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COMMITTEE ON PROFESSIONAL ETHICS
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TO: NYSBA Executive Committee and House of Delegates

Re: Proposed New Comments to Rules 1.4 & 5.6 Regarding Departing Lawyers

The Committee on Professional Ethics ("CPE") joins the Committee on Standards of Attorney Conduct ("COSAC") in recommending the adoption of new Comments to Rule 1.4 regarding departing lawyers. The current proposed text of those new Comments to Rule 1.4 is the product of discussions between the two Committees and is being forwarded to the Executive Committee and House of Delegates separately by COSAC.

However, CPE respectfully opposes COSCAC's proposed amendments to the Comments to Rule 5.6 regarding departing lawyers on the basis that they are not needed and intrude into territory best left to the marketplace.

Background

At its February 16, 2022 meeting, CPE referred COSAC's proposed new Rule 5.9 Regarding Departing Lawyers to a subcommittee for review. The subcommittee's report opposing new Rule 5.9 and recommending, as an alternative, the adoption of new Comments to Rule 1.4, was adopted by CPE at its meeting of March 16, 2022. Apparently in response to CPE's action, COSAC withdrew proposed new Rule 5.9 in favor of proposed new Comments to Rule 1.4 and proposed amendments to the Comments to Rule 5.6

These proposed new Comments and amendments to Comments were reviewed by the same CPE subcommittee, and its report was presented at the CPE meeting of June 15, 2022. As a result of that meeting, CPE has reached agreement with COSAC on the text of the proposed new Comments to Rule 1.4, but no similar agreement has been reached concerning COSAC's proposed amendments to the Comments to Rule 5.6, which CPE respectfully opposes.

COSAC's Proposed Amendments to the Comments to Rule 5.6 Should Not Be Adopted

The proposed amendments to the Comments to Rule 5.6 drill down on specific contractual provisions that would not violate the prohibition in Rule 5.6(a)(1) against an agreement "that restricts the right of a lawyer to practice after termination of the relationship." The proposed amendments also establish "broad factors" that must be considered in determining the reasonableness of such provisions, particularly as they apply to transitional "notice" periods.

After considerable reflection and debate, and mindful of deference due COSAC, CPE has nonetheless concluded that ABA 489 (2019) fully addresses these rights and has received widespread support in the ethics community. That opinion said, among other things:

> Firms have an ethical obligation to assure that client matters transition smoothly and therefore, firm partnership, shareholder, member, employment agreements may request a reasonable notification period, necessary to assure that files are organized or updated, and staffing is adjusted to meet client needs. In practice, these notification periods cannot be fixed or rigidly applied without regard to client direction, or used to coerce or punish a lawyer for electing to leave the firm, nor may they serve to unreasonably delay the diligent representation of a client. If they would affect a client's choice of counsel or serve as a financial disincentive to a competitive departure, the notification period may violate Rule 5.6. A lawyer who wishes to depart may not be held to a pre-established notice period particularly where, for example, the files are updated, client elections have been received, and the departing lawyer has agreed to cooperate post-departure in final billing. In addition, a lawyer who does not seek to represent firm clients in the future should not be held to a pre-established notice period because client elections have not been received.

CPE sees no need to add to this teaching. Of particular concern is COSAC's effort at describing "permissible agreements" in its proposed amendments to the Comments. Why do so? The proposed amendments to the Comments to Rule 5.6 should not be used to establish a safe harbor for departing lawyers or their firms on the permissibility of specific partnership regulation of intra-firm disputes where the legal shoreline may continue to drift. Why wade into these waters? Why not allow the market, and legal developments in the field, to chart the boundaries of what a law firm may or may not do? COSAC's very recent amendments to these comments are enough. One could easily draft other contractual provisions that are equally "permissible" under Rule 5.6.

CPE appreciates COSAC's work regarding both the new proposed Rule 5.9, now withdrawn, and the subsequently proposed new Comments to Rule 1.4 and proposed amendments to the Comments to Rule 5.6. COSAC's reports and recommendations have been impressive, thought-provoking, and the product of much careful consideration. In the end, however, CPE concludes that the NYS Bar Association should not be in the business of drafting partnership agreements by way of the Comments. We therefore respectfully oppose COSAC's proposed amendments to the Comments to Rule 5.6

Very truly yours,

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