; (iv) suppression or preclusion of evidence; and (v) additional resources not available due to the client's financial circumstances;

g. In the event of, and in advance of trial: (i) developing a legal and factual strategy, using whatever investigative and forensic resources are appropriate; (ii) preparing for cross examination of the People's witnesses and direct examination of defense witnesses; (iii) developing a foundation for the introduction of defense evidence; (iv) formulating an opening statement; and (v) drafting requests for jury instructions;

h. In the event of, and during the course of trial and all related proceedings: (i) make specific and timely objections where appropriate and consistent with trial strategy; (ii) ensure that such objections are made on the record and recorded; and (iii) identify the particular element or elements for which the evidence is insufficient when moving to dismiss at the close of the prosecution's case.

i. In the event of, and in advance of, sentence: (i) gathering favorable information and, where appropriate, presenting that information in written form; (ii) reviewing the probation department report to ensure that it is accurate and taking whatever steps are necessary to correct errors; and (iii) utilizing forensic resources if appropriate;

j. Following a final disposition other than a dismissal or acquittal: (i) advising the client of the right to appeal and the requirement to file a notice of appeal; (ii) filing a notice of appeal on the client's behalf if the client requests; (iii) advising the client of the right to seek appointment of counsel and a free copy of the transcript; (iv) applying for appointment of counsel and a free copy of the transcript if the client requests; and (v) cooperating fully with appellate counsel;

k. Following a disposition from which the prosecutor has a right to appeal: (i) advising the client of the possibility that the prosecutor will pursue an appeal; (ii) advising the client of the client's right to appointment of counsel should the prosecutor appeal; and (iii) applying for appointment of counsel if the client requests; and

l. The case file maintained by counsel belongs to the client. Following any disposition: (i) retaining the file under as secure conditions as reasonably feasible for that period of time as required by law, unless directed otherwise; and (iii) promptly furnishing a client's file to successor counsel upon counsel's request, except for confidential information unless the client gives permission.

I-8. Juvenile Delinquency and Juvenile Offender Matters

a. Attorneys representing children in Family Court shall investigate, research and prepare in the same manner and using the same tools as attorneys in criminal cases. Thus, to the extent consistent with these types of matters, the Performance Standards contained in §I-7, *supra*, apply here. Counsel in Family Court shall also comply with the New York State Bar Association standards for representing children in the relevant proceeding.

b. The attorney shall take into consideration the age of the client and any attendant emotional and psychological needs of the client. Where appropriate, the attorney shall employ the services of a forensic social worker or other qualified professionals.

c. Considering the flexibility available to judges in entering dispositional orders in cases involving children, attorneys representing them shall be especially vigorous in advocating for the least restrictive alternative, including dismissal.

I-9. Abuse and Neglect Matters

a. Attorneys representing adults in abuse and neglect cases shall investigate, research and prepare in the same manner and using the same tools as attorneys in criminal cases. Thus, to the extent consistent with these types of matters, the Performance Standards contained within §I-7, *supra*, apply here.

b. The attorney shall take into consideration any attendant emotional and psychological needs of the client. Where appropriate, the attorney shall employ the services of a forensic social worker or other qualified professionals.

c. The attorney shall be aware of the possibility of criminal prosecution based upon the same conduct at issue and plan strategy and advise the client accordingly.

d. When an attorney has been appointed to represent children of the client, the attorney shall advise the client regarding the role of the child's attor-

ney and, when appropriate, shall prepare the client for contact or interviews with the child's attorney.

e. Attorneys shall counsel clients regarding all of the potential consequences of any particular resolution of the matter before clients are asked to make decisions regarding potential dispositions.

I-10. Appeals

Zealous, effective and high quality representation at the appellate stage means, at a minimum:

a. Obtaining and reviewing all relevant portions of the record;

b. Researching the applicable law, including substantive law, procedural law and rules regarding the appeal;

c. Strategically selecting among the issues presented by the facts, considering the strength of authority, the facts, and the standard and scope of review. The selection of issues must be made with an awareness of the consequences for later post-conviction or post-disposition proceedings;

d. Preparing a statement of facts that accurately sets out the significant and relevant facts, with supporting record citations;

e. Presenting legal arguments that apply the most relevant and persuasive law to the facts of the case;

f. Writing in a clear, cogent and persuasive manner;

g. Requesting oral argument when such argument would be in the client's interests and, when oral argument is granted, being thoroughly prepared and presenting the argument in a clear, cogent and persuasive manner;

h. Preparing and filing an application for leave to appeal to the New York State Court of Appeals should the client not prevail on the appeal to the intermediate appellate court, and preparing and filing an opposition to the prosecutor's application for leave to appeal to the Court of Appeals, should the client prevail on the appeal to the intermediate appellate court;

i. In the event of a favorable determination of the appeal that results in a remand to the trial court for further proceedings, ensuring that appropriate action is taken in that court.

j. Where, during the course of appellate representation, new and material evidence comes to light which suggests that the defendant may actually be innocent, undertaking reasonable efforts to investigate the viability of such a claim, and if warranted either raising such a claim or else attempting to secure other representation of the defendant to pursue such a claim;

k. Making oneself available to the trial courts for assignment pursuant to Article 722 to pro se Article 440 or other pro se post-conviction motions, where the court believes counsel should be assigned, if such representation would be compensated pursuant to Article 722; and

1. In the event of affirmance of an unfavorable intermediate appellate disposition, reversal of a favorable intermediate appellate disposition or denial of leave to the Court of Appeals, advising the client of (i) the right to petition the United States Supreme Court for a writ of certiorari and the procedures by which the client may do so; (ii) the circumstances under which the client may file a state court application for post-conviction or post-disposition relief; and (iii) the circumstances under which the client may file a federal petition for a writ of habeas corpus, including the time limitations and the requirements of preservation and exhaustion.

J. QUALITY ASSURANCE

J-1. Institutional providers of mandated representation shall provide both professional and support staff with meaningful periodic and ongoing evaluation of their work according to objective criteria. Institutional providers of mandated representation shall establish objective criteria to be used in determining whether they are providing quality representation. Such objective criteria shall include, but are not limited to, the Performance Standards contained herein.

J-2. Discipline or discharge should be options where staff performance evaluations indicate a failure to meet the institutional provider's standards of quality representation.

J-3. Institutional providers of mandated representation shall develop procedures for tracking and managing individual cases to ensure that performance standards are met at all stages of proceedings.

J-4. Institutional providers of mandated representation shall establish procedures for the receipt, investigation and resolution of comments and complaints from clients and the client community.¹⁶ All staff must be informed of and required to comply with such procedures.

J-5. Assigned counsel plans shall provide assigned counsel with meaningful, periodic and ongoing evaluation of their work according to objective criteria. The standards against which an assigned counsel's performance is measured should be those of a skilled, knowledgeable and conscientious practitioner in the same field. An assigned counsel plan's objective criteria shall be publicized and shall include, but not be limited to, the Performance Standards contained herein.

J-6. Assigned counsel plans shall establish a system for the periodic and ongoing evaluation of assigned counsel performance according to objective criteria. Assigned counsel plans shall establish policies for the imposition of penalties, including removal from the roster of counsel eligible for assignment to cases, when counsel fails to provide quality representation according to these objective criteria.

J-7. Assigned counsel plans shall establish procedures for the receipt, investigation and resolution of client complaints. Assigned counsel shall be informed of, and be required to comply with, such procedures.

J-8. An independent monitoring and enforcement mechanism shall be established for the evaluation of providers of mandated representation. This

mechanism shall ensure that all providers of mandated representation meet the standards of quality representation contained herein.

J-9. All attorneys providing mandated representation, regardless of whether pursuant to an assigned counsel plan, a public defender office, a legal aid bureau or society or any other institutional or associational structure, shall keep records of all time spent on the representation of each individual client, indicating the duration and nature of the work done and the dates on which the work was performed.

K. COMPENSATION

K-1. There shall be parity between the compensation provided to counsel who provide mandated representation and the compensation provided to attorneys for the government working on the same matters.

K-2. Contracts with institutional providers of mandated representation shall require that there be parity between the compensation paid to their attorneys and other staff and to attorneys and other staff performing comparable duties for the government on the same matters.

K-3. Assigned counsel shall receive prompt compensation at a reasonable hourly rate sufficient to cover their actual overhead costs and expenses and to provide them in addition with a reasonable fee.

K-4. No distinction shall be made between the rates paid to assigned counsel for work performed in court and work performed out of court.

K-5. The rates of compensation paid to assigned counsel shall be reviewed on an annual basis to ensure their adequacy.

K-6. Assigned counsel shall be compensated for all hours necessary to provide quality legal representation, including work done post-disposition.

K-7. Assigned counsel shall be promptly reimbursed for all of their reasonable out-of-pocket expenses.

K-8. Under no circumstances may any attorney who has represented a person pursuant to assignment to provide mandated legal representation accept any payment whatsoever on behalf of the client in connection with the matter that is the subject of the assignment.

K-9. Assigned counsel plans shall have policies allowing payment of interim vouchers for fees and expenses and payment of supplemental vouchers for post-disposition work.

K-10. Where an assigned counsel's request for compensation is reduced in any respect, counsel must be afforded a meaningful opportunity to contest said reduction, including the right to be heard and present relevant information and argument supporting the request. A reduction shall be made and sustained only where the request clearly overstates the amount of hours necessary to provide quality legal representation or the expenses incurred in the particular case.

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Staff Memorandum

HOUSE OF DELEGATES Agenda Item #7

REQUESTED ACTION: None, as the report is informational at this meeting.

The Committee on Standards of Attorney Conduct (COSAC) is in the process of a comprehensive review of the Rules of Professional Conduct. Earlier this year, COSAC published for comment draft amendments to the rules relating to conflicts of interest. 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.

The proposed amendments may be summarized as follows:

- **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.
- **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.
- **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.

The report is being presented to you on an informational basis at this meeting. It will be scheduled for debate and vote at the January 2019 meeting.

Past president David M. Schraver, a member of COSAC, will present the report at the November 3 meeting.

MEMORANDUM

September 30, 2018

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
– Final Report Responding to Public Comments

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”). COSAC received comments from (a) the New York City Bar Association Professional Responsibility Committee, which supported the proposed amendments in toto, without change; (b) the New York State Bar Association Committee on Professional Ethics (the “NYSBA Ethics Committee”), which supported the proposed amendments except as discussed below; and (c) Nancy Ann Connery, a member of the Bar, who made some useful drafting observations. This report updates the Public Comment Conflicts Report to take into account the public comments. COSAC is now forwarding this report to the Executive Committee of the Association for informational purposes and for eventual consideration by the House of Delegates.

Below are COSAC’s proposals. After a summary of the proposals, we explain the issues that led COSAC to propose each particular amendment, and then set out the proposed amendment 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.
- **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.
- **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.

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 of the 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.¹ While there was extensive discussion of the precise formulation of a conflict standard, apparently no one proposed returning to the old standard.

¹https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/kutakcommissiondrafts.html.

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.²

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 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

² 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.”

own *judgment*” (emphasis added), so COSAC proposed using both terms.³ 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.

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

³ 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).

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. 2nd 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.

....

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).

....

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.

....

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 may 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.

....

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~~ 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

....

[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,⁴ 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 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.

....

[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

⁴ In her public comments, Ms. Connery 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.

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 to the representation ~~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 approximately sixteen other states that have rules providing that screening, with various conditions, will prevent imputation of conflicts from most lateral hire lawyers.⁵ In addition, in some states where the Rules of Professional Conduct themselves do not address screening, state court judicial decisions have held that screening can be used to prevent imputation of lateral-hire conflicts for purposes of disqualification motions. *E.g., Kirk v. First American Title Ins. Co.*, 108 Cal. Rptr.3d 620, 638 (Ct. App. 2010) (analyzing California case law and concluding that “in the proper circumstances ... ethical screening will effectively prevent the sharing of confidences in a particular case”).

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 [are] defined too strictly, the result [is] 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 for a very junior lawyer who did only abstract legal research for a former client and was exposed to no client confidences.

We submit that the Rule should permit screening to avoid imputation of a lateral hire's conflicts under 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 sixteen 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, which are not required to follow state court interpretations of New York State ethics rules, have repeatedly approved of screening to cure lateral-hire conflicts in decisions declining to disqualify counsel. *E.g., Hempstead Video, Inc. v. Inc. Vill. of Valley*

⁵ The states are Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Washington and Wyoming.

Stream, 409 F.3d 127, 132 (2d Cir. 2005) (approving of screening to cure conflict from lateral-hire of-counsel); *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 for 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 seem to encourage disputes. The ABA provisions, moreover, provide for a different screening procedure in Rule 1.10 from those provided in Rules 1.11, 1.12 and 1.18, and appear to COSAC to be unduly complicated and unjustified. We see no substantial reason to distinguish among laterally-hired former government lawyers, former law clerks, and lawyers previously employed at 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, 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.” This proposal, apparently a compromise, would not appear to apply to many representations and would often have required a fairly searching inquiry into the information that the lateral-hire had acquired in the course of the former representation. COSAC no longer supports that proposal.

In addition to the sixteen states that have, by rule, adopted screening for lateral-hire lawyers generally, another thirteen 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 “did not have primary responsibility” or “no substantial responsibility.”⁶

⁶ These states are Arizona, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, and Wisconsin.

We do not propose to adopt such a limited participation test because it would not remove the obstacles to mobility presented by lateral-hire conflicts and 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 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. 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.

Firms using screening in this way can rely on state court decisions that have declined to disqualify lawyers who are properly screened – *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 screen 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 the new firm can prove that “any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation”).

The *Kassis* carve-out is of limited utility, however, because: (i) by its terms it addresses relatively few situations; (ii) it is difficult to determine whether a lateral-hire lawyer acquired information that the former client might claim was “significant or material” to the matter – the new firm cannot inquire very deeply into what work the lateral-hire lawyer did, and the lateral-hire lawyer often is not in a position to access records of what he or she did; and (iii) it is impossible to completely eliminate the risk created by the former client’s tactical incentive to mischaracterize the facts to support a later disqualification motion.

For New York Rule 1.10, therefore, COSAC 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 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.

Thus, disclosure within a firm that is permitted by another Rule, such as disclosure to secure legal advice about compliance with the Rules or other law by a lawyer associated in a firm,

would not 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 and Comment [4C] to Rule 1.12, and proposes to amend Comment [7C] to Rule 1.18 in a slightly different way – see below.)

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 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.

....

~~(h) [Moved to Rule 1.8(I).] 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.⁷

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 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

⁷ 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.

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. 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.

~~[5A]—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).

[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).

....

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/2C2CkXO>.

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.) 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)).

Rule 1.6 provides a number of exceptions to the protections usually given to confidential information. For example, Rule 1.6(b)(4) permits disclosure to secure advice on a lawyer's or law firm's compliance with ethical rules. On occasion, a firm will need to make inquiries of a personally disqualified former law clerk or arbitrator to determine whether a conflict exists, such as whether a former matter was the same or substantially related to a potential new matter the firm is contemplating taking on. As the New York City Bar ethics committee pointed out in N.Y. City 2013-1 (2013), which deals with parallel language in Comment [7C] to Rule 1.18, the "guidance" in Comment [7C] should not "prevent the disclosure of the information to a limited number of lawyers in the firm for the purpose of evaluating the firm's duties ... provided that those lawyers are also disqualified from working on the matter and are appropriately screened." The same analysis and conclusion should apply to Comment [7A] to Rule 1.11.

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.⁸

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

⁸ 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).

(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.

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 former clients where possible.

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) where the disqualification is based on the application of Rule 1.9, give written notice to the former client to enable it to ascertain compliance with the provisions of this Rule, except (i) if the notice to the former 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 the former client or is otherwise no longer protected by Rule 1.6.

[To make room for new paragraph (e), existing subparagraphs (e) and (f) in Rule 1.11 would be redesignated 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, 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~~ 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] Where the conflict arises from the government lawyer's prior representation of a client, the office, agency or department is required to notify the former 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 be in violation of law or in violation of Rule 1.6. The requirement that the government lawyer's former 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 proposed amendment to Comment [7A] to Rule 1.11, 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 change to Comment [7A] to Rule 1.11, *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 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

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.”

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

Wallace L. Larson Jr.


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From: Nancy Ann Connery nconnery@schoeman.com 
Subject: COSAC Proposal
Date: July 25, 2018 at 12:39 PM
To: roy.simon@hofstra.edu



EXTERNAL MESSAGE

Dear Mr. Simon,

I had a few minor comments to the COSAC Proposal, which I'm submitting in my individual capacity:

1. The first change in Comment [3] to Rule 1.8 is not entirely consistent with Rule 1.7. I think it should read: "{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 representation of the client **will be adversely affected or materially limited** by the lawyer's financial interest in the transaction." I suggest the change because Rule 1.7 provides that a conflict of interest exists when there is a significant risk that the lawyer's independent judgment will be "adversely affected by" the lawyer's own financial interests.
2. With respect to the proposed change in Rule 1.8(c), the new rule, as parsed, reads: "Unless the lawyer is related to the client, a lawyer shall not ... prepare on behalf of a client an instrument giving the lawyer ... any substantial gift, unless a reasonable lawyer would conclude that the transaction is fair and reasonable." To my mind, the double "unless" creates some ambiguity. It seems to say that if the lawyer is related to a client, all bets are off. What is the rule if the lawyer is not related and what is the rule if the lawyer is related? It's not clear.

Nancy



Nancy Ann Connery

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Staff Memorandum

HOUSE OF DELEGATES Agenda Item #7(b)

REQUESTED ACTION: None, as the report is informational at this meeting.

The Committee on Standards of Attorney Conduct (COSAC) is in the process of a comprehensive review of the Rules of Professional Conduct. In this report, it is recommending amendments to Rules 1.16, 3.3, 3.4, and 3.6. The proposed amendments may be summarized as follows:

- **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.

The report is being presented to you on an informational basis at this meeting. It will be scheduled for debate and vote at the January 2019 meeting.

Past president David M. Schraver, a member of COSAC, will present the report at the November 3 meeting.

MEMORANDUM

July 16, 2018

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

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. In this memorandum COSAC is circulating for public comment proposals to amend the Rules 1.16, 3.3, 3.4 and 3.6 of the New York Rules. We invite comments. **Comments are due at 5:00 p.m. on October 19, 2018**, which is ninety (90) days from the date of this memo. Please email comments to roy.simon@hofstra.edu, and please submit any proposed new or different language in redline style (like COSAC's proposals below). Below are COSAC's proposals. After a summary of the proposals, we explain the issues and reasoning that led COSAC to propose each particular amendment, and then set out the proposed amendment in redline 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 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

**COSAC Proposed Amendments to Rules 1.16, 3.3, 3.4 and 3.6 for Public Comment
July 19, 2018**

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).

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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:

[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.”

COSAC Proposed Amendments to Rules 1.16, 3.3, 3.4 and 3.6 for Public Comment
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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.¹ New York did not appear to suffer from frequent unremedied 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.

¹ DR 7-102(B) provided as follows:

- B. A lawyer who receives information clearly establishing that:
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.]

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 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.

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.

**COSAC Proposed Amendments to Rules 1.16, 3.3, 3.4 and 3.6 for Public Comment
July 19, 2018**

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**

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

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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



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #12

REQUESTED ACTION: Approval of the proposed Model Pro Bono Policy for Attorney Employees of Local Governments and Local Government Agencies.

In 2016, the House of Delegates approved a model pro bono policy for attorneys in state and federal government agencies. Concerned that this policy does not function well for lawyers employed by local government entities, the Local and State Government Law Section has proposed a companion policy that would apply to lawyers in the public sector who are employed by local governments. This policy parallels the state and federal policy previously approved by the House.

This report was posted for comment in September 2018. Attached is a letter from the President's Committee on Access to Justice indicating support for the proposal.

A representative of the Local and State Government Law Section will present the proposed model policy at the November 3 meeting.

NEW YORK STATE BAR ASSOCIATION
LOCAL AND STATE GOVERNMENT LAW SECTION REPORT AND
RECOMMENDATION REGARDING A MODEL PRO BONO POLICY FOR
ATTORNEY-EMPLOYEES OF LOCAL GOVERNMENTS
AND LOCAL GOVERNMENT AGENCIES

Following a study and recommendation performed by the NYSBA Committee on Access to Justice, on June 18, 2016 the NYSBA House of Delegates adopted a Model Pro Bono Policy and Procedures for Attorneys in State and Federal Government Agencies (“State and Federal Policy”). That policy applies to State and federal government agencies, but did not provide guidance for attorneys employed in the multitude of local governments across the State of New York.

Due largely to the great variation in laws, policies and operational capabilities and resources of those local governments, the State and Federal Policy is not translatable to local government entities. However, those local entities employ numerous attorneys, who should be encouraged to perform pro bono services in a manner which fits within their local responsibilities and conforms to legal and ethical requirements.

To that end, the Local and State Government Law Section (“LSGL”) has engaged in additional study, and has concluded that NYSBA should adopt a companion policy which would encourage and guide attorneys employed by local governments and their various agencies in the performance of pro bono services.

LSGL does not intend this policy to apply to those attorney who are in private practice, but who, in the course of their private practice, represent local governments or agencies. Those attorneys are governed by the Rules of Professional Conduct, and operate in their private law practices without most of the constraints placed on attorneys who are government employees. Rather, this proposed policy is intended to apply to the many attorneys employed in local government agencies, who are sometimes prevented or restrained from providing pro bono legal service due to legal and ethical limitations on their practice of law other than for their government employers.

The Model Pro Bono Policy and Procedures for Attorneys Employed by Local Government Agencies “Local Policy” submitted as Attachment A to this report parallels the State and Federal Policy. It is not intended to prescribe an inflexible template, but rather to encourage municipalities to utilize or, where necessary, vary any or all of its model provisions as appropriate in efforts to promote voluntary legal service activities by local government attorneys. As local governments utilize and adapt the policy, it is expected that they will thereby create models that others will use. Future iterations of this policy may reflect such evolution.

The Local and State Government Law Section requests that the NYSBA House of Delegates endorse this Report, and commend to local governments throughout New York State the adoption of a pro bono policy utilizing the model policy annexed hereto.

Respectfully submitted,

NEW YORK STATE BAR ASSOCIATION
LOCAL AND STATE GOVERNMENT LAW SECTION

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ATTACHMENT A

NEW YORK STATE BAR ASSOCIATION MODEL PRO BONO POLICY FOR ATTORNEY-EMPLOYEES OF LOCAL GOVERNMENTS AND LOCAL GOVERNMENT AGENCIES

Introduction:

New York attorneys, both public and private, have volunteered countless hours of pro bono legal services to their communities. Despite these efforts, the unmet legal needs of the disadvantaged throughout the State of New York greatly exceed the combined capacity of existing legal services programs. For example, in its report and recommendations to the Chief Judge in November 2014, the Task Force to Expand Access to Civil Legal Services in New York concluded that more than 1.8 million New Yorkers were unrepresented in court proceedings involving civil matters in 2013. The Task Force also estimated that at best 30% of the civil legal needs of low-income New Yorkers in matters involving the essentials of life are being met by the civil legal services delivery system in New York State.

It is commonly accepted that these unfortunate circumstances have only become worse in the years since the Task Force report. Significant efforts have been undertaken to incentivize attorneys to devote time and skill to remediate as much of this problem as may be reasonably feasible, recognizing that full remediation of the problem will require the dedication of significant societal resources. Realistically, the necessary resources will not be forthcoming in the near future, and it falls to the private Bar to step up its efforts to secure justice for all.

In recognition of the scope of the problem, and to encourage members of the Bar to increase their pro bono efforts, the New York State Supreme Court Appellate Divisions have strongly encouraged all attorneys “to aspire to provide at least 50 hours of pro bono legal services each year to poor persons,” and require all attorneys to regularly report the number of hours spent providing pro bono legal services to poor persons. For those purposes, pro bono legal services are defined as those provided for specified purposes or in aid of specified clients, without charge and without expectation of compensation of any kind.

However, unlike attorneys in private practice, attorneys who are employed by local governments face unique legal and practical obstacles to providing pro bono services, whether to poor persons or to others. Public sector employees are prohibited by the State Constitution from using the resources of their government offices, which have been paid for with taxpayer money, for non-governmental purposes.¹ In addition, the Rules of Professional Conduct proscribe attorneys taking on work that creates a conflict

¹ The State Constitution’s prohibition on using governmental resources for non-governmental purposes does not prevent public initiatives and policies that may result in an incidental private benefit.

of interest with the attorney's government client, and thus limit opportunities for pro bono service. Further still, many local governments have enacted ethics codes applicable to their employees, which may further limit pro bono work. Finally, those attorney employees will not be indemnified or defended by the local governments insurer for work performed for a pro bono client, and those attorneys must protect themselves by maintaining other insurance coverage elsewhere.

With these constraints in mind, this municipality² has established the following procedures and policies to support and encourage employees of the municipality to perform pro bono legal services for individual clients, and/or for organizations that provide services to poor persons or otherwise qualify as recipients of pro bono services, or for other pro bono clients.

PRO BONO POLICY

I. Permitted Pro Bono Legal Services

Pro bono legal services are those which fall within the definition of such services pursuant to the Rules of Professional Conduct and the rules of the Appellate Divisions, and include the pro bono representation of clients, including non-litigation activities, at no cost to clients and without any expectation of compensation.

General Considerations:

An agency attorney may render pro bono legal services if the activities are consistent with the guidelines set forth in this policy. No pro bono legal services activities may be rendered if they would:

1. Constitute a practice prohibited by any applicable state or local ethics restriction, including rules, regulations or other guidance of the municipal ethics board, or any other applicable law or regulation [cite any specific local restriction here];
2. In any manner interfere or conflict with the proper and effective discharge of the attorney's official duties;
3. Create or appear to create a conflict of interest with the attorney's official position;
4. Be of such nature that the outcome would be influenced or appear to be influenced by the attorney's position in the agency; or
5. Involve matters in which the municipality, its agencies, or its officers or employees in an official capacity is a party or has a direct or substantial interest.

² Note to drafter: globally replace the term "municipality" with the term "agency" or other descriptive term if appropriate.

For the Benefit of Poor Persons

The provision of pro bono legal services for the benefit of poor persons³ and others by attorneys employed by this municipality is encouraged and permitted, subject to the limits and conditions in this policy or as otherwise restricted by law or regulation. Pro bono legal services encompassed by this policy are:

- (1) professional services in a civil matter, or in a criminal matter for which the government is not required to provide legal representation, rendered directly to an individual who is financially unable to pay an attorney;
- (2) activities related to improving the administration of justice by simplifying the legal process for, or increasing the availability and quality of legal services to, poor persons; and
- (3) professional services rendered to charitable, religious, civic and educational organizations in matters designed predominantly to address the needs of poor persons.

[OPTION WITH RESPECT TO OTHER WORTHY ORGANIZATIONS:

For the Benefit of Worthy Organizations

The municipality recognizes that there are other worthy non-profit organizations in the community that would benefit from the volunteer legal services of attorneys. The provision of pro bono legal services to other worthy organizations, by attorneys employed by this municipality, is permitted, subject to the limits and conditions in this policy.]

[OPTION WITH RESPECT TO LIMITED SCOPE REPRESENTATION:

Limited Scope Representation

The municipality recognizes that there are Limited Scope Representation programs in the community that involve training attorneys to help in a clinical setting, or at a time and place established and publicized in advance for people with particular legal needs. These programs do not involve a continuing client relationship, and may be particularly convenient for attorneys seeking to balance the demands of governmental service with volunteer opportunities. The provision of pro bono legal services to organizations that provide limited scope representation opportunities, by attorneys employed by this municipality, is permitted, subject to the limits and conditions in this policy.]

II. Procedures

A. Use of Attorney's Own Time and Resources

An attorney employed by this municipality may perform pro bono legal services strictly on the attorney's own time and exclusively using the attorney's own resources (including a non-municipal telephone and non-municipal computer), provided that the work meets the requirements of the General Considerations set forth in Section I above and the employee ensures that his or her pro bono activities are covered by an outside professional liability insurance policy.

³ 22 NYCRR Part 1200, Rule 6.1.

Any attorney may seek an opinion of the municipal ethics board regarding the permissibility or propriety of a proposed pro bono matter prior to accepting it, even if the attorney will be exclusively using his own time and resources.

[Optional: If the attorney holds a high-level or policy-making position in the municipality, then he or she should obtain the approval of the INSERT ENTITY/PERSON⁴ before accepting a specific pro bono matter for which the attorney plans to exclusively use his or her own time and resources.]

B. Minimal and Incidental Use of Employer's Time [and Resources]⁵

The municipality's time [and resources] may be used in a minimal and incidental manner by an attorney employed by this municipality to provide pro bono legal services permitted by this policy, subject to the terms and conditions set forth below.

C. Procedure for Approval

[Note to drafter: OPTION 1 – use (a) only]

(a) Approval by the INSERT ENTITY/PERSON

If the attorney wishes to make minimal and incidental use of employer time and resources to perform the pro bono work covered by this policy, the attorney's participation in a specific pro bono matter must be approved in advance in writing by the INSERT ENTITY/PERSON. In determining whether to approve the request, the INSERT ENTITY/PERSON will consider whether the request falls within the kinds of pro bono services or

⁴ Note to drafter: "ENTITY/PERSON" may be the municipal governing board, the municipal ethics board, the attorney's supervisor, or some other person or body.

Further note to drafter: if there is an individual within the law department who has been given the role of pro bono coordinator (this role may exist in large city law offices and county law offices), use this optional text in lieu of "ENTITY/PERSON":

Agency Pro Bono Coordinator:

_____ has been appointed to serve as the agency's pro bono coordinator. The pro bono coordinator will approve organizations that attorneys can work with on a pro bono basis. The pro bono coordinator must also approve pro bono activities that are not referred by an approved organization.

⁵ "and resources" should be omitted if Option 1 of Section IV.B. is selected, prohibiting the even minimal use of municipal resources. The phrase should be included if Option 2 in Section IV.B. is selected, which permits minimal and incidental use of municipal resources.

activities specifically permitted by this policy and does not violate any of the restrictions delineated in this policy.

[Note to drafter: OPTION 2 – omit (a) above; instead use (aa) and (bb) below together]

(aa) Approved Legal Services Organizations

This municipality has determined that matters referred to its attorney-employees by the legal services organizations on the list attached to this policy as Appendix “A” are approved for pro bono services to poor persons.⁶ The matters may be referred for direct representation, for the provision of counsel and advice, or for the provision of legal information, subject to the restrictions set forth below in this policy. These matters may include advice and legal information clinics for low-income people.

The organizations that are approved have each certified that:

1. The organization provides professional liability insurance coverage for attorneys who accept pro bono matters from it;
2. The organization screens clients to ensure that they are eligible to receive pro bono services;
3. The organization assesses the legal merit of a matter before it is referred to a pro bono attorney;
4. The organization provides training and support for its pro bono attorneys; and
5. The organization or the pro bono client pays for expenses, such as court filing fees and publishing costs, that cannot be waived.

[OPTIONAL: When an attorney accepts a pro bono matter from one of the approved organizations listed on appendix A, the attorney shall notify INSERT ENTITY/PERSON.]

(bb) Approval by the INSERT ENTITY/PERSON

Participation by an attorney-employee in covered pro bono activities other than those sponsored by the legal services organizations listed in appendix A must be approved in advance in writing by the attorney’s INSERT ENTITY/PERSON. In determining whether to approve the request, the attorney’s INSERT ENTITY/PERSON will consider whether the request falls within the kinds of pro bono services or activities covered by this policy and does not violate any of the restrictions delineated in this policy.

III. Prohibition on Identification with Municipality when Representing a Pro Bono Client

Attorneys who participate in pro bono activities must not indicate or represent in any way that they are acting on behalf of the municipality or in their official capacity, or allow the inference or permit confusion as to that fact.

⁶ Note to drafter: If the municipality allows pro bono work for other worthy organizations, and has a pre-approved list of such organizations, mention it here.

In particular:

1. The attorney must make it clear to the pro bono client and all others involved in a pro bono matter that the attorney is acting in his or her individual capacity as a volunteer, and is not acting as a representative of, or on behalf of, the municipality;
2. The attorney must not use municipal letterhead, agency business cards, or otherwise identify himself or herself as a government attorney in any communication;
3. The municipality's telephone number, email and the fax number must not be used for pro bono activities; and
4. Municipal offices must not be used for meetings in connection with in a pro bono activity.

IV. Use of Agency Resources:

A. Use of Work Hours

An attorney-employee must ascertain before accepting a pro bono matter whether the attorney can provide the pro bono legal services (1) entirely outside of regular work hours, (2) mostly outside of regular work hours and only minimally and incidentally during regular work hours, or (3) during regular work hours in a non-minimal, non-incidentally way.

If the pro bono matter will require work during regular work hours in a non-minimal, non-incidentally way ((3) above), the attorney may ask INSERT ENTITY OR NAME to approve a flexible work schedule to accommodate the time needed for such pro bono work. Although INSERT ENTITY OR NAME will not be required to accommodate the request, the INSERT ENTITY OR NAME may allow the flexible schedule if the attorney's performance of the attorney' work for the municipality will not be negatively impacted. Alternatively, the attorney must use his or her accrued annual or personal leave to perform the pro bono work, and must follow the municipality's rules for obtaining permission to use such accrued leave.

B. Use of Offices, Computers, Supplies and Other Municipal Resources

OPTION 1 (prohibition):

Attorneys may not use any of the resources of the agency, including but not limited to their personal offices, their computers, their word processing equipment, office supplies or photocopying to perform pro bono work.

OPTION 2 (limited use allowed; drafter should edit as appropriate):

So long as there is compliance with the foregoing restrictions on prohibiting identification with the municipality and use of work hours, attorneys may utilize municipal resources in a limited way to perform pro bono work permitted by this policy, as follows:

- a. Attorneys may use their personal offices and office computers to draft legal documents for pro bono clients.
- b. Office supplies:

Option 1: Attorneys must supply their own paper and office supplies for pro bono matters.

Option 2: Attorneys may use minimal amounts of municipal paper and office supplies for pro bono matters.

- c. Documents produced for pro bono clients must not be stored on the municipality's computers for any period of time.
- d. Note that attorneys who use the municipality's personal office and office computers cannot guarantee their own access to, or the confidentiality of, the attorney's documents and communications pertaining to a pro bono matter, since the municipality owns and controls these real and virtual spaces. This lack of perfect confidentiality may impact the attorney's ability to fully comply with Rule 1.2 of the Rules of Professional Conduct with respect to the pro bono client.
- e. Attorneys who use office computers to perform pro bono work must adhere to any incidental personal use provisions of the municipality's technology use policy.
- f. The municipality's license with an online legal research provider such as Westlaw or Lexis/Nexis may be used to do pro bono research. The attorney must become familiar with the scope of the license, and should not incur extra charges for researching outside the license scope unless the attorney has obtained prior approval and will reimburse the municipality.
- g. The attorney must not use the attorney's work email account to transmit or receive electronic communications, files, folders, or documents of any kind. The attorney must not copy computer files, folders or documents, or use municipal computer files, folders or documents for the benefit of a pro bono client, with the exception of templates and models.
- h. The attorney must not use the time or resources of any municipal employee for the performance of pro bono work, such as including secretaries or process servers, regardless of the time of day or location of the work.
- i. No preprinted material of the municipality, or any document or computer file that uses the logo or name of the municipality in an identifying manner, may be used in the performance of pro bono legal services, including letterhead and business cards.
- j. Attorneys must not make long distance telephone calls on the office phone if the municipality pays more for long distance calls than it pays for local calls, use government vehicles, or use government postage or delivery service accounts (e.g., UPS, FedEx) for the provision of pro bono legal services.

V. Professional Liability Insurance:

The municipality does not provide professional liability coverage for the pro bono work of its attorneys. Attorneys will not be indemnified or defended by the municipality against any claim made by a pro bono client. Therefore, attorneys must

ensure that outside professional liability insurance coverage is in place to defend and indemnify them in the case of such a claim.

VI. Aspirational Goal:

Consistent with the New York Rules of Professional Conduct (22 NYCRR Part 1200, Rule 6.1), the agency encourages, but does not require, every attorney covered by this policy to provide at least 50 hours of pro bono legal services each year to poor persons.

VII. Disclaimer:

This pro bono policy does not override statutes, rules or regulations governing the use of government property. Any attorney-employee of the municipality who has questions about the application of this section to any particular situation should consult with INSERT ENTITY/NAME.

Appendix A [if Option 2 of Section II.C is used]

Approved Organizations for Pro Bono Services to poor persons:

October 5, 2018

Dear NYSBA Executive Committee Members:

At a meeting held on October 2, 2018 the New York State Bar Association's President's Committee on Access to Justice (PCAJ) unanimously passed a motion in support of adoption by the NYSBA House of Delegates of the Local and State Government Law Section's report and recommendation to establish a model pro bono policy for attorneys employed by local governments and local government agencies. We write in our capacities as the co-chairs of the PCAJ to urge the Executive Committee to endorse the model pro bono policy and urge the NYSBA House of Delegates to approve it.

The House of Delegates adopted a similar model pro bono policy for attorneys in state and federal government agencies at its meeting on June 18, 2016, following consideration of a report and recommendation submitted by PCAJ. As with that model policy, we believe that the policy proposed by the Local and State Government Law Section will allow local government agency attorneys, under appropriate terms and conditions, to participate in pro bono activities with the encouragement and support of their employers.

The problems that will be able to be addressed by the Local and State Government Law Section's proposed model policy are the same as those that caused PCAJ to recommend the adoption of a policy for state and federal attorneys in government agencies in 2016:

- A tremendous need for pro bono legal services;
- Unclear ethics and conflicting rules with respect to public sector attorneys performing private work;
- The existence of disparate agency-by-agency policies on the performance of outside work by the attorneys employed by them; and
- The lack of formal referral processes for government agency attorneys to receive pro bono cases.

Despite significant increases in funding for civil legal services and pro bono providers in New York State in recent years, in its November 2017 report to the Chief Judge, the New York State Permanent Commission on Access to Justice concluded that in 2016, 63% of the legal needs of low-income New Yorkers remains unmet. Pro bono attorneys are needed to help abate this high unmet need to serve, among many others, survivors of domestic violence and sexual assault, seniors who are subjected to

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consumer scams, financially distressed homeowners facing foreclosure and veterans with disabilities seeking to establish eligibility for benefits.

NYSBA has a long and rich history of encouraging New York attorneys to serve the public interest and to provide pro bono services and, together with that encouragement, NYSBA provides support for such work through our Department of Pro Bono Affairs and the provision of continuing legal education, such as the one sponsored in October 2017 on the ethics of government attorneys providing pro bono services. The adoption of the proposed model policy by the House of Delegates is consistent with this history.

The adoption of the proposed policy will provide another tool to the legal services and pro bono providers, which will be able to add new components to their service delivery systems to help those who are in need.

We thank you for your consideration of our comments and invite you to contact us if you have any questions or need any additional information.

Very truly yours,

Hank Greenberg
Co-Chair
President's Committee on Access to Justice

Edwina Frances Martin
Co-Chair
President's Committee on Access to Justice

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE MEETING
THE OTESAGA, COOPERSTOWN, NEW YORK
JUNE 14-15, 2018**

PRESENT: Members Jonathan B. Behrins, Mark A. Berman, Earamichia Brown, Norman P. Effman, Margaret J. Finerty, Sharon Stern Gerstman, Sarah E. Gold, Evan M. Goldberg, Taa R. Grays, Henry M. Greenberg, Richard M. Gutierrez, Susan L. Harper, Erica M. Hines, Drew Jaglom, Scott M. Karson, Sherry Levin Wallach, Peter H. Levy, Richard C. Lewis, Michael Miller, Steven E. Millon, Aimee L. Richter, Robert T. Schofield, IV, Rona G. Shamoon, Carol A. Sigmond, Tucker C. Stanclift, David H. Tennant, Jean Marie Westlake.

Guests: James A. Barnes, Jay Blankenship, Richard D. Collins, Donald C. Doerr, Mark S. Gorgos, Daniella E. Keller, David J. Lansner, Roger Juan Maldonado, Thomas J. Maroney, Sandra Rivera, Thomas E. Schimmerling.

Mr. Miller presided over the meeting as President of the Association.

1. Mr. Miller called the meeting to order, and Mark A. Berman, Evan M. Goldberg, Erica M. Hines, Richard C. Lewis, Aimee L. Richter, Robert T. Schofield, IV, Rona G. Shamoon, Tucker C. Stanclift, and Jean Marie Westlake were welcomed as new members of the Executive Committee.
2. Approval of minutes of meeting. The minutes of the April 13, 2018 meeting and June 1, 2018 conference call were accepted as distributed.
3. Consent Calendar.
 - a. Approval of bank resolutions.

The consent calendar, consisting of the item listed above, was approved by voice vote.
4. Report of the Treasurer. In his capacity as Treasurer, Mr. Karson reported that through April 30, 2018, the Association's total revenue was \$16 million, an increase of approximately \$528,000 over the previous year, and total expenses were \$8.2 million, a decrease of approximately \$476,000 over 2017. The report was received with thanks.
5. Report of Audit Committee. Mark S. Gorgos, chair of the committee, updated the Executive Committee on the committee's work, including its review of the 2017 audit; its review of the Association's insurance coverage, with the addition of a \$2 million cyber policy; and the development of an RFP for audit services. The report was received with thanks.
6. Report of staff leadership. Pamela McDevitt, Executive Director; Daniel Weiller, Managing Director of Marketing and Communications; Adam Rossi, Director of Marketing;

Victoria Shaw, Director of Attorney Engagement and Retention; and Jason Nagel, Managing Director of IT Services, highlighted staff efforts with respect to changes being made to Association publications, technology, marketing initiatives, non-dues revenue, and membership initiatives. The report was received with thanks.

7. Report re advertising and sponsorships. Jay Blankenship, Sales Manager with MCI, the Association's advertising representative, provided an overview of NCI's efforts with respect to the Association's advertising and sponsorship initiatives. The report was received with thanks.
8. Report of President. Mr. Miller highlighted the information contained in his printed report, a copy of which is appended to these minutes. In addition, he reported that Hon. Judy Harris Kluger, Executive Director of Sanctuary for Families, had contacted him to request him to designate a representative to a group examining the impact on courts as a result of Immigrations and Customs Enforcement officers detaining people in courthouses. A motion was adopted to authorize the designation of a representative.
9. Discussion of Executive Committee liaison responsibilities and duties of Vice Presidents. Mr. Miller led a discussion of liaisons' roles in facilitating communication, providing guidance on policy and procedure, and encouraging sections and committees to undertake projects. He asked liaisons to maintain regular contact with their groups, encourage them to submit reports for consideration by the Executive Committee and/or House of Delegates and comment on reports submitted by other groups, and to be mindful of the need for diversity. He outlined the reimbursement policy for liaisons attending section and committee meetings.

Mr. Miller also reviewed the responsibilities of Vice Presidents, as set forth in the By-laws, to promote relations with local bars and members in their respective districts. He noted the importance of informing local bar leaders, including those of minority and specialty bars, of Association initiatives and encouraged them to advise the Association of local bar concerns.
10. Reports of Executive Committee liaisons and Vice Presidents. Mr. Miller noted that at future meetings, all members should be prepared to make presentations regarding their Executive Committee liaison responsibility and, for Vice Presidents, local bar activities. At this meeting, Mr. Effman reported on the activities of the Senior Lawyers Section; Mr. Tennant reported on the Committee on Courts of Appellate Jurisdiction; and Mr. Levy reported on the Real Property Law Section, the Committee on Media Law, and the Tenth District local bars.
11. Report of Lawyer Assistance Committee. Thomas E. Schimmerling, the committee's chair, together with committee member Daniella E. Keller, presented an informational report reviewing the committee's and the Program's activities during the prior year. The report was received with thanks. The committee then presented an award to Sharon Stern Gerstman for her support of the Program during her presidency.

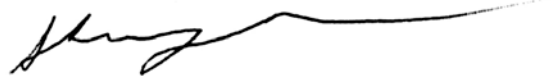
12. Report and recommendation of Committee on Committees. Donald C. Doerr, chair of the committee, reviewed the committee's report and recommendations with respect to the operation of 12 committees. After discussion, a motion was adopted to approve the report and recommendations.
13. Report re legislative activities. Sandra Rivera, chair of the Committee on State Legislative Policy, updated the Executive Committee on the 2018 state legislative session, particularly with respect to the Association's legislative priorities. The report was received with thanks.
14. Report of Committee on Continuing Legal Education. James A. Barnes, chair of the committee, together with Katherine Suchocki, Senior Director of Continuing Legal Education, outlined initiatives the committee is pursuing to develop innovative products, improve marketing, and utilize new technology. The report was received with thanks.
15. Report of Committee on Membership. Committee co-chair Thomas J. Maroney, together with Victoria Shaw, Adam Rossi and Jason Nagel, updated the Executive Committee on committee initiatives aimed at recruitment, as well as a focus on encouraging current members to become sustaining members. The report was received with thanks.
16. Request of Committee on Women in the Law. Susan L. Harper, chair of the committee, reviewed a proposal by the committee to conduct a feasibility study to convert the committee to section status. After discussion, it was the consensus of the Executive Committee that a feasibility study is not needed and a motion was adopted to endorse the creation of a section for favorable action by the House.
17. Report and recommendations of Criminal Justice Section. Mr. Stanclift, in his capacity as chair of the section, together with Richard D. Collins, co-chair of the section's Sealing Committee, outlined a proposal for the enactment of a federal statute for sealing of criminal convictions. After discussion, a motion was adopted to approve the proposal.
18. Report and recommendations of Committee on Mandated Representation and Criminal Justice Section. In his capacity as past chair of the Committee on Mandated Representation, , outlined a report recommending an increase in the rates paid to private attorneys under County Law article 18-B. After discussion, a motion was adopted to endorse the following resolution for favorable action by the House:
 1. Legislation should be enacted to increase assigned counsel rates. This increase should apply to all assignments as defined under " Definition" in the NYSBA 2015 Revised Standards for providing Mandated Representation, which reads:

Mandated Representation - Legal representation of any person financially unable to obtain counsel without substantial hardship who is (1) accused of an offense punishable by incarceration; (2) entitled to or is afforded representation under §249, §262 or §1120 of the Family Court Act; Judiciary Law §35 including child

custody and habeas corpus cases; Article 6-C of the Correction Law; §407 of the Surrogate's Court Procedure Act; §259-i of the Executive Law; or §717 of the County Law; or (3) otherwise entitled to counsel pursuant to constitutional, statutory or other authority.

2. The rates of compensation should be comparable to the percentage increase of judicial and elected district attorney salaries.
 3. The legislation should provide for an annual review and adjustment as needed of assigned counsel rates based on a formula using comparable compensation rates similar to the formula utilized by the Federal Criminal Justice Act.
 4. The increase in rates should not result in an unfunded mandate to the counties and should be a state expense.
19. Report and recommendations of Committee on Children and the Law. David J. Lansner, chair of the committee, reviewed the committee' proposed communication with the Administrative Board requesting a comprehensive review of the bar admission application to evaluate its conformity to applicable law and revisions to remove unlawful barriers to bar admission. After discussion, a motion was adopted to approve the communication.
20. Report and recommendation of New York City Bar Association. Roger Juan Maldonado, President of the New York City Bar Association, presented a report recommending that Puerto Rico receive a permanent exemption from the Jones, Act, 46 U.S.C. §§5501 et seq. After discussion, a motion was adopted to endorse the report and recommendations for favorable action by the House.
21. New Business.
22. Date and place of next meeting. The next meeting of the Executive Committee will be held on Friday, November 2, 2018 at the Bar Center in Albany.
23. Adjournment. There being no further business, the meeting of the Executive Committee was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary

**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE
CONFERENCE CALL MEETING
July 10, 2018**

Members Participating: Jonathan Behrins, Matthew Coseo, Margaret Finerty, Michael Fox, Sharon Stern Gerstman, Henry Greenberg, Erica Hines, Drew Jaglom, Scott Karson, Peter Levy, Michael Miller, Aimee Richter, William Russell, Robert Schofield, Rona Shamoan, Carol Sigmond, Tucker Stanclift, Jean Marie Westlake

Mr. Miller presided as President of the Association.

1. Mr. Miller explained that NYSBA Past President James Moore had requested that NYSBA become a signatory to a resolution recently adopted by the Governing Board of the Union Internationale des Avocats at its recent meeting in New York City urging President Trump to implement U.S. District Court Judge Sabraw's order directing that immigrant children be reunited with their parents. As indicated in Mr. Moore's written request, for several years he has been active in the Governing Board of the Union Internationale des Avocats, an approximately 2,300 member association of lawyers from more than 40 countries. Mr. Moore had advised that if the NYSBA became a signatory, NYSBA's logo would be placed on the resolution. A motion was made to become a signatory to the resolution. The motion was seconded and after discussion, the motion was approved.
2. Adjournment. There being no further business to come before the Executive Committee, the meeting was adjourned.

Respectfully submitted,

Pamela McDevitt, Secretary Pro Tempore


**NEW YORK STATE BAR ASSOCIATION
MINUTES OF EXECUTIVE COMMITTEE
CONFERENCE CALL MEETING
AUGUST 17, 2018**

Members Participating: Margaret J. Finerty, Michael L. Fox, Sharon Stern Gerstman, Taa R. Grays, Henry M. Greenberg, Richard M. Gutierrez, Erica M. Hines, Scott M. Karson, Peter H. Levy, Richard C. Lewis, Michael Miller, Steven E. Millon, William T. Russell, Jr., Robert I. Schofield, IV, Rona G. Shamoon, Carol A. Sigmond, David H. Tennant, Jean Marie Westlake.

Mr. Miller presided as President of the Association.

1. Report and recommendations of Committee on Annual Award. Mr. Miller presented the committee's recommendation with respect to the proposed recipient of the 2019 Association Gold Medal. After discussion, a motion was adopted to approve the recommendation.
2. Adjournment. There being no further business to come before the Executive Committee, the meeting was adjourned.

Respectfully submitted,



Sherry Levin Wallach
Secretary