NEW YORK
CITY BAR

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Steven C. Krane, Chair
Committee on Standards of Attorney Conduct
New York State Bar Association
One Elk Street
Albany, New York 11207

Dear Steve:

The following are the comments of the New York City Bar Association on proposed rules 1.11-1.12, 2.1, 2.3, 2.4, 4.2-4.4, 6.1-6.5.

I. Proposed Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees

This rule makes a number of changes to the existing New York conflict rule for lawyers who serve or have served in the government. The Association supports these changes.

II. Proposed Rule 1.12: Former Judge, Arbitrator, Mediator or Third-Party Neutral

Proposed Rule 1.12 contains special conflict of interest rules for lawyers who have previously served as judges or other adjudicative officers. This rule tracks the ABA model rule, which restricts a judge from representing anyone in a matter in which he participated "personally and substantially" as a judge. This differs from New York Rule 9-101(A), which is triggered only if the former judge "acted on the merits" of the matter. The proposed rule, like the ABA Rule and unlike the New York rule, allows for waiver. The proposed rule, unlike the New York rule, imputes the disqualification and allows for screening. The Association agrees with these changes.

III. Proposed Rule 2.1: Advisor

Proposed Rule 2.1 mandates that a lawyer "should exercise independent professional judgment and render candid advice." It permits lawyers to "refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." This mirrors the ABA rule and combines Canon 5 from the New York Code and EC 7-8. The Association does not object to this rule.

IV. Proposed Rule 2.3: Evaluations for Use by Third Parties

This rule concerns evaluations that lawyers are asked to prepare for the use of third parties. New York has no equivalent rule. The rule allows attorneys to take on this kind of representation if "the lawyer believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client." Rule 2.3(b) requires informed consent when "the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely."

The Association would like to add the following italicized text to comment 4: *"[i]n no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law, or knowingly omit any material information in providing an evaluation under this rule.*" See Rule 4.1; 8.4(c).

V. Proposed Rule 2.4: Lawyer Serving as Third Party Neutral

The Association agrees with the addition of this rule.

VI. Proposed Rule 4.2: Communication with Person Represented by Counsel

Proposed Rule 4.2(a) forbids a lawyer from communicating "with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." The Committee agrees with new addition of "court order."

The Committee also notes, and agrees with, the change from the New York rule that involves a shift from "party" to "person."

The Committee disagrees with COSAC's removal of the "legal competence" requirement for client-to-client communications. The Committee suggests that the new rule should read: [4.2(b)(1)] "cause a client to communicate with a represented person if that person is legally competent, and…"

The Committee suggests the language set forth below be added to proposed comment 11. The new language, which is in *italics,* underscores the lawyer's obligation to avoid abusing, harassing or other unfair conduct toward an adversary.

"Parties to a matter may communicate directly with each other and a lawyer may properly advise a client to communicate directly with a represented person without obtaining consent from a represented person's counsel. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. *In connection with such communications,* a lawyer may not advise the client to seek confidential information or encourage or invite the represented person to take actions without the advice of counsel. *A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing or unfair conduct with regard to the adverse party. The lawyer should advise the client against such conduct. In considering how to advise the client the lawyer should, for example, advise the client against communicating with the adverse party at all if the adverse party is legally incompetent.*"

This proposed comment goes beyond the COSAC proposal by directing the lawyer to consider the respective bargaining power of the two persons and tailor his advice accordingly. It mentions that once the lawyer has taken these considerations into account, he may want to advise the client against engaging in abusive conduct but it also suggests that there may be times when it is necessary to advise the client not to contact the other party at all. The discretionary language also avoids the likely effect of the current comment that lawyers will draft a "form" letter of advice to their client based on this rule.

VII. Proposed Rule 4.3: Dealing with Unrepresented Person

The new rule provides more guidance in dealing with unrepresented parties. Specifically, it adds new language stating that lawyer must make a reasonable effort to correct the unrepresented person's misunderstanding of lawyer's role "when the lawyer knows or reasonably should know" that the unrepresented person has such a misunderstanding. The Association agrees with this addition.

VIII. Proposed Rule 4.4: Respect for Rights of Third Persons

Proposed Rule 4.4(a) prohibits tactics that "have no substantial purpose other than to embarrass or harm" or "violate the legal rights" of third persons. This rule omits the "litigation-specific" language (i.e., "file a suit, assert a position, conduct a defense, delay a trial…") used in the current New York rule. The Committee agrees with this change.

The Association also agrees with the new rule's language. It bars conduct that has "no substantial purpose other than to embarrass or harm a third person," (while, in contrast, existing rule prohibits "known" or "obvious" conduct meant "merely to harass" or "maliciously injure" another).

We suggest a change in proposed Rule 4.4(b) to reflect recent opinions by the New York City Bar Association. Rule 4.4(b) requires an attorney to merely notify the sender, rather than also refrain from reading an inadvertently sent document. The New York City Bar's Formal Opinion 2003-04 expressly acknowledged and rejected Model Rule 4.4(b), which is identical to proposed Rule 4.4(b). That opinion concluded "[a] lawyer who receives [an inadvertent communication containing confidences or secrets] . . . should promptly notify the sender and refrain from further reading or listening to the communication and should follow the sender's directions regarding destruction or return of the communication." *See also* N.Y. County Op. 730 (2002) (expressing a similar view). The Association recognizes that the American Bar Association has recently withdrawn its previously held view, expressed in ABA Formal Opinion 92-368 (1992), that a lawyer who receives misdirected communications from another lawyer "should notify the sending lawyer of their receipt and . . . abide by the sending lawyer's instructions as to their disposition." *See* ABA Formal Opinion 05-437 (2005) (formally withdrawing Opinion 92-368); ABA Formal Opinion 06-440 (2006) (recognizing same). However, the basis for the ABA's withdrawal of its earlier opinion was that such opinion was grounded on moral and ethical policy considerations that went beyond the scope of what was required pursuant to the text of Model Rule 4.4(b). As noted in the COSAC commentary, ABA Rule 4.4(b), adopted in 2002, provides for "notification only." As we are now commenting on proposed text for Rule 4.4(b) itself, the Committee believes that such Rule should include the more stringent obligations set forth in New York City Bar Formal Opinion 2003-04. Accordingly, we would add the following text at the end of the final sentence to proposed Rule 4.4(b): "and refrain from further reading or listening

to the communication and should follow the sender's directions regarding destruction or return of the communication."

Accordingly, proposed Rule 4.4(b) should be changed as follows:

A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender *and refrain from further reading of the document and should follow the sender's direction regarding destruction or return of the document, provided that if the receiving lawyer believes in good faith that the communication appropriately may be retained and used, the receiving lawyer may submit the document for in camera consideration by a tribunal.*

IX. Proposed Rule 6.1: Voluntary Pro Bono Service

The Association agrees with this proposed rule.

X. Proposed Rule 6.2: Accepting Appointments

The proposed rule states that "a lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause." The new rule combines EC 2-29 and EC 2-30. Unlike the ABA Rule, it specifies the examples in the comments as opposed to the rule itself. The Association does not object to these changes.

XI. Proposed Rule 6.3: Membership in a Legal Services Organization

This rule allows lawyers to serve as officers of not-for-profit legal services organizations without exposing them to conflicts that might otherwise disqualify them. New York adopted the equivalent of this rule in 1999. The COSAC rule differs from the ABA rule in that it requires the legal services organization to be not-for-profit. The Association does not object to this addition.

XII. Proposed Rule 6.4: Law Reform Activities Affecting Client Interests

This rule allows a lawyer to serve as a member of a law reform organization, regardless of the effect that the reform may have on the interests of the lawyer's clients. The proposed rule tracks the ABA rule except that it, like EC 8-4, requires disclosure when the client's interest is "materially affected," not just when the client's interest is "materially benefited." The Association does not object to the change.

XIII. Proposed Rule 6.5: Participation in Limited Legal Services Programs

This rule provides that a lawyer participating in certain short-term limited legal services programs is subject to the conflict of interest rules only if he knows of the conflict. The Association agrees with this addition to the New York rules.

Sincerely,

Barry Kamins

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