



NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

April 4, 2016

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendments to the New York Rules of Professional Conduct (22 NYCRR Part 1200)

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Public comment is requested on several amendments to the New York Rules of Professional Conduct (22 NYCRR Part 1200) proposed by the New York State Bar Association (Exh. A). In brief, these proposals are as follows:

- Amend Rule 1.0(x) (definition of "writing" in "Terminology") to clarify that it encompasses evolving forms of electronic communications (Exh. A, p. 23).
- Amend Rule 1.6(c) ("Confidentiality of Information") to require lawyers to make "reasonable efforts" to safeguard confidential information against (i) inadvertent disclosure or use, (ii) unauthorized disclosure or use, and (iii) unauthorized access; and to make clear that Rule 1.6(c) extends to lawyers themselves (Exh. A, pp. 23-24).
- Amend Rule 1.18(a) (defining "prospective client") and Rule 1.18(e) (setting forth exceptions to the definition of "prospective client") to improve clarity (Exh. A, p. 25).
- Amend Rule 4.4(b) ("Respect for Rights of Third Persons") to clarify that it applies to "electronically stored information" (Exh. A, p. 26).
- Amend Rule 7.3 ("Solicitation and Recommendation of Professional Employment") to delete the phrase "prospective client" in subparagraph (b) and to replace it with "persons" in subparagraph (c) (Exh. A, pp. 26-27).

A fuller explanation of these proposed changes is set forth in a report of the NYSBA Committee on Standards of Attorney Conduct (COSAC), attached as Exh. B.

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Persons wishing to comment on the proposed rules should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than June 1, 2016.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

**REPORT OF THE
NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT (“COSAC”)**

**LEGISLATIVE STYLE AND CLEAN VERSIONS OF
MARCH 2015 AMENDMENTS TO COMMENTS**

AND

PENDING PROPOSALS TO AMEND BLACK LETTER TEXT

IN THE

NEW YORK RULES OF PROFESSIONAL CONDUCT

**Based on COSAC’s Comprehensive Review of
Changes to the ABA Model Rules of Professional Conduct
Resulting From the Work of the ABA Commission on Ethics 20/20**

Executive Summary

From 2009 to 2013, the ABA Commission on Ethics 20/20 drafted and recommended proposed amendments to the ABA Model Rules of Professional Conduct to account for increasing globalization and rapid changes in technology. In 2012 and 2013, the ABA House of Delegates adopted many of the proposed amendments.

From 2013 through early 2015, the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") systematically reviewed all of the ABA amendments to assess whether New York should adopt similar amendments to the black letter text and the Comments in the New York Rules of Professional Conduct. In January of 2015, COSAC presented its recommendations to the House of Delegates, and the recommendations were circulated to the Bar for public comment. At its March 2015 Quarterly Meeting, after COSAC revised some recommendations in response to public comments, the State Bar's House of Delegates adopted COSAC's recommendations.

Amendments to the Comments took effect immediately (except the amendments proposed to Comments [16] and [17] to Rule 1.6, which are contingent on the Appellate Divisions' approval of proposed amendments to the black letter text of Rule 1.6(c)). Proposed amendments to the black letter text have been forwarded to the Appellate Divisions for their consideration but will not take effect unless and until the Appellate Divisions approve them.

Below is a summary of the amendments to the Comments, followed by a summary of the proposed amendments to the black letter text of various Rules that the State Bar is recommending to the Appellate Divisions. Following the summaries, this report reprints in both legislative style and clean versions the full text of each new or amended Comment. After the new and amended Comments, the report reprints in legislative style and clean versions each proposed amendment to the black letter Rules that the NYSBA is recommending to the Appellate Divisions.

Summary of Changes to Comments (Effective Immediately)

Rule 1.0 ("Terminology"): A new Comment [1A] clarifies the scope of New York's unique defined term "computer-accessed communication."

Rule 1.1 ("Competence"): New and amended Comments [6] to [8] address three topics: (a) outsourcing, (b) co-counsel arrangements, and (c) the obligations to keep abreast of changes in law and technology and to engage in continuing study and education.

Rule 1.4 (“Communication”): Comment [4] has been amended to replace the narrow phrase “telephone calls” with the broader term “communications.”

Rule 1.6 (“Confidentiality of Information”): New Comments [18A]-[18F] provide guidance on applying the duty of confidentiality to lawyers considering lateral moves and to law firms contemplating law firm mergers.

Rule 1.10 (“Imputation of Conflicts of Interest”): To complement new Comments [18A]-[18F] to Rule 1.6, new Comments [9H] and [9I] to Rule 1.10 offer guidance on the information a law firm may request in the context of a contemplated lateral hire or law firm merger.

Rule 1.18 (“Duties to Prospective Clients”): Amended Comments [1]-[2] and [4]-[5] to Rule 1.18 clarify how and when a person becomes a “prospective client” within the meaning of Rule 1.18.

Rule 4.4 (“Respect for Rights of Third Persons”): Amended Comment [2] to Rule 4.4 provides expanded guidance to lawyers regarding the scope of Rule 4.4(b) and the options available to a lawyer who receives an inadvertently sent document or other writing.

Rule 5.3 (“Lawyer’s Responsibility for Conduct of Nonlawyers”): Amended Comment [2] and new Comment [3] to Rule 5.3 offer guidance on outsourcing. In particular, language in new Comment [3] identifies some circumstances a lawyer should consider when determining how to comply with Rule 5.3’s requirement to make “reasonable efforts” to supervise nonlawyers. (Former Comment [3] is retained verbatim but is renumbered as Comment [2A] so that New York Comment [3] corresponds to ABA Comment [3].)

Rule 7.2 (“Payment for Referrals”): Amended Comment [1] to Rule 7.2 clarifies the situations in which a lawyer may pay others for generating client leads gathered from the Internet or elsewhere, and amended Comment [3] replaces the term “prospective clients” (which is defined in Rule 1.18) with the more accurate term “potential clients.”

Rule 7.3 (“Solicitation and Recommendation of Professional Employment”): Amended Comment [9] to Rule 7.3 provides more guidance regarding the phrase “real-time or interactive communications” in Rule 7.3.

Summary of Proposed Black Letter Amendments Recommended to the Appellate Divisions

The New York State Bar Association (“NYSBA”) is recommending that the Appellate Divisions approve the following amendments to the black letter text of the Rules of Professional Conduct:

Rule 1.0(x) (in “Terminology”): The NYSBA recommends that the Appellate Divisions amend the definition of “writing” to clarify that it encompasses evolving forms of electronic communications.

Rule 1.6 (“Confidentiality of Information”): The NYSBA recommends that the Appellate Divisions amend the black letter text of Rule 1.6(c) to require lawyers to make “reasonable efforts” to safeguard confidential information against three things: (i) inadvertent disclosure or use, (ii) unauthorized disclosure or use, and (iii) unauthorized access. In addition, the NYSBA recommends that the Appellate Divisions amend Rule 1.6(c) to make clear that Rule 1.6(c) expressly extends to lawyers themselves. (The NYSBA has also approved amendments to Comments [16] and [17] to Rule 1.6 contingent on the Appellate Divisions’ approval of the proposed black letter changes to the text of Rule 1.6(c) – see below.)

Rule 1.18 (“Duties to Prospective Clients”): The NYSBA recommends that the Appellate Divisions amend the black letter text of Rule 1.18 by adding the phrase “Except as provided in Rule 1.18(e)” at the beginning of Rule 1.18(a) (which defines the term “prospective client”), and by slightly changing the wording and structure of Rule 1.18(e) (which states two exceptions to the definition of “prospective client”) to make it easier to understand.

Rule 4.4 (“Respect for Rights of Third Persons”): The NYSBA recommends that the Appellate Divisions amend the black letter text of Rule 4.4(b) to make explicit that it applies to “electronically stored information.”

Rule 7.3 (“Solicitation and Recommendation of Professional Employment”): The NYSBA recommends that the Appellate Divisions amend the black letter text of Rule 7.3(b) (which defines “solicitation”) by deleting the phrase “of a prospective client” at the end of paragraph (b). The NYSBA also recommends that the Appellate Divisions amend the black letter text of Rule 7.3(c)(5)(ii) by replacing the phrase “prospective client” with the more precise and less confusing phrase “potential client.”

New and Amended Comments (Effective Immediately)

Each new and amended Comment is set forth below, first in legislative style and then in a clean version showing the final language now in effect.

Rule 1.0. Terminology

New Comment [1A] to New York Rule 1.0

Legislative style version:

Computer-Accessed Communication

[1A] Rule 1.0(c), which defines the phrase “computer-accessed communication,” embraces electronic and wireless communications of every kind and includes, without limitation, communication by devices such as cell phones, smartphones, and all other handheld or portable devices that can send or receive communications by any electronic or wireless means, including cellular service, the Internet, wireless networks, or any other technology.

Clean final version of Comment [1A] to New York Rule 1.0:

Computer-Accessed Communication

[1A] Rule 1.0(c), which defines the phrase “computer-accessed communication,” embraces electronic and wireless communications of every kind and includes, without limitation, communication by devices such as cell phones, smartphones, and all other handheld or portable devices that can send or receive communications by any electronic or wireless means, including cellular service, the Internet, wireless networks, or any other technology.

Rule 1.1.

Competence

New and Amended Comments [6]-[8] to New York Rule 1.1

Legislative style version:

Retaining or Contracting with Lawyers Outside the Firm

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the needs of the client, the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[6A] Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routine calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other about the scope of their respective roles and the allocation of responsibility among them. See Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (e.g., under local court rules, the CPLR, or the Federal Rules of Civil Procedure) that are a matter of law beyond the scope of these Rules.

[7A] Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, if a lawyer retains an outside lawyer or law firm to work under the retaining lawyer's close direction and supervision, and the retaining lawyer closely reviews the outside lawyer's work, the retaining lawyer usually will not need to consult with the client about the outside lawyer's role and level of responsibility. On the other hand, if

the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event, whenever a retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

Maintaining Competence

~~[6]~~ [8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in ~~the law and its practice~~ substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education, and comply with all applicable continuing legal education requirements ~~to which the lawyer is subject.~~ See under 22 N.Y.C.R.R. Part 1500.

Clean final version of Comments [6]-[8] to New York Rule 1.1:

Retaining or Contracting with Lawyers Outside the Firm

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the needs of the client, the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[6A] Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routine calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other about the scope of their respective roles and the allocation of responsibility among them. See Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (e.g., under local court rules, the CPLR, or the Federal Rules of Civil

Procedure) that are a matter of law beyond the scope of these Rules.

[7A] Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, if a lawyer retains an outside lawyer or law firm to work under the retaining lawyer's close direction and supervision, and the retaining lawyer closely reviews the outside lawyer's work, the retaining lawyer usually will not need to consult with the client about the outside lawyer's role and level of responsibility. On the other hand, if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event, whenever a retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

Rule 1.4.

Communication

Amended Comment [4] to New York Rule 1.4

Legislative style version:

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer's staff acknowledge receipt of the request and advise the client when a response may be expected. ~~Client telephone calls should be promptly returned or acknowledged~~ A lawyer should promptly respond to or acknowledge client communications, or arrange for an appropriate person who works with the lawyer to do so.

Clean final version of Comment [4] to New York Rule 1.4:

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer or a member of the lawyer's staff acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications, or arrange for an appropriate person who works with the lawyer to do so.

Rule 1.6.

Confidentiality of Information

New Comments [18A]-[18F] to New York Rule 1.6

Legislative style version:

Lateral Moves, Law Firm Mergers, and Confidentiality

[18A] When lawyers or law firms (including in-house legal departments) contemplate a new association with other lawyers or law firms through lateral hiring or merger, disclosure of limited information may be necessary to resolve conflicts of interest pursuant to Rule 1.10 and to address financial, staffing, operational, and other practical issues. However, Rule 1.6(a) requires lawyers and law firms to protect their clients' confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client's informed consent or some other exception to Rule 1.6.

[18B] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily permitted regarding basic information such as: (i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer's total book of business; (v) the financial terms of each client-lawyer relationship; and (vi) information about aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments). Such information is generally not "confidential information" within the meaning of Rule 1.6.

[18C] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily *not* permitted, however, if information is protected by Rules 1.6(a), 1.9(c), or Rule 1.18(b). This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. For example, many clients would not want their lawyers to disclose their tardiness in paying bills; the amounts they spend on legal fees in particular matters; forecasts about their financial prospects; or information relating to sensitive client matters (e.g., an unannounced corporate takeover, an undisclosed possible divorce, or a criminal investigation into the client's conduct).

[18D] When lawyers are exploring a new association, whether by lateral move or by merger, all lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts and financial concerns, and should consider whether to ask clients for a waiver of confidentiality if consistent with those fiduciary duties – see Rule 1.10(e) (requiring law firms to check for conflicts of interest). Questions of fiduciary duty are legal issues beyond the scope of the Rules.

[18E] For the unique confidentiality and notice provisions that apply to a lawyer or law firm seeking to sell all or part of its practice, see Rule 1.17 and Comment [7] to that Rule.

[18F] Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms – both those providing information and those receiving information – should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b). These steps might include such measures as: (1) disclosing client information in stages, initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process.

Clean final version of Comments [18A]-[18F] to New York Rule 1.6:

Lateral Moves, Law Firm Mergers, and Confidentiality

[18A] When lawyers or law firms (including in-house legal departments) contemplate a new association with other lawyers or law firms through lateral hiring or merger, disclosure of limited information may be necessary to resolve conflicts of interest pursuant to Rule 1.10 and to address financial, staffing, operational, and other practical issues. However, Rule 1.6(a) requires lawyers and law firms to protect their clients' confidential information, so lawyers and law firms may not disclose such information for their own advantage or for the advantage of third parties absent a client's informed consent or some other exception to Rule 1.6.

[18B] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily permitted regarding basic information such as: (i) the identities of clients or other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer's total book of business; (v) the financial terms of each client-lawyer relationship; and (vi) information about aggregate current and historical payment of fees (such as realization rates, average receivables, and aggregate timeliness of payments). Such information is generally not "confidential information" within the meaning of Rule 1.6.

[18C] Disclosure without client consent in the context of a possible lateral move or law firm merger is ordinarily not permitted, however, if information is protected by Rules 1.6(a), 1.9(c), or Rule 1.18(b). This includes information that a lawyer knows or reasonably believes is protected by the attorney-client privilege, or is likely to be detrimental or embarrassing to the client, or is information that the client has requested be kept confidential. For example, many clients would not want their lawyers to disclose their tardiness in paying bills; the amounts they spend on legal fees in particular matters; forecasts about their financial prospects; or information relating to sensitive client matters (e.g., an unannounced corporate takeover, an undisclosed

possible divorce, or a criminal investigation into the client's conduct).

[18D] When lawyers are exploring a new association, whether by lateral move or by merger, all lawyers involved must individually consider fiduciary obligations to their existing firms that may bear on the timing and scope of disclosures to clients relating to conflicts and financial concerns, and should consider whether to ask clients for a waiver of confidentiality if consistent with those fiduciary duties – see Rule 1.10(e) (requiring law firms to check for conflicts of interest). Questions of fiduciary duty are legal issues beyond the scope of the Rules.

[18E] For the unique confidentiality and notice provisions that apply to a lawyer or law firm seeking to sell all or part of its practice, see Rule 1.17 and Comment [7] to that Rule.

[18F] Before disclosing information regarding a possible lateral move or law firm merger, law firms and lawyers moving between firms – both those providing information and those receiving information – should use reasonable measures to minimize the risk of any improper, unauthorized or inadvertent disclosures, whether or not the information is protected by Rule 1.6(a), 1.9(c), or 1.18(b). These steps might include such measures as: (1) disclosing client information in stages, initially identifying only certain clients and providing only limited information, and providing a complete list of clients and more detailed financial information only at subsequent stages; (2) limiting disclosure to those at the firm, or even a single person at the firm, directly involved in clearing conflicts and making the business decision whether to move forward to the next stage regarding the lateral hire or law firm merger; and/or (3) agreeing not to disclose financial or conflict information outside the firm(s) during and after the lateral hiring negotiations or merger process.

Note on contingent approval of amendments to Comments [16]-[17] to Rule 1.6: The NYSBA House of Delegates also approved proposed amendments to Comments [16] and [17] to Rule 1.6, but those amendments were approved contingent on the Appellate Divisions' approval of the proposed black letter amendments to Rule 1.6(c). Proposed Comments [16]–[17] to Rule 1.6 are reprinted below after the proposed amendments to the black letter text of Rule 1.6(c).

Rule 1.10.

Imputation of Conflicts of Interest

New Comments [9H] and [9I] to New York Rule 1.10

Legislative style version:

Confidentiality Considerations in Lateral Moves and Law Firm Mergers

[9H] Rule 1.10(e) requires a law firm to avoid conflicts of interest by checking proposed engagements against current and previous engagements. When lawyers move from one firm to another firm as lateral hires, or when two law firms merge, the lateral lawyers' conflicts and the merging firms' conflicts arising under Rule 1.9(a) and (b) will be imputed to the hiring or newly merged firms under Rule 1.10(a). To fulfill the duty to check for conflicts before hiring laterals

or before merging firms, the hiring or merging firms should ordinarily obtain such information as: (i) the identity of each client that the lateral lawyers or the merging firms currently represent; (ii) the identity of each client that the lateral lawyers or the merging firms, within a reasonable period in the past, either formerly represented within the meaning of Rule 1.9(a), or about whom the lateral lawyers or the lawyers in the merging firms acquired material confidential information within the meaning of Rule 1.9(b); (iii) the identity of other parties to the matters in which the lateral lawyers or merging firms represented those clients; and (iv) the general nature of each such matter. The hiring or merging firms may also request aggregate financial data for all clients or from groups of clients (such as past billings, pending receivables, timeliness of payment, and probable future billings) to determine whether the employment or merger is economically justified.

[9I] Whether lawyers may disclose information in response to such requests depends on the nature of the information. Some of this information is ordinarily not confidential (e.g., the names of clients and adversaries in publicly disclosed matters, the general nature of such matters, and aggregate information about legal fees from all clients or from groups of clients), but other information is ordinarily confidential (e.g., non-public criminal or matrimonial representations, or client-specific payment information). The lateral lawyers or the merging firms should carefully assess the nature of the information being requested to determine whether it is confidential before asking lawyers to disclose it. Some measures to assist attorneys in abiding by confidentiality requirements in the lateral and merger context are discussed in Comments [18A]-[18F] to Rule 1.6.

Clean final version of Comments [9H] and [9I] to New York Rule 1.10:

Confidentiality Considerations in Lateral Moves and Law Firm Mergers

[9H] Rule 1.10(e) requires a law firm to avoid conflicts of interest by checking proposed engagements against current and previous engagements. When lawyers move from one firm to another firm as lateral hires, or when two law firms merge, the lateral lawyers' conflicts and the merging firms' conflicts arising under Rule 1.9(a) and (b) will be imputed to the hiring or newly merged firms under Rule 1.10(a). To fulfill the duty to check for conflicts *before* hiring laterals or before merging firms, the hiring or merging firms should ordinarily obtain such information as: (i) the identity of each client that the lateral lawyers or the merging firms currently represent; (ii) the identity of each client that the lateral lawyers or the merging firms, within a reasonable period in the past, either formerly represented within the meaning of Rule 1.9(a), or about whom the lateral lawyers or the lawyers in the merging firms acquired material confidential information within the meaning of Rule 1.9(b); (iii) the identity of other parties to the matters in which the lateral lawyers or merging firms represented those clients; and (iv) the general nature of each such matter. The hiring or merging firms may also request aggregate financial data for all clients or from groups of clients (such as past billings, pending receivables, timeliness of payment, and probable future billings) to determine whether the employment or merger is economically justified.

[9I] Whether lawyers may disclose information in response to such requests depends on the nature of the information. Some of this information is ordinarily not confidential (*e.g.*, the names of clients and adversaries in publicly disclosed matters, the general nature of such matters, and *aggregate* information about legal fees from all clients or from groups of clients), but other information is ordinarily confidential (*e.g.*, non-public criminal or matrimonial representations, or client-specific payment information). The lateral lawyers or the merging firms should carefully assess the nature of the information being requested to determine whether it is confidential before asking lawyers to disclose it. Some measures to assist attorneys in abiding by confidentiality requirements in the lateral and merger context are discussed in Comments [18A]-[18F] to Rule 1.6.

Rule 1.18. Duties to Prospective Clients

Amended Comments [1], [2], [4] and [5] to New York Rule 1.18

Legislative style version:

[1] Prospective clients, like current clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~ consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. As provided in paragraph (e), a person who~~ Such a person communicates information unilaterally to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." ~~within the meaning of paragraph (a). Similarly, Moreover,~~ a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client" – see Rule 1.18(e). ~~from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule. A lawyer may not encourage or induce a person to communicate~~

~~with a lawyer or lawyers for that improper purpose. See Rules 3.1(b)(2), 4.4, 8.4(a).~~

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial ~~interview~~ consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client.

[5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(j) for the definition of "informed consent," and with regard to the effectiveness of an advance waiver see Rule 1.7, Comments [22]-[22A] and Rule 1.9, Comment [9]. If permitted by law and if the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Clean final version of Comments [1], [2], [4] and [5] to N.Y. Rule 1.18:

Confidentiality Considerations in Lateral Moves and Law Firm Mergers

[1] Prospective clients, like current clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who

communicates with a lawyer for the purpose of disqualifying the lawyer is not a “prospective client” – see Rule 1.18(e).

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7 or Rule 1.9, then consent from all affected current or former clients must be obtained before accepting the representation. The representation must be declined if the lawyer will be unable to provide competent, diligent and adequate representation to the affected current and former clients and the prospective client.

[5] A lawyer may condition a consultation with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(j) for the definition of “informed consent,” and with regard to the effectiveness of an advance waiver see Rule 1.7, Comments [22]-[22A] and Rule 1.9, Comment [9]. If permitted by law and if the agreement expressly so provides, the prospective client may also consent to the lawyer’s subsequent use of information received from the prospective client

Rule 4.4.

Respect for Rights of Third Persons

Amended Comments [2] and [3] to New York Rule 4.4

Legislative style version:

[2] Paragraph (b) recognizes that lawyers and law firms sometimes receive a document~~s~~, electronically stored information, or other “writing” as defined in Rule 1.0(x), that ~~were~~ was mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. A document, electronically stored information, or other writing is “inadvertently sent” within the meaning of paragraph (b) when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or other writing is accidentally included with information that was intentionally transmitted. One way to resolve this situation is for lawyers and law firms to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer or law firm knows or reasonably should know that such a document or other writing was sent inadvertently, then this Rule requires only that the receiving lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the receiving lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence preclusion. Whether the lawyer or law firm is required to take additional steps, such as returning the ~~original~~ document or other writing, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document or other writing has been waived. Similarly, this

Rule does not address the legal duties of a lawyer who receives a document or other writing that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, “document, electronically stored information, or other writing” includes not only paper documents, but also email and other forms of electronically stored information – including embedded data (commonly referred to as “metadata”) – that is subject to being read or put into readable form. See Rule 1.0(x).

[3] Refraining from reading or continuing to read a document or other writing once a lawyer realizes that it was inadvertently sent, ~~to the wrong address~~ and returning the document to the sender or permanently deleting electronically stored information, honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer’s ethical obligations should not bar use of the information obtained from an inadvertently sent document or other writing, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document or other writing, or to return the document or other writing to the sender or permanently delete electronically stored information, or both. Accordingly, in deciding whether to retain or use an inadvertently received document or other writing, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, the decisions to refrain from reading such a documents or other writing or instead to return or delete it them, or both, are matters of professional judgment reserved to the lawyer. See Rules 1.2, 1.4.

Clean final version of Comments [2] and [3] to New York Rule 4.4:

[2] Paragraph (b) recognizes that lawyers and law firms sometimes receive a document, electronically stored information, or other “writing” as defined in Rule 1.0(x), that was mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. A document, electronically stored information, or other writing is “inadvertently sent” within the meaning of paragraph (b) when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or other writing is accidentally included with information that was intentionally transmitted. One way to resolve this situation is for lawyers and law firms to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer or law firm knows or reasonably should know that such a document or other writing was sent inadvertently, then this Rule requires only that the receiving lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the receiving lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence preclusion. Whether the lawyer or law firm is required to take additional steps, such as returning the document or other writing, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or other writing has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or other writing that the lawyer knows or reasonably should know may have been inappropriately obtained by the

sending person. For purposes of this Rule, “document, electronically stored information, or other writing” includes not only paper documents, but also email and other forms of electronically stored information – including embedded data (commonly referred to as “metadata”) – that is subject to being read or put into readable form. *See* Rule 1.0(x).

[3] Refraining from reading or continuing to read a document or other writing once a lawyer realizes that it was inadvertently sent, and returning the document to the sender or permanently deleting electronically stored information, honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where a lawyer’s ethical obligations should not bar use of the information obtained from an inadvertently sent document or other writing, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document or other writing, or to return the document or other writing to the sender or permanently delete electronically stored information, or both. Accordingly, in deciding whether to retain or use an inadvertently received document or other writing, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, the decision to refrain from reading such a document or other writing or instead to return or delete it, or both, are matters of professional judgment reserved to the lawyer. *See* Rules 1.2, 1.4.

Rule 5.3. Lawyer’s Responsibility for Conduct of Nonlawyers

Amended Comment [2] and New Comment [3] to New York Rule 5.3

Legislative style version:

[2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm, including nonlawyers outside the firm working on firm matters, is compatible with the professional obligations of the lawyers and the firm. Lawyers typically employ nonlawyer assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such nonlawyer assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer’s professional services. Likewise, lawyers may employ nonlawyers outside the firm to assist in rendering those services. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm). A law firm must ensure that such nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information ~~relating to representation of the client, and --~~ see Rule 1.6(c) (requiring lawyers to take reasonable care to avoid unauthorized disclosure of confidential information). Lawyers also should be responsible for the work done by their nonlawyer assistants ~~work product~~. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. A law firm should make reasonable efforts to ensure that the firm has in effect

~~measures giving~~ ~~establish internal policies and procedures designed to provide~~ reasonable assurance that nonlawyers in the firm ~~and nonlawyers outside the firm who work on firm matters~~ will act in a way compatible with ~~these Rules~~ the professional obligations of the lawyer. A lawyer with ~~direct~~ supervisory authority over a nonlawyer within or outside the firm has a parallel duty to provide appropriate supervision of the supervised nonlawyer.

~~[3]~~ [2A] Paragraph (b) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules if engaged in by a lawyer. For guidance by analogy, see Rule 5.1, Comments [5]-[8].

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include (i) retaining or contracting with an investigative or paraprofessional service, (ii) hiring a document management company to create and maintain a database for complex litigation, (iii) sending client documents to a third party for printing or scanning, and (iv) using an Internet-based service to store client information. When using such services outside the firm, a lawyer or law firm must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer and law firm. The extent of the reasonable efforts required under this Rule will depend upon the circumstances, including: (a) the education, experience and reputation of the nonlawyer; (b) the nature of the services involved; (c) the terms of any arrangements concerning the protection of client information; (d) the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality; (e) the sensitivity of the particular kind of confidential information at issue; and (f) whether the client will be supervising all or part of the nonlawyer's work. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4 (professional independence of the lawyer), and 5.5 (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

Clean final version of Comments [2] and [3] to New York Rule 5.3:

[2] With regard to nonlawyers, who are not themselves subject to these Rules, the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm, including nonlawyers outside the firm working on firm matters, is compatible with the professional obligations of the lawyers and the firm. Lawyers typically employ nonlawyer assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such nonlawyer assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. Likewise, lawyers may employ nonlawyers outside the firm to assist in rendering those services. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm). A law firm must ensure that such nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose confidential information -- see Rule 1.6(c) (requiring lawyers to take reasonable care to avoid unauthorized disclosure of confidential information). Lawyers also

should be responsible for the work done by their nonlawyer assistants. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. A law firm should make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the professional obligations of the lawyer. A lawyer with supervisory authority over a nonlawyer within or outside the firm has a parallel duty to provide appropriate supervision of the supervised nonlawyer.

[2A] Paragraph (b) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of these Rules if engaged in by a lawyer. For guidance by analogy, see Rule 5.1, Comments [5]-[8].

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include (i) retaining or contracting with an investigative or paraprofessional service, (ii) hiring a document management company to create and maintain a database for complex litigation, (iii) sending client documents to a third party for printing or scanning, and (iv) using an Internet-based service to store client information. When using such services outside the firm, a lawyer or law firm must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer and law firm. The extent of the reasonable efforts required under this Rule will depend upon the circumstances, including: (a) the education, experience and reputation of the nonlawyer; (b) the nature of the services involved; (c) the terms of any arrangements concerning the protection of client information; (d) the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality; (e) the sensitivity of the particular kind of confidential information at issue; and (f) whether the client will be supervising all or part of the nonlawyer's work. *See also* Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4 (professional independence of the lawyer), and 5.5 (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

Rule 7.2.

Payment for Referrals

Amendments to Comments [1] and [3] to New York Rule 7.2

Legislative style version:

[1] Except as permitted under paragraphs (a)(1)-(a)(2) of this Rule or under Rule 1.17, lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer. See Rule 8.4(a) (lawyer may not violate or attempt to violate a Rule, knowingly assist another to do so, or do so through the acts of another). A communication contains a recommendation if it endorses or

vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (a), however, does not prohibit a lawyer from paying for advertising and communications permitted by these Rules, including the costs of printing directory listings and newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads~~ Internet-based advertisements, search engine optimization, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as (i) the lead generator does not recommend the lawyer, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (advertising) and 7.3 (solicitation and recommendation of professional employment). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 ~~for the~~ (lawyer's responsibility for conduct of nonlawyers) ~~who prepare marketing materials for them~~.

[3] A lawyer who accepts assignments or referrals from a qualified legal assistance organization must act reasonably to ensure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. The lawyer must ensure that the organization's communications with prospective potential clients are in conformity with these Rules. For example, the organization's advertising must not be false or misleading, as would be the case if the organization's communications falsely suggested ~~of a qualified legal assistance organization would mislead prospective clients to think~~ that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic or real-time interactive electronic contacts that would violate Rule 7.3.

Clean final version of Comments [1] and [3] to New York Rule 7.2:

[1] Except as permitted under paragraphs (a)(1)-(a)(2) of this Rule or under Rule 1.17, lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that would violate Rule 7.3 if engaged in by a lawyer. See Rule 8.4(a) (lawyer may not violate or attempt to violate a Rule, knowingly assist another to do so, or do so through the acts of another). A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (a), however, does not prohibit a lawyer from paying for advertising and communications permitted by these Rules, including the costs of printing directory listings and newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, search engine optimization, and group advertising. A lawyer may also compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, marketing personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as (i) the lead generator does

not recommend the lawyer, (ii) any payment to the lead generator is consistent with Rules 1.5(g) (division of fees) and 5.4 (professional independence of the lawyer), (iii) the lawyer complies with Rule 1.8(f) (prohibiting interference with a lawyer's independent professional judgment by a person who recommends the lawyer's services), and (iv) the lead generator's communications are consistent with Rules 7.1 (Advertising) and 7.3 (solicitation and recommendation of professional employment). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (lawyer's responsibility for conduct of nonlawyers).

[3] A lawyer who accepts assignments or referrals from a qualified legal assistance organization must act reasonably to ensure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. The lawyer must ensure that the organization's communications with potential clients are in conformity with these Rules. For example, the organization's advertising must not be false or misleading, as would be the case if the organization's communications falsely suggested that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic or real-time interactive electronic contacts that would violate Rule 7.3.

Rule 7.3

Solicitation and Recommendation of Professional Employment

Amended Comment [9] to New York Rule 7.3

Legislative style version:

[9] Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure an individual to hire the lawyer without adequate consideration. These same risks are present in telephone contact or in real-time or interactive computer-accessed communication. These same risks are also present in all other real-time or interactive electronic communications, whether by computer, phone, or related electronic means – see Rule 1.0(c) (defining “computer-accessed communication”) – and are regulated in the same manner. The prohibitions on in-person or telephone contact and the prohibitions on contact by real-time or interactive computer-accessed communications do not apply if the recipient is a close friend, relative, former or current client. Communications with these individuals do not pose the same dangers as solicitations to others. However, when the special 30-day (or 15-day) rule applies, it does so even where the recipient is a close friend, relative, or former client. Ordinarily, email communications and web sites are not considered to be real-time or interactive communications. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communications. However, instant messaging (“IM”),

chat rooms, and other similar types of “conversational” computer-accessed communications – whether sent or received via a desktop computer, a portable computer, a cell phone, or any similar electronic or wireless device, and whether sent directly or via social media – are considered to be real-time or interactive communications.

Clean final version of Comment [9] to New York Rule 7.3:

[9] Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure an individual to hire the lawyer without adequate consideration. These same risks are present in telephone contact or in real-time or interactive computer-accessed communication. These same risks are also present in all other real-time or interactive electronic communications, whether by computer, phone, or related electronic means – see Rule 1.0(c) (defining “computer-accessed communication”) – and are regulated in the same manner. The prohibitions on in-person or telephone contact and the prohibitions on contact by real-time or interactive computer-accessed communications do not apply if the recipient is a close friend, relative, former or current client. Communications with these individuals do not pose the same dangers as solicitations to others. However, when the special 30-day (or 15-day) rule applies, it does so even where the recipient is a close friend, relative, or former client. Ordinarily, email communications and web sites are not considered to be real-time or interactive communications. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communications. However, instant messaging (“IM”), chat rooms, and other similar types of “conversational” computer-accessed communications – whether sent or received via a desktop computer, a portable computer, a cell phone, or any similar electronic or wireless device, and whether sent directly or via social media – are considered to be real-time or interactive communications.

**Proposed Amendments to the
Black Letter Text of the
New York Rules of Professional Conduct
Recommended by the NYSBA
to the Appellate Divisions**

The New York State Bar Association is recommending that the Appellate Divisions adopt the following amendments to the black letter text of the New York Rules of Professional Conduct. These proposed amendments cannot take effect unless and until the Appellate Divisions formally approve them. (The Appellate Divisions are also free to reject or modify the proposals.) Each proposed amendment is set forth below, first in legislative style and then in a clean version showing how the final language would appear if adopted as proposed.

Rule 1.0.

Terminology

Legislative style proposal for amending Rule 1.0(x):

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, ~~and~~ e-mail or other electronic communication or any other form of recorded communication or recorded representation. A "signed" writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Clean final version of amended Rule 1.0(x) as proposed:

(x) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, e-mail or other electronic communication or any other form of recorded communication or recorded representation. A "signed" writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Rule 1.6.

Confidentiality of Information

Legislative style proposal for amending Rule 1.6(c):

(c) A lawyer shall ~~exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee~~ make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

Clean final version of amended Rule 1.6(c) as proposed:

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

Note on conditional approval of amendments to Comments [16]-[17] to Rule 1.6: The NYSBA House of Delegates approved amendments to Comments [16] and [17] contingent on the Appellate Divisions' approval of the proposed black letter amendments to Rule 1.6(c). If the Appellate Divisions approve the proposed or substantially similar amendments to the black letter text of Rule 1.6(c), then the following amended versions of Comments [16]-[17] to Rule 1.6 will take effect automatically:

[16] Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer's duties when sharing information with nonlawyers inside or outside the lawyer's own firm, see Rule 5.3, Comment [2].

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality. However, a lawyer may be required to take specific steps to safeguard a client's information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked "Confidential" or "Confidential – Attorneys' Eyes Only"; the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") may require a lawyer to take specific precautions with respect to a client's or adversary's medical records; and court rules may require a lawyer to block out a client's Social Security number or a minor's name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.

Rule 1.18.

Duties to Prospective Clients

Legislative style proposal for amending Rule 1.18(a), (b) and (e):

- (a) ~~A~~ Except as provided in Rule 1.18(e), a person who discusses consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a ~~“prospective client”~~.
- (b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.
- (e) A person ~~who~~ is not a prospective client within the meaning of paragraph (a) if the person:
- (1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or
 - (2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter. ~~is not a prospective client within the meaning of paragraph (a).~~

Clean final version of amended Rule 1.18(a), (b) and (e) as proposed:

- (a) **Except as provided in Rule 1.18(e), a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.**
- (b) **Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.**
- (e) **A person is not a prospective client within the meaning of paragraph (a) if the person:**
- (1) **communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or**
 - (2) **communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter.**

Rule 4.4.

Respect for Rights of Third Persons

Legislative style proposal for amending Rule 4.4(b):

(b) A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that ~~the document~~ it was inadvertently sent shall promptly notify the sender.

Clean final version of amended Rule 4.4(b) as proposed:

(b) A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender.

Rule 7.3.

Solicitation and Recommendation of Professional Employment

Legislative style proposal for amending Rule 7.3(b) and (c):

(b) For purposes of this Rule, "solicitation" means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request, ~~of a prospective client.~~

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions ...

(5) The provisions of this paragraph shall not apply to ...

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at ~~a prospective client~~ persons affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

Clean final version of amended Rule 7.3(b) and (c) as proposed:

(b) For purposes of this Rule, “solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions ...

(5) The provisions of this paragraph shall not apply to ...

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at persons_affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

EXHIBIT B

*May 8, 2015
For Publication*

**REPORT OF THE
NEW YORK STATE BAR ASSOCIATION
COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT (“COSAC”)**

**PROPOSALS TO AMEND BLACK LETTER RULES
IN THE
NEW YORK RULES OF PROFESSIONAL CONDUCT**

**Based on COSAC’s Comprehensive Review of
Changes to the ABA Model Rules of Professional Conduct
Resulting From the Work of the ABA Commission on Ethics 20/20**

**Roy D. Simon, Chair, Committee on Standards of Attorney Conduct
May 8, 2015**

Executive Summary

From 2009 to 2013, the ABA Commission on Ethics 20/20 drafted and recommended proposed amendments to the ABA Model Rules of Professional Conduct to account for increasing globalization and rapid changes in technology. In 2012 and 2013, the ABA House of Delegates adopted many of the Ethics 20/20 Commission's proposed amendments.

From 2013 through early 2015, the New York State Bar Association ("NYSBA") Committee on Standards of Attorney Conduct ("COSAC") systematically reviewed all of the ABA amendments to assess whether New York should adopt similar amendments to the New York Rules of Professional Conduct. In January of 2015, COSAC presented its recommendations to the NYSBA House of Delegates and circulated the recommendations to the Bar for public comment. At its March 2015 Quarterly Meeting, after COSAC revised some recommendations in response to public comments, the House of Delegates adopted COSAC's recommendations.

Amendments to the Comments that were not contingent on proposed changes in the black letter text of the Rules took effect immediately, but proposed amendments to the Rules themselves require approval by the Appellate Divisions. Below is a summary of amendments to the Rules that the NYSBA is recommending to the Appellate Divisions.

Summary of Recommended Amendments

The NYSBA recommends that the Appellate Divisions approve the following amendments to New York Rules of Professional Conduct:

Rule 1.0(x) (in "Terminology"): The NYSBA recommends that the Appellate Divisions clarify the definition of "writing" to make clear that it encompasses evolving and future forms of communications.

Rule 1.6 ("Confidentiality of Information"): The NYSBA recommends that the Appellate Divisions amend Rule 1.6(c) to require lawyers to make "reasonable efforts" to safeguard confidential information against three things: (i) inadvertent disclosure or use, (ii) unauthorized disclosure or use, and (iii) unauthorized access. In addition, the NYSBA recommends that the Appellate Divisions amend Rule 1.6(c) to make clear that Rule 1.6(c) extends to lawyers themselves.

Rule 1.18 ("Duties to Prospective Clients"): The NYSBA recommends that the Appellate Divisions amend Rule 1.18 in three ways: (i) by adding the phrase "Except as provided in Rule 1.18(e)" at the beginning of Rule 1.18(a) (which defines the term "prospective client"); (ii) by replacing the narrow phrase "had discussions with" in Rule 1.18(b) with the broader terms "consult" and "learned information from"; and (iii) by slightly re-ordering the wording of Rule 1.18(e) (which states two exceptions to the definition of "prospective client") to make it easier to understand.

Rule 4.4 (“Respect for Rights of Third Persons”): The NYSBA recommends that the Appellate Divisions amend Rule 4.4(b) to make explicit that it applies to “electronically stored information” as well as any “other writing.”

Rule 7.3 (“Solicitation and Recommendation of Professional Employment”): The NYSBA recommends that the Appellate Divisions amend Rule 7.3(b) (which defines “solicitation”) by deleting the phrase “of a prospective client” at the end of paragraph (b). The NYSBA also recommends that the Appellate Divisions amend Rule 7.3(c)(5)(ii) by replacing the words “prospective client” with the more accurate and less confusing word “persons.”

Proposed Amendments Recommended by the NYSBA to the New York Rules of Professional Conduct

The following proposed amendments are presented first in legislative style, showing changes from the existing New York Rules of Professional Conduct, and then in “clean” versions as they will appear if the Appellate Divisions accept them as proposed.

Rule 1.0. Terminology

Legislative style proposal for amending Rule 1.0(x):

(x) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, ~~and e-mail~~ or other electronic communication or any other form of recorded communication or recorded representation. A “signed” writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Clean final version of amended Rule 1.0(x):

(x) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, e-mail or other electronic communication or any other form of recorded communication or recorded representation. A “signed” writing includes an electric sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

COSAC Reporter’s Explanation of proposed amendments to Rule 1.0(x):

In 2012, the ABA amended its definition of the term “writing” by eliminating the example of “e-mail” and substituting the words “electronic communication.” The ABA amendments seek to encompass different types of electronic communications and to capture evolving

technologies.

COSAC agrees that the definition of “writing” should be expanded to encompass evolving types of electronic communications, but recommends two improvements to the ABA approach.

First, unlike the ABA, COSAC sees no reason to eliminate the word “e-mail,” which COSAC considers to be a helpful example because email is currently a widely used method of electronic communication.

Second, COSAC believes that the phrase “electronic communication” standing alone may prove too restrictive to encompass future technologies, which may use methods that are not electronic.

Accordingly, the proposed COSAC revisions maintain the “e-mail” example, add the phrase “or other electronic communication,” and include a more flexible catch-all phrase – “or any other form of **recorded** communication or **recorded** representation” (emphasis added). This catch-all phrase is designed to encompass whatever technologies may develop. At the same time, the revised definition of “writing” should make clear that telephone calls, though “electronic,” are not within the scope of the definition unless they are “recorded.”

In sum, COSAC recommends that the Appellate Division amend the definition of “writing” in Rule 1.0(x) to accommodate continued advances in technology, which are constantly producing new forms of recorded communication.

Rule 1.6. Confidentiality of Information

Legislative style proposal for amending Rule 1.6(c):

(c) A lawyer shall ~~exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client, except that a lawyer may reveal the information permitted to be disclosed by paragraph (b) through an employee~~ make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

Clean final version of amended Rule 1.6(c):

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

COSAC Reporter's Explanation of proposed amendments to Rule 1.6(c):

In 2012, the ABA amended ABA Model Rule 1.6 by adding a new paragraph (c) requiring a lawyer to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” The ABA version goes beyond New York’s current version of Rule 1.6(c) in three important ways.

First, the ABA version expressly requires lawyers to make reasonable efforts to guard against “inadvertent” disclosure.

Second, the ABA version requires lawyers to make reasonable efforts to guard against unauthorized “access” to information.

Third, by eliminating New York’s reference to “employees, associates, and others whose services are utilized by the lawyer,” the ABA version imposes the duty not only on employees, associates, and others but also on lawyers themselves.

References to “inadvertent” disclosure and unauthorized “access,” and language imposing the duty of care on lawyers themselves, all go beyond the concept of “unauthorized disclosure” in New York’s current version of Rule 1.6(c). COSAC believes that New York

should adopt the ABA language on all points.

COSAC also recommends that New York expand the ABA version of Rule 1.6(c) in two ways. First, New York should make clear that the duty to protect confidential information also applies to information protected by Rule 1.9(c) (which applies to former clients) and to information protected by Rule 1.18(b) (which applies to prospective clients). Second, New York should make clear that “reasonable efforts” are also required to prevent the inadvertent or unauthorized “use of” such information. This change would reflect the fact that both New York’s Rule 1.6 (which is unlike ABA Model Rule 1.6) and New York Rule 1.8(b) (which is like its ABA counterpart) prohibit a lawyer from using confidential information “to the disadvantage of a client or for the advantage of the lawyer or a third person.”

Arguably, the Rules already protect confidential information of former and prospective clients because Rule 1.9(c) refers to Rule 1.6, 1.8(b) prohibits improper “use,” and Rule 1.18(b) refers to Rule 1.9(c). But making the point explicit by building it into Rule 1.6(c) is an efficient and a helpful reminder.

The rationale for the proposed amendments is compelling. When lawyers and law firms stored virtually all of their confidential information and client files on paper, unauthorized access or outright theft of the information was rare, and reasonable efforts to protect confidential information typically involved simple precautions such as not talking in public places, not leaving confidential papers exposed in a county law library, and locking file cabinets and file rooms where confidential files were stored. Today, in contrast, much of a lawyer’s or law firm’s data is stored electronically (including on smart phones, iPads, laptops, and other portable devices that can easily be lost or misplaced), and the threats to security are more complex. Hackers and criminals actively seek to gain unauthorized access to law firm computers and computer networks; lawyers frequently communicate electronically with clients, co-counsel, experts, and others; and relatively few lawyers are experts in technology or computers. All of this poses new and evolving risks to the security of confidential information.

The proposed amendments to New York Rule 1.6(c) address these concerns by imposing on lawyers a duty to “make reasonable efforts” (the ABA phrase) to prevent three types of breaches of confidential information: (i) *inadvertent* disclosure (such as when a lawyer or secretary accidentally sends an e-mail to the wrong person); (ii) *unauthorized* disclosure (such as when a paralegal reveals information to an opposing party without the client’s consent); and (iii) unauthorized *access* (such as when hackers break into a law firm’s computer network).

The reference in existing New York Rule 1.6(c) to “employees, associates, and others whose services are utilized by the lawyer” has been deleted. It has no equivalent in the ABA Model Rule, and deleting that phrase broadens the scope of Rule 1.6(c) by making clear that lawyers themselves – not just “employees, associates, and others whose services are utilized by the lawyer” – must make reasonable efforts to protect confidential information.

Rule 1.18. Duties to Prospective Clients

Legislative style proposal for amending Rule 1.18:

(a) ~~A~~ Except as provided in Rule 1.18(e), a person who discusses consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a “prospective client”.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had~~ discussions with learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

(e) A person ~~who~~ is not a prospective client within the meaning of paragraph (a) if the person:

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter, ~~is not a prospective client within the meaning of paragraph (a).~~

Clean final version of amended Rule 1.18:

(a) **Except as provided in Rule 1.18(e), a person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.**

(b) **Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.**

(e) **A person is not a prospective client within the meaning of paragraph (a) if the person:**

(1) communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship; or

(2) communicates with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation on the same or a substantially related matter.

COSAC Reporter's Explanation of proposed amendments to Rule 1.18(a), (b), and (e):

In 2012, the ABA amended Rule 1.18 in three ways: (i) the ABA replaced the word "discusses" in Rule 1.18(a) with the broader term "consults"; (ii) the ABA replaced the phrase "had discussions with" in Rule 1.18(b) with the broader term "learned information from"; and (iii) the ABA deleted the relatively narrow phrase "learned in the consultation" in Rule 1.18(b) because it would be redundant with the new phrase "learned information from" earlier in paragraph (b).

COSAC agrees that the words "discusses" and "discussions" are too narrow, and may be misleading because they imply face-to-face or live telephone conversations, whereas in reality a prospective client often "consults" with a lawyer by voice mail, e-mail, or other means. Similarly, COSAC agrees that the structural revisions to Rule 1.18(b) (including the use of the proposed phrase "learned information from" and the deletion of the old phrase "learned in the consultation") help to make Rule 1.18(e) easier to read.

COSAC therefore recommends that the Appellate Division amend Rule 1.18(a)-(b) to match amended ABA Model Rule 1.18 verbatim.

COSAC also recommends adding an express reference in New York Rule 1.18(a) to the exceptions articulated in New York Rule 1.18(e), which has no equivalent in ABA Model Rule 1.18. As a companion amendment, COSAC recommends amending New York Rule 1.18(e) to simplify the grammatical structure, without making any substantive changes to paragraph (e).

Rule 4.4. Respect for Rights of Third Persons

Legislative style proposal for amending Rule 4.4(b):

(b) A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that ~~the document~~ it was inadvertently sent shall promptly notify the sender.

Clean final version of amended Rule 4.4(b):

(b) A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or reasonably should know that it was inadvertently sent shall promptly notify the sender.

COSAC Reporter's Explanation of proposed amendments to Rule 4.4(b):

The ABA amended ABA Model Rule 4.4(b) by adding the phrase "or electronically stored information" after both instances of the word "document" in Rule 4.4(b). COSAC generally agrees with the ABA change. However, COSAC has gone beyond the ABA provision by adding "or other writing" as a catch-all to account former future technological change.

Rule 7.3. Solicitation and Recommendation of Professional Employment

Legislative style proposal for amending Rule 7.3(b) and (c):

(b) For purposes of this Rule, “solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request, ~~of a prospective client~~

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions ...

(5) The provisions of this paragraph shall not apply to ...

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at a ~~prospective client~~ persons affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

Clean final version of amended Rule 7.3(b) and (c):

(b) For purposes of this Rule, “solicitation” means any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request.

(c) A solicitation directed to a recipient in this State shall be subject to the following provisions ...

(5) The provisions of this paragraph shall not apply to ...

(ii) a web site maintained by the lawyer or law firm, unless the web site is designed for and directed to or targeted at persons affected by an identifiable actual event or occurrence or by an identifiable prospective defendant; or

COSAC Reporter's Explanation of proposed amendments to Rule 7.3(b) and (c):

In 2012, the ABA amended ABA Model Rule 7.3 by eliminating or replacing the phrase "prospective client" wherever it appears. The phrase "prospective client" is defined in ABA Model Rule 1.18(a) to mean something other than what it means in Rule 7.3, so deleting or replacing the phrase "prospective client" in the context of Rule 7.3 avoided confusion.

In the New York Rules of Professional Conduct, however, the phrase "prospective client" appears only in Rule 7.3(b) and (c), not in Rule 7.3(a). COSAC considered replacing the word "prospective" in New York Rule 7.3(c), with the word "potential," but the phrase "prospective client" in Rule 7.3(b) seems entirely unnecessary. Sending information in response to a specific request from any person, whether a potential client or a prospective client or someone else, is not solicitation. COSAC therefore recommends deleting the last four words – "of a prospective client" – from Rule 7.3(b).

Similarly, in Rule 7.3(c)(5)(ii), COSAC has replaced defined term "a prospective client" with the broader terms "persons." The meaning of Rule 7.3(c)(5)(ii) remains the same, but the confusion arising from the use of the phrase "prospective client" is eliminated.

Dated: May 8, 2015

Respectfully submitted,

Roy D. Simon
Chair, Committee on Standards of Attorney Conduct