



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #5

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

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

At the January 2019 House meeting, the House approved amendments to Rules 1.0, 1.7, 1.8, 1.10 (with the exception of a proposal regarding lateral hires), 1.11, 1.12 and 6.5 of the Rules of Professional Conduct. At this meeting, the House will consider the balance of the report.

The proposed amendments may be summarized as follows:

CONFLICTS

- **Rule 1.10.** In Rule 1.10, which governs imputation of conflicts among lawyers in a law firm, permit screening to avoid imputation of lateral-hire conflicts.

TRIBUNALS

- **Rule 1.16(c)(5).** Amend the test for when a lawyer may withdraw because a client has failed to pay fees. The existing test permits withdrawal only when a client "deliberately disregards" an agreement or obligation to the lawyer as to expenses or fees. The amended test would instead permit a lawyer to withdraw if "the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled."

- **Rule 3.3(c).** Insert a proviso that a lawyer's duty to remedy false testimony or criminal or fraudulent conduct before a tribunal ends at the conclusion of the proceeding.
- **Rule 3.4(a).** Insert a new provision prohibiting a lawyer from knowingly participating in or counseling the "the unlawful destruction or unlawful deletion of any document having potential evidentiary value."
- **Rule 3.4(e).** Amend the existing prohibition on presenting or threatening "criminal charges solely to obtain an advantage in a civil case" so that it prohibits presenting "*criminal or disciplinary charges to obtain an advantage in a civil matter, if those charges are not advanced in good faith or are unrelated to the civil matter.*"
- **Rule 3.6(c).** Amend the introduction to the list of permitted forms of trial publicity in Rule 3.6(c) so that it reads "*Notwithstanding* paragraph (a)" rather than "Provided that the statement complies with paragraph (a)." The amendment will make Rule 3.6(c) a true safe harbor.

Comments on the proposals are attached.

A representative of the committee will present the report at the April 13 meeting.

(From COSAC Conflicts Report, January 2019)

Rule 1.10 **Imputation of Conflicts of Interest**

Overview

COSAC proposes the following four changes to Rule 1.10:

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

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

Proposal to remove imputation for personal conflicts

COSAC proposes to eliminate New York's minority rule that categorically imputes to associated lawyers all conflicts that arise from a lawyer's own financial, business, property or other personal interest ("personal conflicts"). New York's inflexible rule is shared by only five other states: Alabama, California, Georgia, Mississippi, and Texas. All other states appear to have adopted the position in ABA Model Rule 1.10(a) that such conflicts are not ordinarily imputed to the law firm as a whole.

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

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

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

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

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

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

Proposal for screening to remove imputation arising from lateral hire conflicts

COSAC proposes that New York join more than a dozen other states whose rules provide that screening, with various conditions, will prevent imputation of conflicts from lateral-hire lawyers.¹

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

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

New York's current version of Rule 1.10(a) imputes a lateral-hire lawyer's conflicts arising out of his or her former representation of a client in all cases except where "the newly associated lawyer did not acquire any information protected by Rule 1.6 or 1.9(c) that is material to the current matter" — an extremely limited exception that typically applies only to a very junior lawyer who did only abstract legal research for a former client and was exposed to no client confidences.

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

As noted, in addition to the many states that have adopted lateral-hire screening by rule, some states have approved of screening for lateral hires via state court decisions. Further, federal courts in New York have repeatedly approved of screening to cure lateral-hire conflicts in decisions declining to disqualify counsel. *E.g., Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) (approving of screening to cure conflict from laterally-hired of-counsel lawyer); *Maricultura del Norte, S. de R.L. de C.V. v. Worldbusiness Capital, Inc.*, 2015 WL 1062167, at *15 (S.D.N.Y. Mar. 9, 2015) (surveying case law in Second Circuit and concluding that "[i]n every other post-*Hempstead* case I have located within this

¹ States providing that screening, with various conditions, will prevent imputation of conflicts from all lateral-hire lawyers are Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Washington and Wyoming. Further, as discussed in more detail below, another group of states have adopted rules providing for screening for lateral-hire lawyers who had limited participation in the prior matter, with the limited participation expressed in various standards, such as "did not have primary responsibility" or had "no substantial responsibility." These states are Arizona, California, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Tennessee, and Wisconsin.

circuit, the district court, after considering whether an ethical screen was sufficient, has found the presumption rebutted and denied a motion to disqualify”). COSAC proposes to codify these federal court decisions in New York’s Rule 1.10(a), which would then be applicable in state courts and in disciplinary proceedings and would provide clear guidance for the day-to-day practice of law firms in New York State.

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

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

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

As a consequence, many firms already believe that if a lateral-hire lawyer had very limited involvement in a matter (such as a junior associate who did only legal research on discrete issues), the risk of conflicts is limited and can be managed by screening under the current rules. State court decisions have declined to disqualify lawyers who are properly screened in such circumstances. *E.g.*, *Nimkoff v. Nimkoff*, 18 A.D.3d 344, 346, 797 N.Y.S.2d 3, 6 (1st Dep’t 2005) (if party seeking to avoid disqualification proves that any information acquired by the lateral “is unlikely to be significant or material in the litigation,” then “a ‘Chinese Wall’ around

the disqualified [lateral] lawyer would be sufficient to avoid firm disqualification”); see *Matter of Jalcia G.*, 41 Misc. 3d 931, 971 N.Y.S.2d 831 (Bronx County Family Ct. 2013) (permitting Legal Aid Society to oppose a former client in a substantially related matter as long as (i) all LAS personnel working on current matter avoid any contact with records relating to representation of former client and (ii) all LAS staff who worked on former client’s matter are screened from current matter). See also *Kassis v. Teacher’s Ins. & Annuity Ass’n*, 93 N.Y.2d 611, 617 (1999) (disqualifying firm in particular matter but saying, in dicta, that screening at a lateral hire’s new firm would be sufficient to avoid disqualification where new firm can prove that “any information acquired by the disqualified lawyer is unlikely to be significant or material in the litigation”).

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

Several states have adopted limitations on screening similar to COSAC’s alternative proposal. Arizona and Indiana limit screening to lawyers who did not have “primary responsibility” for the matter that is causing the disqualification; New Jersey and Tennessee bar screening in litigated matters where the lawyer had “primary responsibility” (New Jersey), or was “substantially involved” (Tennessee), in the representation.²

In addition another ten states have adopted screening for lateral-hire lawyers who had limited participation in the prior matter, with the limited participation expressed in various standards,

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

such as “performed no more than minor or isolated services” or “did not have a substantial role in the matter.”³

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

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

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

³ The states setting out language regarding lateral-hire lawyers who had limited participation in the prior matter are California, Colorado, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, and Wisconsin.

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 newly associated lawyer’s current firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from

participating in the representation of the current client;

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

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

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

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

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

....

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

(i) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11 and not by this Rule.⁴

⁴ 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.

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 represent a client with interests directly adverse to those of a current client of the firm. Moreover, the firm may not represent the client where the matter is the same or substantially related to a matter in which (i) the formerly associated lawyer represented the client, and (ii) the firm or any lawyer currently in the firm has actual knowledge of, or has accessed, information protected by Rule 1.6 ~~and~~ or Rule 1.9(c) that is material to the matter.

[5A] If all lawyers who have worked on a matter or have confidential information about a matter have left a firm, then the fact that the law firm retains confidential information in its electronic databases or paper files regarding the matter will not by itself give rise to a

conflict as long as (i) no lawyer currently in the firm has reviewed that information, and (ii) the firm takes appropriate steps to limit access to such information. Merely accessing files to determine whether information exists, without reading the confidential information, would not ordinarily constitute reviewing confidential information material to the matter. ~~In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter.~~

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

[5C] Paragraph (c)(2) contemplates the use of screening procedures that permit the law firm of a personally disqualified lawyer to avoid imputed disqualification. See Rule 1.0(t) for the definition of "screened" and "screening." A firm seeking to avoid disqualification under this Rule should consider its ability to implement, maintain, and monitor the screening procedures described by paragraph (c)(2) before undertaking or continuing the representation. In deciding whether the screening procedures permitted by this Rule will avoid imputed disqualification, a firm should consider a number of factors, including how the size, practices and organization of the firm will affect the likelihood that any confidential information acquired about the matter by the personally disqualified lawyer can be protected. If the firm is large and is organized into separate departments, or maintains offices in multiple locations, or for any reason the structure of the firm facilitates preventing the sharing of information with lawyers not participating in the particular matter, it is more likely that the requirements of this Rule can be met and imputed disqualification avoided. Although a large firm will find it easier to maintain effective screening, lack of timeliness in instituting, or lack of vigilance in maintaining, the procedures required by this Rule may make those procedures ineffective in avoiding imputed disqualification. If a personally disqualified lawyer is working on other matters with lawyers who are participating in a matter requiring screening, it may be impossible to maintain effective screening procedures. Although the size of the firm may be considered as one of the factors affecting the firm's ability to institute and maintain effective screening procedures, it is not a dispositive factor. A small firm may need to exercise special care and vigilance to maintain effective screening but, if appropriate precautions are taken, small firms can satisfy the requirements of paragraph (c)(2).

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

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

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

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

....

MEMORANDUM

January 3, 2019

To: NYSBA Executive Committee

Cc: Kathy Baxter, NYSBA General Counsel

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

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

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

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

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

Summary of Proposals

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

- **Rule 1.16(c)(5).** Amend the test for when a lawyer may withdraw because a client has failed to pay fees. The existing test permits withdrawal only when a client “deliberately disregards”

an agreement or obligation to the lawyer as to expenses or fees. The amended test would instead permit a lawyer to withdraw if “the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.”

- **Rule 3.3(c).** Insert a proviso that a lawyer’s duty to remedy false testimony or criminal or fraudulent conduct before a tribunal ends at the conclusion of the proceeding.
- **Rule 3.4(a).** Insert a new provision prohibiting a lawyer from knowingly participating in or counseling the “the unlawful destruction or unlawful deletion of any document having potential evidentiary value.”
- **Rule 3.4(e).** Amend the existing prohibition on presenting or threatening “criminal charges solely to obtain an advantage in a civil case” so that it prohibits presenting “criminal *or disciplinary* charges to obtain an advantage in a civil matter, *if those charges are not advanced in good faith or are unrelated to the civil matter.*”
- **Rule 3.6(c).** Amend the introduction to the list of permitted forms of trial publicity in Rule 3.6(c) so that it reads “*Notwithstanding* paragraph (a)” rather than “Provided that the statement complies with paragraph (a).” The amendment will make Rule 3.6(c) a true safe harbor.

Rule 1.16

Declining or Terminating Representation

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

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

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

Noting that the "key word is 'deliberately,'" the Committee in N.Y. State 598 elaborated on the meaning of that word, stating:

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

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

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

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

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

(c) Except as stated in paragraph (d), a lawyer may withdraw from representing a client when . . . (5) the client ~~deliberately disregards an agreement or obligation to the lawyer as~~

~~to expenses or fees~~ fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

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

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

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

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

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

Rule 3.3

Conduct Before a Tribunal

Rule 3.3(a)(3) and Rule 3.3(b) both obligate lawyers, in specified narrow circumstances, to reveal information to remedy misconduct by a client or other person, even if the revelation would otherwise be prohibited by Rule 1.6. If a lawyer comes to know that the client or another witness called by the lawyer "has offered material evidence" and "the lawyer comes to know of its falsity," *see* Rule 3.3(a)(3), or if a lawyer who represents a client before a tribunal "knows that a person

intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding,” *see* Rule 3.3(b), then the lawyer “shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal,” *see* Rule 3.3(a) and (b). Disclosure to the tribunal is a momentous step, fraught with serious consequences for both lawyer and client, and even less drastic remedial measures can telegraph problems with a case. Therefore, it is important for lawyers to know when the duty to make disclosure or take other remedial measures ends.

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

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

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

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

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

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

[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.

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

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

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

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

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.]

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require) a lawyer to disclose confidential information to the extent the lawyer reasonably believes necessary to remedy a fraud on a tribunal or a wrongful conviction based upon such a fraud.

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

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

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 3.4 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

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- scheduling matters
- requests for assistance in obtaining evidence, and
- warnings of danger about people involved in litigation

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

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

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

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

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

DISPUTE RESOLUTION SECTION

2018-2019 Officers

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

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

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

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

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

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

