NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

HON. JOSEPH A. ZAYAS
CHIEF ADMINISTRATIVE JUDGE

HON. NORMAN ST. GEORGE
FIRST DEPUTY CHIEF ADMINISTRATIVE JUDGE

DAVID NOCENTI
COUNSEL

MEMORANDUM

To: All Interested Persons

From: David Nocenti

Re: Request for Public Comment -- Proposed amendments to Rule 1.10 and Rule 3.4 of the Rules of Professional Conduct

Date: July 2, 2024

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The Administrative Board of the Courts is seeking public comment on a proposal: (1) to amend Rule 1.10 of the Rules of Professional Conduct relating to the imputation of conflicts of interest; and (2) to amend Rule 3.4 of the Rules of Professional Conduct relating to restrictions on attorneys seeking to direct witnesses not to speak with other parties. The specific proposed amendments are attached as Exhibit A.

These amendments are being recommended by the New York State Bar Association (NYSBA), following a comprehensive review conducted by the NYSBA Committee on Standards of Attorney Conduct. Attached as Exhibit B is a letter from NYSBA setting forth the background and reasons for the proposed changes.

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: David Nocenti, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 10th Fl., New York, New York, 10004. Comments must be received no later than Friday, August 16, 2024.

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

PROPOSED AMENDMENT TO RULE 1.10

Rule 1.10: Imputation of conflicts of interest.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein, unless:

(1) the prohibition is based on a lawyer's own financial, business, property or other personal interests within the meaning of Rule 1.7(a)(2), and

(2) under the circumstances, a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely affected.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if ~~the firm or~~ any lawyer remaining in the firm has actual knowledge of, or has accessed, information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless

(1) the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter, or

(2) the newly associated lawyer's current firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

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

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

(iv) give written notice to the former client to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential

information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the former client or is otherwise no longer protected by Rule 1.6;

(3) Notwithstanding paragraph (c)(2), the screening measures set forth in subparagraphs (c)(2)(i)-(iv) of this Rule will not prevent imputation of conflicts within a firm pursuant to paragraph (a) of this Rule where the matter is a litigation, arbitration, or other adjudicative proceeding and the newly associated lawyer, while associated with the prior firm, either (i) substantially participated in the management and direction of the matter, or (ii) had substantial decision-making responsibility in the matter on a continuous day-to-day basis.

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

(d) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

(e) A law firm shall make a written record of its engagements, at or near the time of each new engagement, and shall implement and maintain a system by which proposed engagements are checked against current and previous engagements when:

(1) the firm agrees to represent a new client;
(2) the firm agrees to represent an existing client in a new matter;
(3) the firm hires or associates with another lawyer; or
(4) an additional party is named or appears in a pending matter.

(f) Substantial failure to keep records or to implement or maintain a conflict-checking system that complies with paragraph (e) shall be a violation thereof regardless of whether there is another violation of these Rules.

(g) Where a violation of paragraph (e) by a law firm is a substantial factor in causing a violation of paragraph (a) by a lawyer, the law firm, as well as the individual lawyer, shall be responsible for the violation of paragraph (a).

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

PROPOSED AMENDMENT TO RULE 3.4

Rule 3.4: Fairness to opposing party and counsel.

A lawyer shall not:

(a)

(1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce;

(2) advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein;

(3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false; or

(6) knowingly engage in other illegal conduct or conduct contrary to these Rules;

(b) offer an inducement to a witness that is prohibited by law or pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:

(1) reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses; or
(2) a reasonable fee for the professional services of an expert witness and reasonable related expenses;

(c) disregard or advise the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take appropriate steps in good faith to test the validity of such rule or ruling;

(d) in appearing before a tribunal on behalf of a client:

(1) state or allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence;
(2) assert personal knowledge of facts in issue except when testifying as a witness;
(3) assert a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused but the lawyer may argue, upon analysis of the evidence, for any position or conclusion with respect to the matters stated herein; or

(4) ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person; ~~or~~

(e) present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

EXHIBIT B

NEW YORK STATE BAR ASSOCIATION
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May 13, 2024

David Nocenti, Esq.
Counsel
New York State Office of Court Administration
25 Beaver Street
New York, NY 10004

RE: Proposed Amendments to New York Rules of Professional Conduct

Dear Mr. Nocenti:

The New York State Bar Association ("NYSBA") through its Committee on Standards of Attorney Conduct ("COSAC"), has conducted a comprehensive review of the New York Rules of Professional Conduct (the "Rules"), and the House of Delegates has voted to approve the proposals contained in this memorandum. NYSBA recommends that the following proposals are the most significant to be addressed.

Summary of Proposals

NYSBA recommends the changes to the Rules described below. After the Administrative Board of the Courts has acted, NYSBA plans to align the Comments that explain the amended Rules.

- ***Rule 1.10.*** In Rule 1.10, which governs imputation of conflicts among lawyers in a law firm, we recommend three separate changes:
  - Amend Rule 1.10(a) to remove imputation for most personal conflicts.
  - Amend Rule 1.10(b) to address conflicts that would arise solely from information that resides in databases or files of a law firm after all lawyers who worked on the matter in question have left the firm.
  - Amend Rule 1.10(c) to permit prompt and effective screening to avoid imputation of conflicts arising from lateral hires, except in certain situations.

- ***Rule 3.4.*** Add a new Rule 3.4(f), which would prohibit a lawyer from requesting any person (except a client) not to speak with or provide information to another party, unless (i) the unrepresented person is the client's relative, employee, or other agent and (ii) the advice would nor harm the person's interests.

This memorandum summarizes the considerations that led COSAC to develop each proposed amendment to the black letter text of the Rules. The proposed amendments are set out in legislative style, striking deleted language (~~in red~~) and underscoring added language (in blue), attached as Appendix A. Below are details regarding these recommended changes.

Rule 1.10 Imputation of Conflicts of Interest

COSAC proposes three changes to Rule 1.10:

a. Remove imputation for personal conflicts;

b. Permit screening to avoid imputation of lateral-hire conflicts in limited circumstances; and

c. Avoid imputation of conflicts to a firm that is no longer associated with any lawyers who worked on a conflicting matter but continues to have information regarding the matter in its databases or paper files, provided the firm meets certain conditions.

Proposal # 1: Remove imputation for personal conflicts

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

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

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

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

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

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

Proposal # 2: Clarify that conflicts based on a former client's information solely in databases will not be imputed

We propose that Rule 1.10(b) be amended to clarify that, when all the lawyers who have worked on a matter have left a firm, the firm will not be disqualified from representing a party adverse to the former client based solely on information residing only in the firm's databases, as long as no lawyer presently at the firm has actual knowledge of, or has accessed, the information in the firm's databases. Under the current version of New York Rule 1.10(b), a law firm is prohibited from representing a person adverse to its former client "if the firm or any lawyer remaining in the firm has information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter." We think that standard is too harsh.

Our proposed amendment codifies the result in a recent New Jersey appellate decision, Estate of Francis P. Kennedy v. Rosenblatt, 149 A.3d 5 (N.J. Super. Ct. App. Div. 2016). The court there found that New Jersey's version of this rule was not violated where all the lawyers who had worked on the earlier matter had left the firm, even though the firm continued to maintain materials in its electronic files relating to the former representation, because no lawyer presently at the firm had accessed the electronic files (other than to determine that the files existed). The Superior Court reached that conclusion because New Jersey's version of Rule 1.10(b) refers to the condition that "any lawyer remaining in the firm has information protected by [Rule] 1.6 or [Rule] 1.9(c) that is material to the matter" (emphasis added), but New Jersey's version does not refer to the firm having such information.

The New Jersey interpretation cannot easily be reached under New York's current version of Rule 1.10, but the New Jersey approach makes sense in an age when the vast majority of the client information in law firm files is maintained electronically and those files are not typically deleted as

lawyers who worked on matters leave the firm. COSAC therefore recommends amending Rule 1.10(b) to accord with New Jersey's practical approach to electronic files.

Proposal # 3: Allow screening to remove imputation arising from lateral conflicts

COSAC proposes to amend Rule 1.10(c) to provide that screening, with various strict conditions, will, in certain narrow circumstances, prevent imputation of conflicts from lateral-hire lawyers.[1] Current Comment [4A] to New York Rule 1.10 notes the following rationale for permitting screening to avoid imputation of lateral-hire conflicts:

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

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

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

Federal courts in New York have repeatedly approved of screening to cure lateral-hire conflicts in decisions declining to disqualify counsel. E.g., Hempstead Video, Inc. v. Incorporated Village of Valley Stream, 409 F.3d 127, 132 (2d Cir. 2005) (approving of screening to cure conflict from laterally-hired of-counsel lawyer); Maricultura del Norte, S. de R.L. de C.V. v. Worldbusiness Capital, Inc., 2015 WL 1062167, at *15 (S.D.N.Y. Mar. 9, 2015) (surveying case law in Second Circuit and concluding that "[i]n every other post-Hempstead case I have located within this circuit, the district court, after considering whether an ethical screen was sufficient, has found the presumption rebutted and denied a motion to disqualify"). COSAC proposes to codify these federal

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[1] New York would be joining many states whose Rules of Professional Conduct provide that screening, with various conditions, will prevent imputation of conflicts from lateral-hire lawyers. Some states permit screening to overcome conflicts in the case of all lateral hires. These states are: Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Maryland, Michigan, Montana, North Carolina, Oregon, Pennsylvania, Rhode Island, Utah, Washington and Wyoming.

Other states have adopted rules providing for screening for lateral-hire lawyers who had limited participation in the prior matter, with the limited participation expressed in various standards, such as "did not have primary responsibility" or had "no substantial responsibility." These states are: Arizona, California, Colorado, Indiana, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio,Tennessee, and Wisconsin. (These states are discussed in more detail below.)

Still other states have approved of screening for lateral hires via state court decisions. (These states are discussed in the text below.)

court decisions in New York's Rule 1.10(a), which would then be applicable in state courts and in disciplinary proceedings and would provide clear guidance for the day-to-day practice of law firms in New York State.

Under the current New York Rules, screening is permitted to avoid imputation of conflicts of former government lawyers (Rule 1.11(b)), former judges, arbitrators and law clerks (Rule 1.12(d)), and lawyers who have received significantly harmful information from prospective clients (Rule 1.18(d)(2)).

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

The proposal in this report incorporates changes as a result of discussions in the NYSBA House of Delegates. In November 2018, when COSAC first presented its conflicts proposals for informational purposes, COSAC's proposal for Rule 1.10(c) provided that screening would be available to avoid imputation of conflicts of lateral-hire lawyers in all cases. That proposal triggered concerns that the proposed screening provision was not sufficiently protective when a client's lawyer, in the midst of a hotly litigated matter, moved to the opposing firm.

Ultimately, the House adopted a proposal to model the rule on New Jersey's approach to Rule 1.10(c). Under the New Jersey version of Rule 1.10(c), screening is not available to avoid imputation of conflicts from lateral-hire lawyers who, while at a former law firm, either participated in the management and direction of a litigated matter or had continuous day-to-day decision-making responsibility for the litigated matter.

Specifically, New Jersey Rule 1.10(c)(1) provides that screening of lateral-hire lawyers is available to avoid imputation only where "the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility." (Emphasis added.) New Jersey Rule 1.0(h), in turn, defines "primary responsibility" as follows:

> "Primary responsibility" denotes actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.

The House voted in favor of the amended alternative proposal to adopt New Jersey's approach. COSAC then revised proposed Rule 1.10(c)(3) to incorporate the key elements of New Jersey Rule 1.10(c).

In revising proposed Rule 1.10(c)(3), COSAC omitted New Jersey's distinction between "policymaking" and "operational" levels because those terms are not entirely appropriate for litigation matters and because the concepts are sufficiently addressed by the distinction between "management and direction of the matter," on the one hand, and "day-to-day decision-making responsibility," on the other hand. COSAC also inserted the term "substantial" to denote the kind of involvement indicated by the term "primary" responsibility in the New Jersey formulation.

Under COSAC's revised formulation, lateral-hire screening would be unavailable to avoid imputation of conflicts not only from the lead counsel in a litigated matter, but from all lawyers who either (i) substantially participated in the management and direction of the matter, or (ii) had substantial decision-making responsibility in the matter on a continuous day-to-day basis.

Rule 3.4 Fairness to Opposing Party and Counsel

COSAC proposes to add a new paragraph (f) to Rule 3.4.

COSAC proposes to make clear that a lawyer ordinarily may not request a person other than a client to refrain from voluntarily talking with or giving relevant information to another party unless (1) the person is a client's relative, employee, or other agent and, in addition, (2) the lawyer reasonably believes that such a person's interests will not be adversely affected by refraining from giving such information.

COSAC's proposal is based verbatim on the black letter text of ABA Model Rule 3.4(f). The Restatement (Third) of the Law Governing Lawyers adopts a nearly identical position, but explicitly adds in a Comment that lawyers may inform third parties that they have the right not to be interviewed by another party if they so choose. COSAC recommends that New York add the Restatement language to Comment [4] to Rule 3.4.

The prohibition (with limited exceptions) on lawyers asking persons not to provide information to opposing counsel derives from the general view that witnesses do not "belong" to any particular party and that "fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like." ABA Model Rule 3.4, Comment [1].

The New York Rules do not contain the proposed language. A constellation of other rules might be interpreted to prohibit the conduct at issue, but according to N.Y. City 2009-5 (2009), they do not. Opinion 2009-5 noted that in 2008 the New York State Bar Association recommended that the Courts adopt Rule 3.4(f), and that the COSAC Reporter's Notes explained the need for Rule 3.4(f) as follows:

> ... Rule 3.4(f) has no equivalent in the existing Disciplinary Rules but deserves a place in the mandatory rules because it provides clear guidance on a question lawyer for entities face on a daily basis. The Rule strikes an appropriate balance between the justice system's search for the truth through the presentation of evidence and an organization's right to control the disclosure of trade secrets or other proprietary information to the organization's adversaries.

However, Rule 3.4(f) was not included in the final version of the Rules that took effect on April 1, 2009. According to Opinion 2009-5, "there is no rulemaking history shedding any light on the

omission ... but we view the omission as a factor reinforcing our conclusion that it would be inappropriate to imply a restriction nowhere found on the face of the Rule, as approved." Thus, at least according to the City Bar ethics committee, the Rules do not currently prohibit lawyers from asking witnesses to refrain from voluntarily providing information to opposing counsel.

The vast majority of states closely follow the ABA Model Rule 3.4(f). In fact, anecdotal evidence suggests that even in New York many attorneys believe that the prohibition in proposed Rule 3.4(f) already exists, perhaps because the prohibition exists in many other jurisdictions and because many attorneys intuitively believe that the behavior is wrong.

COSAC has also been told by some criminal defense attorneys that the lack of the prohibition in proposed Rule 3.4(f) leads to asymmetric access to witnesses. This lack magnifies the already asymmetric nature of criminal discovery in New York, where prosecutors have many tools to gather evidence that defense lawyers do not have. We are also told that some defense lawyers refrain from telling a third-party witness not to speak to law enforcement or a prosecutor out of a concern that making such a request might lead to a charge of obstruction of justice. Yet on the prosecution side there does not appear to be any (realistic) danger that a prosecutor risks discipline or sanctions for requesting a witness not to speak to defense counsel – even though a "request" coming from a prosecutor or law enforcement official might sound more like an order than a mere request.

COSAC also recommends that the State Bar add the language from the Restatement explicitly stating: "A lawyer may inform any person of the right not to be interviewed by any other party." That language appears in Comment e to § 116 of the Restatement. COSAC believes this language should be placed in the Comment rather than in the black letter text of Rule 3.4. The ABA Model Rule 3.4(f) contains no analogous language in its Comment, but COSAC believes the Restatement language is valuable.

We look forward to discussing any questions you may have about the above proposed amendments.

Respectfully,

President, New York State Bar Association

Appendix A (attached)

Appendix A

Redlined proposals to amend Rule 1.10(a)-(c)

COSAC proposes to revise New York Rule 1.10(a), (b), and (c) to read as follows:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein, unless:

(1) the prohibition is based on a lawyer's own financial, business, property or other personal interests within the meaning of Rule 1.7(a)(2), and

(2) under the circumstances, a reasonable lawyer would conclude that there is no significant risk that the representation will be materially limited or that the independent professional judgment of the participating lawyers in the firm will be adversely affected.

(b) When a lawyer has terminated an association with a firm, the firm is prohibited from thereafter representing a person with interests that the firm knows or reasonably should know are materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm if ~~the firm or~~ any lawyer remaining in the firm has actual knowledge of, or has accessed, information protected by Rule 1.6 or Rule 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, the firm may not knowingly represent a client in a matter that is the same as or substantially related to a matter in which the newly associated lawyer, or a firm with which that lawyer was associated, formerly represented a client whose interests are materially adverse to the prospective or current client unless

(1) the newly associated lawyer did not acquire any information protected by Rule 1.6 or Rule 1.9(c) that is material to the current matter~~;~~, or

(2) the newly associated lawyer's current firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

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

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

(iv) give written notice to the former client to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would

disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the former client or is otherwise no longer protected by Rule 1.6;

(3) Notwithstanding paragraph (c)(2), the screening measures set forth in subparagraphs (c)(2)(i)-(iv) of this Rule will not prevent imputation of conflicts within a firm pursuant to paragraph (a) of this Rule where the matter is a litigation, arbitration, or other adjudicative proceeding and the newly associated lawyer, while associated with the prior firm, either (i) substantially participated in the management and direction of the matter, or (ii) had substantial decision-making responsibility in the matter on a continuous day-to-day basis.

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

Redlined proposal to add Rule 3.4(f)

Thus, COSAC proposes to add a new paragraph (f) to Rule 3.4 as follows:

A lawyer shall not ...

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

In order to explain the new provision, COSAC also proposes to amend Comment [4] to Rule 3.4 to as follows:

[4] In general, a lawyer is prohibited from giving legal advice to an unrepresented person, other than the advice to secure counsel, when the interests of that person are or may have a reasonable possibility of being in conflict with the interests of the lawyer's client. See Rule 4.3. However, subject to Rule 4.3, a lawyer may inform any person of the right not to be interviewed by any other party.