



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #10

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

Attached are two reports from COSAC proposing amendments to the comments to the New York Rules of Professional Conduct. The first report proposed amendments to the comments to Rules 1.6 and 4.2, summarized as follows:

- **Rule 1.6:** Amend Comments [16] and [17] to improve clarity, and to add a new Comment [17A] to provide additional guidance to lawyers regarding cybersecurity practices.
- **Rule 4.2:** Add a new Comment [4A] to (i) explain the circumstances under which a lawyer may access the public online information of a represented person, (ii) define certain terms, and (iii) make clear that communications with jurors and prospective jurors are governed by Rule 3.5 (addressing communications with jurors and prospective jurors), not by Rule 4.2 (which governs communications with represented persons).

It should be noted that when COSAC originally published this report for comment, it included proposals relating to Rules 3.4(e) and 8.3. In response to comments received, it is not presenting those proposals at this meeting.

The second report recommends amendments to the comments to Rule 7.1 and 7.5 relating to advertising and trade names. These proposals take into account the amendments adopted by the House at the April meeting and that were published for public comment by the Administrative Board of the Courts. The report notes that these amendments are similar to ones approved by the House in November 2019.

The report will be presented at the June 13 meeting by past COSAC chair Joseph E. Neuhaus.

MEMORANDUM

June 4, 2020

COSAC's *Revised* Proposals to Amend Comments to Rules 7.1 and 7.5 of the New York Rules of Professional Conduct

On May 1, 2020, COSAC circulated a report recommending amendments to the Comments to Rules 7.1 and 7.5, which primarily concern advertising and trade names. This memorandum reviews the public comments sent to COSAC regarding those proposals, and offers the proposals for consideration by the House of Delegates.

By way of background, on November 2, 2019 the House of Delegates approved COSAC's proposals to amend Rules 7.1 through 7.5, together with accompanying Comments. However, before proposed Rules 7.1 through 7.5 were forwarded to the Administrative Board of the Courts, a federal lawsuit was filed in S.D.N.Y. against multiple New York disciplinary counsel claiming that New York's blanket ban on firms in private practice practicing under a trade name is unconstitutional. COSAC was requested to draft a version of Rule 7.5 that would permit trade names under some conditions, and COSAC did so.

On April 4, 2020, the House of Delegates approved COSAC's proposed amendments to Rule 7.5 (with one amendment from the floor restoring the prohibition against including the name of a nonlawyer in the name of a law firm in private practice).

On April 14, 2020, the Administrative Board of the Courts approved COSAC's amended proposal with one change (expanding "misleading" to "false, deceptive, and misleading"). On Friday, April 17, 2020, the Administrative Board circulated its version of Rule 7.5 for public comment, with a June 1 deadline for submitting comments.

If the Administrative Board ultimately adopts the version of Rule 7.5 that it has circulated for public comment, then the Comments to Rules 7.1 and 7.5 must be revised to match. This memorandum offers COSAC's proposed Comments to Rules 7.1 and 7.5 that are consistent with the version of Rule 7.5 that the Administrative Board circulated for public comment.

The amended proposals are similar to the versions the House of Delegates approved back in November 2019. The main differences are that (a) COSAC has moved certain Comments about law firm names from Rule 7.1 to Rule 7.5, where they fit more logically, and (b) COSAC has revised and reorganized the Comments to Rule 7.5.

Below is the version of Rule 7.5 that the Courts have circulated for public comment, followed by a clean version of the revised Comments COSAC is proposing to Rules 7.1 and 7.5, followed by a redline version of the same Comments. (The redline compares the COSAC proposals that the House of Delegates approved in November 2019 with the revised Comments COSAC is recommending now.)

Clean version of *Proposed* Rule 7.1 and Comment [5] Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT

[5] A law firm's name, trade name, domain name, web site, social media pages, office sign, business cards, letterhead, and professional designations are communications concerning a lawyer's services and must not be false, deceptive, or misleading. They must also comply with Rule 7.5, which treats those forms of communication in detail.

Clean Version of *Proposed* Rule 7.5 Professional Notices, Letterheads, and Names as *approved* by NYSBA House of Delegates on April 4, 2020 and *amended and circulated for public comment* by the Administrative Board of the Courts on April 17, 2020

(a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, provided the same do not violate these Rules or any statute or court rule.

(b)(1) A lawyer or law firm in private practice shall not practice under:

- (i) a false, deceptive, or misleading trade name;
- (ii) a false, deceptive, or misleading domain name; or
- (iii) a name that is misleading as to the identity of the lawyer or lawyers practicing under such name.

(2) *Specific Guidance Regarding Law Firm Names.*

- (i) Such terms as "legal aid," "legal service office," "legal assistance office," "defender office," and the like may be used only by bona fide legal assistance organizations.
- (ii) A law firm name, trade name, or domain name may not include the terms "non-profit" or "not-for-profit" unless the law firm qualifies for those designations under applicable law.
- (iii) A lawyer or law firm in private practice may not include the name of a nonlawyer in its firm name.
- (iv) The name of a professional corporation shall contain "PC" or such symbols permitted by law.

(v) The name of a limited liability company or limited liability partnership shall contain “LLC,” “LLP” or such symbols permitted by law.

(vi) A lawyer or law firm may utilize a telephone number that contains a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules.

(3) A lawyer or law firm that has a contractual relationship with a nonlegal professional or nonlegal professional service firm pursuant to Rule 5.8 to provide legal and other professional services on a systematic and continuing basis may not include in its firm name the name of the nonlegal professional service firm or any individual nonlegal professional affiliated therewith.

(4) A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer’s name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer’s name in the firm name or in professional notices of the firm.

(c) Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners.

(d) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

Clean version of *proposed* Comments to Rule 7.5

Professional Affiliations and Designations

[1] A lawyer’s or law firm’s name, trade name, domain name, web site, social media pages, office sign, business cards, letterhead, and professional designations are communications concerning a lawyer’s services and must not be false, deceptive, or misleading. They must comply with this Rule and with Rule 7.1.

[2] A lawyer or law firm may not use any name that is false, deceptive, or misleading. It is not false, deceptive, or misleading for a firm to be designated by the names of all or some of its current members or by the names of retired or deceased members where there has been a continuing line of succession in the firm’s identity. A lawyer or law firm may practice under a trade name or domain name if it is not false, deceptive, or misleading. A lawyer or law firm also may practice under a distinctive website address, social media username, or comparable professional designation, provided that the name is not false, deceptive, or misleading.

[3] By way of example, the name of a law firm in private practice is deceptive or misleading if it implies a connection with (i) a government agency, (ii) a deceased or retired lawyer who was not a former member of the firm in a continuing line of succession, (iii) a lawyer not associated with the firm or a predecessor firm, (iv) a nonlawyer, or (v) a public or charitable legal services organization.

A lawyer or law firm may not use a name, trade name, domain name, or other designation that includes words such as “Legal Services,” “Legal Assistance,” or “Legal Aid” unless the lawyer or law firm is a bona fide legal assistance organization.

[4] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

[5] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a “firm” as defined in Rule 1.0(h), because to do so would be false and misleading. In particular, it is misleading for lawyers to hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners. It is also misleading for lawyers to hold themselves out as being counsel, associates, or other affiliates of a law firm if that is not a fact, or to hold themselves out as partners, counsel, or associates if they only share offices. Likewise, law firms may not claim to be affiliated with other law firms if that is not a fact.

Professional Web Sites, Cards, Office Signs, and Letterhead

[6] A lawyer or law firm may use internet web sites, social media pages, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided they do not violate any statute or court rule and are in accordance with Rule 7.1. Thus, a lawyer may use the following:

(i) a professional card identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the lawyer’s law firm, the names of the law firm’s members, counsel, and associates, and any information permitted under Rule 7.2(c);

(ii) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm, counsel, and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state or describe the nature of the legal practice to the extent permitted under Rule 7.2(c);

(iii) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice to the extent permitted under Rule 7.2(c);

(iv) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.2(c). A letterhead of a law firm may also give the names of members, associates, and counsel, names and dates relating to deceased and retired members, and the names and dates of predecessor firms in a continuing line of succession; and

(v) internet web sites or social media pages or sites that comply with these Rules.

Professional Status

[7] To avoid misleading clients, courts, and the public, lawyers should be scrupulous in representing their professional status. For example:

(i) A lawyer or law firm may be designated “Counsel,” “Special Counsel,” “Of Counsel,” and the like on a letterhead or professional card if there is a continuing relationship with another lawyer or law firm other than as a partner or associate;

(ii) A lawyer or law firm may be designated as “General Counsel” or by similar professional reference on stationery of a client if the lawyer or law firm devotes a substantial amount of professional time to representing that client;

(iii) To alert clients, the public, and those who deal with a lawyer or law firm about possible limitations on liability, the name of a professional corporation shall contain “PC” or such symbols permitted by law, and the name of a limited liability company or limited liability partnership shall contain “LLC,” “PLLC,” “LLP” or such symbols permitted by law;

(iv) A law firm name, trade name, or domain name may not include the terms “non-profit” or “not-for-profit” unless the law firm qualifies for those designations under applicable law, such as the New York Not-for-Profit Corporation Law (“NPCL”).

[8] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but all enumerations of the lawyers listed on the firm’s letterhead and in other permissible listings should make clear the jurisdictional limitations on those members, counsel, and associates of the firm not licensed to practice in all listed jurisdictions.

Trade Names and Domain Names

[9] Some lawyers and law firms may prefer to practice under trade names and/or domain names to make it easier for clients to remember or locate them. A lawyer may practice under a trade name or domain name that is not false, deceptive, or misleading. Provided a lawyer or law firm uses a name otherwise complying with these Rules, it is proper to practice under the lawyer’s or law firm’s own name, initials, trade name, domain name, abbreviations, areas of practice, variations of the foregoing, or a combination of those features, among other things.

[10] For example, with respect to trade names, a law firm whose practice includes real estate matters may use and practice under a name such as AbleBaker Real Estate Lawyers, A&B Real Estate Lawyers, or Dirt Lawyers. Likewise, a law firm may use and practice under a trade name such as Albany Personal Injury Lawyers if the firm practices in Albany and its practice includes personal injury law. With respect to domain names, if the law firm of Able & Baker practices real estate law, the firm may use and practice under a descriptive domain name such as www.realestatelaw.com or www.ablerealestatelaw.com, or under a colloquial domain name such as www.dirtlawyers.com, as long as the name is not false, deceptive, or misleading.

[11] Neither trade names nor domain names may be false, deceptive, or misleading. A law firm may not use a trade name such as “Win Your Case,” or a domain name such as www.winyourcase.com because those names imply that the law firm can obtain favorable results regardless of the particular facts and circumstances. In all events, neither a trade name nor a domain name may be false, deceptive, or misleading or violate Rule 7.1 or any other Rule.

Telephone Numbers

[12] A lawyer or law firm may use telephone numbers that spell words or contain a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules. As with domain names, lawyers and law firms may always properly use telephone numbers consisting of (i)

their own names or initials, or (ii) combinations of names, initials, numbers, and words. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL. By way of further example, a personal injury law firm may use the numbers 1-800-ACCIDENT, 1-800-HURT-BAD, or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.)

Public comments on Comments to Rule 7.5 and COSAC's response

New York City Bar

Two different committees from the New York City Bar comments on COSAC's proposals to amend the Comments to Rules 7.5.

The City Bar Committee on Professional Ethics said it “supports COSAC's proposed amendments” to the Comments to Rules 7.1 and 7.5.

The Professional Responsibility Committee said it “supports the COSAC report regarding comments to Rules 7.1 and 7.5 of the NY Rules of Professional Conduct.”

COSAC's response to the City Bar

COSAC is gratified that two City Bar committees support COSAC's proposals.

Bar Association of Erie County

The Bar Association of Erie County (“BAEC”) submitted the following comment:

... [T]he Ethics committee ... has reviewed the Proposals to Rules 7.1 and 7.5 and again has no objections to the same. We do note for the record that allowing trade names will be a substantial change and we expect it will lead to disputes regarding trade names which are misleading. However, those disputes can be resolved by the Ethics committee.

COSAC's response to BAEC

COSAC agrees that allowing trade names will be a substantial change in New York, but whether to allow trade names is the prerogative of the New York Courts, which have sole power to adopt the black letter Rules of Professional Conduct. COSAC's proposed Comments to Rule 7.5 are intended to provide guidance to lawyers in the event the Courts approve the pending proposal to amend Rule 7.5 to permit trade names.

Robert Kantowitz

Robert Kantowitz, a New York attorney and a member of this Association, made two comments:

In Rule 7.5(b)(2)(i), and in the spirit of the *booking.com* Supreme Court case, the terms “legal service office,” “legal assistance office” and “defender office” are generic enough that

there should be no prohibition on their use. Only "legal aid" has a definitive *pro bono* meaning.

Comment 11 is overwrought. No rational person would assume that "win" in a trade name guarantees victory.

COSAC's response to Mr. Kantowitz

COSAC recognizes that reasonable minds can differ with respect to the use of particular words or phrases in trade names, and COSAC understands Mr. Kantowitz's views, but COSAC disagrees with both of his points. In COSAC's view, the terms "legal service office," "legal assistance office" and "defender office" have all come to signify not-for-profit or pro bono legal services, and lawyers in private practice should not be permitted to expropriate those phrases for private gain.

Likewise, the word "win" as part of a law firm name might well raise unjustified expectations for some people. Mr. Kantowitz is very likely right that most people would not think that including "win" in a trade name "guarantees victory," but some people might put undue weight on the word "win," especially those inexperienced with the legal system who see the name in mass advertising, so COSAC thinks it is prudent to exclude that word (and words like it) from the vocabulary of trade names.

Redline version of *proposed* Comments to Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT

[5] ~~Firm names, A law firm's name, trade name, domain name, web site, social media pages, office sign, business cards, letterhead, and professional designations are communications concerning a lawyer's services and must not be false, deceptive, or misleading. They must also comply with Rule 7.5, which treats those forms of communication in detail. [Note from COSAC: Comments [1] through [4] of COSAC's previous proposals will not be affected by permission to practice under trade names or domain names. The first sentence of Comment [5] has been revised. The rest of Comment [5] to Rule 7.1 and all of Comments [6] through [8B] to Rule 7.1 are shown here as deleted, but the substance has been moved, with some changes, to the Comments to Rule 7.5.] A law firm may not use a name that is misleading. A firm may be designated by the names of all or some of its current members or by the names of deceased members where there has been a succession in the firm's identity. A lawyer or law firm also may be designated by a distinctive website address, social media username, domain name, or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with (i) a government agency, (ii) a deceased lawyer who was not a former member of the firm, (iii) a lawyer not associated with the firm or a predecessor firm, (iv) a nonlawyer, or (v) a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as~~

~~“Springfield Legal Clinic,” an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication— cf. Rule 7.5(b)(2).~~

~~{6} A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but all enumerations of the lawyers listed on the firm’s letterhead and in other permissible listings should make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions—see Rule 7.5(b).~~

~~{7} Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(h), because to do so would be false and misleading. In particular, it is misleading for lawyers to hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners—see Rule 7.5(c).~~

~~{8} It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm—see Rule 7.5(b).~~

~~{8A} A lawyer may utilize a domain name for an internet web site that does not include the name of the lawyer or the lawyer’s firm if (1) all pages of the web site include the actual name of the lawyer or firm; (2) the lawyer or law firm does not attempt to engage in the practice of law using the domain name; (3) the domain name does not imply an ability to obtain results in a matter; and (4) the domain name does not otherwise violate these Rules—see Rule 7.5(e).~~

~~{8B} Likewise, a lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules—see Rule 7.5(f).~~

Redline version of *proposed* Comments to Rule 7.5 **Professional Notices, Letterheads, and Names**

Professional Affiliations and Designations

{1} A lawyer’s or law firm’s name, trade name, domain name, web site, social media pages, office sign, business cards, letterhead, and professional designations are communications concerning a lawyer’s services and must not be false, deceptive, or misleading. They must comply with this Rule and with Rule 7.1.

{2} A lawyer or law firm may not use any name that is false, deceptive, or misleading. It is not false, deceptive, or misleading for a firm to be designated by the names of all or some of its current members or by the names of retired or deceased members where there has been a continuing line of succession in the firm’s identity. A lawyer or law firm may practice under a trade name or domain name if it is not false, deceptive, or misleading. A lawyer or law firm also may practice under a distinctive website address, social media username, or comparable professional designation, provided that the name is not false, deceptive, or misleading.

[3] By way of example, the name of a law firm in private practice is deceptive or misleading if it implies a connection with (i) a government agency, (ii) a deceased or retired lawyer who was not a former member of the firm in a continuing line of succession, (iii) a lawyer not associated with the firm or a predecessor firm, (iv) a nonlawyer, or (v) a public or charitable legal services organization. A lawyer or law firm may not use a name, trade name, domain name, or other designation that includes words such as “Legal Services,” “Legal Assistance,” or “Legal Aid” unless the lawyer or law firm is a bona fide legal assistance organization.

[4] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm’s behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

[5] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a “firm” as defined in Rule 1.0(h), because to do so would be false and misleading. In particular, it is misleading for lawyers to hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners. It is also misleading for lawyers to hold themselves out as being counsel, associates, or other affiliates of a law firm if that is not a fact, or to hold themselves out as partners, counsel, or associates if they only share offices. Likewise, law firms may not claim to be affiliated with other law firms if that is not a fact.

Professional Web Sites, Cards, Office Signs, and Letterhead

[6] A lawyer or law firm may use internet web sites, social media pages, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided they do not violate any statute or court rule and are in accordance with Rule 7.1. Thus, a lawyer may use the following:

(i) a professional card identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the lawyer’s law firm, the names of the law firm’s members, counsel, and associates, and any information permitted under Rule 7.2(c);

(ii) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm, counsel, and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state or describe the nature of the legal practice to the extent-permitted under Rule 7.2(c);

(iii) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice to the extent permitted under Rule 7.2(c);

(iv) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.2(c). A letterhead of a law firm may also give the names of members, associates, and counsel, names and dates relating to deceased and retired members, and the names and dates of predecessor firms in a continuing line of succession; and

(v) internet web sites or social media pages or sites that comply with these Rules.

Professional Status

[7] To avoid misleading clients, courts, and the public, lawyers should be scrupulous in representing their professional status. For example:

(i) A lawyer or law firm may be designated “Counsel,” “Special Counsel,” “Of Counsel,” and the like on a letterhead or professional card if there is a continuing relationship with another lawyer or law firm other than as a partner or associate;

(ii) A lawyer or law firm may be designated as “General Counsel” or by similar professional reference on stationery of a client if the lawyer or law firm devotes a substantial amount of professional time to representing that client;

(iii) To alert clients, the public, and those who deal with a lawyer or law firm about possible limitations on liability, the name of a professional corporation shall contain “PC” or such symbols permitted by law, and the name of a limited liability company or limited liability partnership shall contain “LLC,” “PLLC,” “LLP” or such symbols permitted by law;

(iv) A law firm name, trade name, or domain name may not include the terms “non-profit” or “not-for-profit” unless the law firm qualifies for those designations under applicable law, such as the New York Not-for-Profit Corporation Law (“NPCL”).

[8] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but all enumerations of the lawyers listed on the firm’s letterhead and in other permissible listings should make clear the jurisdictional limitations on those members, counsel, and associates of the firm not licensed to practice in all listed jurisdictions.

Trade Names and Domain Names

[9] Some lawyers and law firms may prefer to practice under trade names and/or domain names to make it easier for clients to remember or locate them. A lawyer may practice under a trade name or domain name that is not false, deceptive, or misleading. Provided a lawyer or law firm uses a name otherwise complying with these Rules, it is proper to practice under the lawyer’s or law firm’s own name, initials, trade name, domain name, abbreviations, areas of practice, variations of the foregoing, or a combination of those features, among other things.

[10] For example, with respect to trade names, a law firm whose practice includes real estate matters may use and practice under a name such as AbleBaker Real Estate Lawyers, A&B Real Estate Lawyers, or Dirt Lawyers. Likewise, a law firm may use and practice under a trade name such as Albany Personal Injury Lawyers if the firm practices in Albany and its practice includes personal injury law. With respect to domain names, if the law firm of Able & Baker practices real estate law, the firm may use and practice under a descriptive domain name such as www.realestatelaw.com or www.ablerealestatelaw.com, or under a colloquial domain name such as www.dirtlawyers.com, as long as the name is not false, deceptive, or misleading.

[11] Neither trade names nor domain names may be false, deceptive, or misleading. A law firm may not use a trade name such as “Win Your Case,” or a domain name such as www.winyourcase.com because those names imply that the law firm can obtain favorable results regardless of the particular

facts and circumstances. In all events, neither a trade name nor a domain name may be false, deceptive, or misleading or violate Rule 7.1 or any other Rule.

Telephone Numbers

[12] A lawyer or law firm may use telephone numbers that spell words or contain a trade name, domain name, nickname, moniker, or motto that does not otherwise violate these Rules. As with domain names, lawyers and law firms may always properly use telephone numbers consisting of their own names or initials, or combinations of names, initials, numbers, and legal words. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4-RED-LAW, or RB-LEGAL. By way of further example, a personal injury law firm may use the numbers 1-800-ACCIDENT, 1-800-HURT-BAD, or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.)

[Note from COSAC: Comments [1]-[4] below were approved by the House of Delegates on November 2, 2019 - but COSAC was subsequently asked to draft a version of Rule 7.5 that would permit law firms to practice under trade names in some circumstances. COSAC submitted a revised draft of Rule 7.5 and on April 4, 2020 the House of Delegates approved it, with one floor amendment. COSAC has since redrafted the Comments to Rule 7.5 to be consistent with Rule 7.5 as circulated by the Courts for public comment on April 17, 2020. The revised Comments to Rule 7.5 use much of the language of Comments previously approved by the House, but COSAC has substantially revised and reorganized those Comment.]

Professional Status

~~[1] In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being a partners or associates if they only share offices.~~

~~[1A] A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following: (i) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4. A professional card of a law firm may also give the names of members and associates; (ii) a professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm or any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. It may state biographical data, the names of members of the firm and associates, and the names and dates of predecessor firms in a continuing line of succession. It may state the nature of the legal practice if permitted under Rule 7.4; (iii) a sign in or near the office and in the building directory identifying the law office and any nonlegal business conducted by the lawyer or law firm pursuant to Rule 5.7. The sign may state the nature of the legal practice if permitted under Rule 7.4; or (iv) a letterhead identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, associates and any information permitted under Rule 7.1(b) or Rule 7.4. A letter head of a law firm may also~~

~~give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer or law firm may be designated “Of Counsel” on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as “General Counsel” or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.~~

Trade Names and Domain Names

~~[2] A lawyer may not practice under a trade name. Many law firms have created Internet web sites to provide information about their firms. A web site is reached through an Internet address, commonly called a “domain name.” As long as a law firm’s name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name. For example, the law firm of Able and Baker may use the domain name www.ableandbaker.com, or www.ab.com, or www.able.com, or www.ablelaw.com. However, to make domain names easier for clients and potential clients to remember and to locate, some law firms may prefer to use terms other than the law firm’s name. If Able and Baker practices real estate law, for instance, it may prefer a descriptive domain name such as www.realestatelaw.com or www.ablerealestatelaw.com or a colloquial domain name such as www.dirtlawyers.com. Accordingly, a law firm may utilize a domain name for an Internet web site that does not include the name of the law firm, provided the domain name meets four conditions: First, all pages of the web site created by the law firm must clearly and conspicuously include the actual name of the law firm. Second, the law firm must in no way attempt to engage in the practice of law using the domain name. This restriction is parallel to the general prohibition against the use of trade names. For example, if Able and Baker uses the domain name www.realestatelaw.com, the firm may not advertise that people buying or selling homes should “contact www.realestatelaw.com” unless the firm also clearly and conspicuously includes the name of the law firm in the advertisement. Third, the domain name must not imply an ability to obtain results in a matter. For example, a personal injury firm could not use the domain name www.win-your-case.com or www.settle-for-more.com because such names imply that the law firm can obtain favorable results in every matter regardless of the particular facts and circumstances. Fourth, the domain name must not otherwise violate a Rule. If a domain name meets the three criteria listed here but violates another Rule, then the domain name is improper under this Rule as well. For example, if Able and Baker are each solo practitioners who are not partners, they may not jointly establish a web site with the domain name www.ableandbaker.com because the lawyers would be holding themselves out as having a partnership when they are in fact not partners.~~

Telephone Numbers

~~[3] Many lawyers and law firms use telephone numbers that spell words, because such telephone numbers are generally easier to remember than strings of numbers. As with domain names, lawyers and law firms may always properly use their own names, initials, or combinations of names, initials, numbers, and legal words as telephone numbers. For example, the law firm of Red & Blue may properly use phone numbers such as RED-BLUE, 4 RED-LAW, or RB-LEGAL.~~

~~[4] Some lawyers and firms may instead (or in addition) wish to use telephone numbers that contain a domain name, nickname, moniker, or motto. A lawyer or law firm may use such telephone numbers as long as they do not violate any Rules, including those governing domain names. For example, a personal injury law firm may use the numbers 1-800-ACCIDENT, 1-800-HURT-BAD,~~

~~or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.) See Rule 7.1, Comment [12].~~

MEMORANDUM

June 5, 2020

COSAC Proposals to Amend Comments to Rules 1.6 and 4.2 of the New York Rules of Professional Conduct

On April 14, 2020, COSAC circulated a memorandum to seek public comment on proposals to amend the black letter text of Comments to Rules 1.6, 3.4, 4.2, and 8.3. COSAC had not previously circulated the proposals regarding Rules 1.6 for public comment, but COSAC had twice previously circulated proposed amendments to the Comments to 4.2 for public comment, in separate reports dated August 13, 2019 and October 31, 2019.

COSAC received formal or informal comments on these proposals from more than a dozen groups and one individual. Here is a list of those who submitted comments:

- United States Department of Justice and United States Attorneys in New York
- NYSBA Committee on Professional Ethics
- NYSBA Committee on Technology and the Legal Profession
- NYSBA Committee on Attorney Professionalism
- NYSBA Trusts and Estates Law Section
- NYSBA Criminal Justice Section
- NYSBA Dispute Resolution Section
- NYSBA State and Local Government Law Section
- NYSBA Real Property Law Section
- Bar Association of Erie County
- New York County Lawyers' Association
- New York City Bar Committee on Professional Ethics
- New York City Bar Committee on Professional Discipline
- New York City Bar Committee on Professional Responsibility
- Robert Kantowitz

COSAC thanks all of these groups for the time and thought they invested in assisting COSAC. COSAC carefully considered every comment and suggestion. COSAC accepted many of the suggestions, and all of the public comments directed COSAC's attention to areas of potential concern. The public comments helped COSAC to improve its earlier proposals or sharpen COSAC's explanation of those proposals. The public comments have persuaded COSAC not to go forward with the proposed amendments to Rules 3.4(e) and the Comments to Rule 8.3 at this time. This memorandum contains COSAC's proposals to amend the Comments to only two Rules:

- Rule 1.6 Confidentiality of Information
- Rule 4.2: Communication with Person Represented by Counsel

Proposed changes to Comments can be made by the House of Delegates of the New York State Bar Association without judicial approval. The amendments to the Comments proposed in this memorandum interpret existing black letter Rules and are not related to or contingent upon any judicial changes to the black letter Rules.

This memorandum summarizes the proposed amendments, explains the issues and reasoning that led COSAC to propose each amendment, sets forth the public comments regarding COSAC's current and prior proposals, and provides COSAC's response to the public comments. We set out each proposed amendment in redline style, striking out deleted language (~~in red~~) and underscoring added language (in blue).

Summary of Proposals

- **Rule 1.6:** Amend Comments [16] and [17] to improve clarity, and to add a new Comment [17A] to provide additional guidance to lawyers regarding cybersecurity practices.
- **Rule 4.2:** Add a new Comment [4A] to (i) explain the circumstances under which a lawyer may access the public online information of a represented person, (ii) define certain terms, and (iii) make clear that communications with jurors and prospective jurors are governed by Rule 3.5 (addressing communications with jurors and prospective jurors), not by Rule 4.2 (which governs communications with represented persons).

The remainder of this report explains COSAC's recommendations.

Rule 1.6: **Confidentiality of Information**

COSAC is not proposing any amendments to the black letter text of Rule 1.6 at this time, but COSAC is proposing various amendments to the Comments to Rule 1.6 that interpret Rule 1.6(c). The proposed amendments include (i) making stylistic changes to Comment [16] to improve clarity and flow, (ii) creating a new Comment [16A] by splitting off language from Comment [16], (iii) adding a new Comment [17A] to provide better guidance on cybersecurity, and (iv) creating a new Comment [17B] by splitting off language from Comment [17].

In redline style, the new and amended Comments would provide as follows:

Duty to Preserve Confidentiality

[16] Paragraph (c) is intended to protect confidential information. It imposes three related obligations: (i) preventing “inadvertent disclosure”; (ii) preventing “unauthorized disclosure”; and (iii) preventing “unauthorized access.” Specifically, paragraph (c) of this Rule ~~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). Paragraph (c) also requires a lawyer to

[make reasonable efforts to safeguard confidential information against unauthorized access by third parties.](#) See also 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.

[16A] 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.

[17A] [The prevalence of hacking, phishing, spoofing, Internet scams, and other unauthorized digital intrusions into electronic or digital means of communication and data storage used by lawyers underscores the need for lawyers and law firms to use reasonable and proportionate technology to safeguard information protected by Rules 1.6, 1.9, or 1.18. To protect such information, lawyers and law firms should use reasonable administrative, technical and physical safeguards that are proportionate to \(a\) the size, nature, and complexity of the practice, and \(b\) the sensitivity of the confidential information the practice maintains.](#)

[17B] ~~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 1.6(c), which was amended effective January 1, 2017, provides as follows:

(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).

The purpose of the 2017 amendments to Rule 1.6(c) was to increase the security of confidential information in the digital age. The amendments to the black letter text of Rule 1.6(c) were accompanied by significant amendments to Comment [17] to Rule 1.6. But even in a little over three years since the 2017 amendments took effect, cybersecurity threats have steadily grown more frequent, more ingenious, more widespread, and more damaging.

The New York State Legislature responded to increasing cybersecurity dangers by enacting a law named the “Stop Hacks and Improve Electronic Data Security” Act (the “SHIELD Act”). The SHIELD Act was signed into law by Governor Cuomo in July 2019 and took effect on March 21, 2020. It amends New York’s data breach notification law, expands the definitions of “breach” and “personal information,” and updates notification requirements when a breach occurs. The legislative justification for the SHIELD Act was that it “creates reasonable data security requirements tailored to the size of a business.” For the full text of the bill as signed, see <https://legislation.nysenate.gov/pdf/bills/2019/S5575B>.

The NYSBA Committee on Technology and the Legal Profession and its Cybersecurity Subcommittee reacted to the passage of the SHIELD Act by urging COSAC to amend Comment [17] to Rule 1.6 and add a new Comment [17A] to help lawyers develop and carry out “reasonable efforts” to comply with Rule 1.6(c). COSAC is grateful to the Committee on Technology and the Legal Profession for drafting proposed Comments, and COSAC has used those proposals as a basis for the amendments to the Comments that COSAC now proposes.

Public comments on Comments to Rule 1.6 and COSAC’s response

United States Department of Justice and United States Attorney Offices in New York

The United States Department of Justice and the United States Attorney Offices in New York submitted the following comment on proposed new and amended Comments to Rule 1.6:

The Department has conducted a number of investigations into cyberattacks on confidential law firm information. We share COSAC’s concerns in this area and believe that the proposed amendments will serve a useful function in reminding the bar of the need to maintain reasonably adequate cyber defenses. To emphasize that cyber defenses must be continuously re-evaluated, we might suggest the following addition to the last sentence of proposed Comment [17A]: “To protect such information, lawyers and law firms should use reasonable **and appropriately up-to-date** administrative, technical and physical safeguards that are proportionate to (a) the size, nature, and complexity of the practice, and (b) the sensitivity of the confidential information the practice maintains.”

COSAC’s response to DOJ

COSAC agrees that lawyers and law firms should use administrative, technical, and physical safeguards that are “appropriately up-to-date,” but COSAC believes that safeguards are “reasonable” only if they are kept up to date. COSAC thus believes that the phrase “lawyers and law firms should use *reasonable* administrative, technical and physical safeguards” provides sufficient guidance without adding any specific reference to keeping these safeguards current.

NYSBA Committee on Technology and the Legal Profession

The NYSBA Committee on Technology and the Legal Profession, which originally suggested that COSAC amend the Comments to Rule 1.6 to provide more guidance to lawyers regarding cybersecurity, wrote to express “support” for COSAC’s proposals, and explained its support as follows:

We commend COSAC for taking the lead in incorporating the concept of lawyers’ cybersecurity hygiene into the Rules. “[H]acking, phishing, spoofing, Internet scams, and other unauthorized digital intrusions into electronic or digital means of communication and data storage used by lawyers” is virtually an everyday occurrence and it is important that the Rules of affirmatively acknowledge these problems, which will only increase over time. Lawyers are even more susceptible to these intrusions while working remotely during the current pandemic. It is such important for the Rules to clarify that lawyers need to ethically address these risks by “us[ing] reasonable and proportionate technology to safeguard information protected” by the Rules. To that end, COSAC’s proposed addition to Comment [16] to Rule 1.6 which now would explicitly state that Rule 1.6(c) requires “a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties,” is critical.

COSAC appropriately seeks to include terminology from New York’s recently enacted “Stop Hacks and Improve Electronic Data Security” Act (“SHIELD Act”). The SHIELD Act calls for persons and businesses, which includes lawyers and law firms, to protect the security, confidentiality and integrity of certain sensitive data through the use of “reasonable administrative, technical and physical safeguards.” while the SHIELD Act utilizes the term “appropriate” to describe how such safeguards should be implemented depending on the “(a) size, nature, and complexity of the practice, and (b) the sensitivity of the confidential information the practice maintains,” COSAC instead uses the term “proportionate” to describe how such factors should be weighed by a lawyer. This subtle change provides the Bar with additional guidance to evaluate such factors.

The Committee endorses COSAC’s proposed changes and additions to the Comments to Rule 1.6. Indeed, it is for the above reasons that the Committee is now proposing that New York be the first bar in the nation to include in its attorney continuing legal education requirement a credit on the topic of cyber security.

COSAC’s response to the Committee on Technology and the Legal Profession

The Committee on Technology and the Legal Profession has great expertise in cybersecurity and related technology, so COSAC is pleased that the Committee supports and endorses COSAC’s proposed changes in the Comments to Rule 1.6.

NYSBA Trusts and Estates Law Section

The NYSBA Trusts and Estates Law Section’s Practice and Ethics Committee submitted the following comments on the proposed amendments to the Comments to Rule 1.6:

We are overall in agreement with the proposed (i) changes to Comment [16] and (ii) new Comment [17A]. For new Comment [17A], we would suggest adding something similar to the following language from the comments to the ABA Model Rules of Professional Conduct to make clear that other rules or laws (separate from the New York Rules of Professional Conduct) may have more elaborate requirements on data privacy.

“Whether a lawyer may be required to take additional steps to safeguard a client’s information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.”

COSAC’s response to Trusts and Estates Law Section

COSAC is aware that other rules or laws (separate from the New York Rules of Professional Conduct) may have more elaborate requirements on data privacy. Existing Comment [17] (which COSAC proposes to renumber as Comment [Rule 1.7(b)]) contains the following language:

[17B] ... [A] lawyer may also 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. [Emphasis added by COSAC.]

Thus, the Rules of Professional Conduct already address the important issue flagged by the Trusts and Estates Law Section.

NYSBA Local and State Government Law Section

The Ethics Committee of the NYSBA Local and State Government Law Section submitted a detailed memorandum supporting COSAC’s proposed new Comment [17A] to Rule 1.6, with one modification. The memorandum says, in pertinent part:

Rule 1.6 protects the confidential information of a client; Rule 1.9 protects the confidential information of a former client; and Rule 1.18 protects the confidential information of a prospective client.

Local and state government lawyers are bound by an additional duty of confidentiality owed to persons who are neither clients, former clients, nor prospective clients. Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees) provides, in pertinent part, that:

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about *a person*, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(Emphasis added).

Rule 1.11(c) is a rule of disqualification. It does not explicitly prohibit disclosure of confidential government information, but Comment 4A to the Rule states, in pertinent part, that

[T]he purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the private client of a law firm with which the former public officer or official is associated from obtaining an unfair advantage by using the lawyer’s confidential information about the private client’s adversary.

Because the purpose and effect of Rule 1.11(c) is to protect confidential information from a source other than those contemplated by Rules 1.6, 1.9 and 1.18, it is recommended that the proposed Comment 17A to Rule 1.6 be modified to include a reference to Rule 1.11, as follows:

[17A] The prevalence of hacking, phishing, spoofing, Internet scams, and other unauthorized digital intrusions into electronic or digital means of communications and data storage used by lawyers underscores the need for lawyers and law firms to use reasonable and proportionate technology to safeguard information protected by Rules 1.6, 1.9, 1.11 or 1.18. To protect such information, lawyers and law firms should use reasonable administrative, technical and physical safeguards that are proportionate to (a) the size, nature, and complexity of the practice, and (b) the sensitivity of the confidential information the practice maintains. [Underscoring is in place of red font in original.]

Representatives of the Local and State Government Law Section will be prepared to move for such an amendment during the House of Delegates meeting. However, This will be unnecessary if this amendment is accepted by COSAC.

COSAC's response to the Local and State Government Law Section

COSAC agrees with the importance of safeguarding confidential government information as defined in Rule 1.11(c), but COSAC believes that confidential *government* information is not in the same category as the information of a current, former, or prospective *client* that is protected by Rules 1.6, 1.9, and 1.18. The information protected by Rule 1.11(c) is not in the physical or digital files of the law firm at which a former government lawyer is working. It is only in that lawyer's head, and therefore does not present a cybersecurity issue (which is the primary subject of proposed Comment [17A]).

Moreover, because the black letter text of Rule 1.11(c) provides that a firm with which the former government lawyer is associated “may undertake or continue representation in the matter *only if the disqualified lawyer is timely and effectively screened from any participation in the matter* in accordance with the provisions of paragraph (b),” Rule 1.11(b) and (c) themselves already obligate a law firm to “implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm.” In addition, the first sentence of Comment [4A] to Rule 1.11 says: “By requiring a former government lawyer to comply with Rule 1.9(c), Rule 1.11(a)(1) protects information obtained while working for the government to the same extent as information learned while representing a private client.”

In sum, COSAC agrees that a former government lawyer must personally protect any confidential government information in that lawyer's possession, but the screening provisions of Rule 1.11(b)(1)(ii) and (c) already keep that information out of the hands of the law firm, so confidential government information does not fit in the same category as information protected by Rules 1.6, 1.9, and 1.18.

Bar Association of Erie County

The Bar Association of Erie County (“BAEC”) notified COSAC that the BAEC Ethics committee “previously reviewed the COSAC revised proposal and had no objections to the amendments to Rules 1.6, 3.4, 4.2, 8.3.”

COSAC's response to BAEC

COSAC is pleased that the BAEC Ethics Committee has no objections to the proposed Comments to Rule 1.6.

New York City Bar

The New York City Bar Committee on Professional Ethics “generally supports” COSAC's proposed amendments to the Comments to Rule 1.6 and did not suggest any changes.

Another committee within the City Bar said: “The technical protections need to be kept up to date.”

COSAC's response to City Bar

COSAC agrees that the administrative, technical, and physical safeguards should be kept appropriately up to date, but COSAC believes that these safeguards are not “reasonable” if they are not kept up to date. COSAC thus believes that the phrase “lawyers and law firms should use reasonable administrative, technical and physical safeguards” is sufficient without any specific reference to keeping these safeguards current.

Rule 4.2

Communication with

Person Represented by Counsel

Proposed new Comment [4A] to Rule 4.2

COSAC is not proposing any amendments to the black letter text of Rule 4.2, but COSAC is proposing to add a new Comment [4A] to Rule 4.2 to provide better guidance to lawyers regarding limitations on accessing a social media account of a person known to be represented by counsel. The new Comment would provide as follows:

[4A] Rule 4.2 does not prohibit a lawyer from accessing (including reading, watching, listening, or otherwise receiving) the public online information of a represented person, even where accessing that information generates a notice to the represented person that the information has been or may be accessed. The term “public online information” refers to information available to anyone accessing a social media network or other online presence without the need for express permission from the person whose information is being accessed. Communications with jurors or prospective jurors are governed by Rule 3.5, not by this Rule.

COSAC Discussion of Proposed New Comment [4A] to Rule 4.2

COSAC's current proposal is a shorter and simpler version of the proposal COSAC circulated for public comment on April 14, 2020. That proposal said:

[4A] Rule 4.2 does not prohibit a lawyer from accessing or following the public online information of a represented person, even where accessing or following that information generates a notice to that person that the information has been accessed or followed. See Rule 4.3, Comment [2A]. The term “following” refers to accounts that a particular user has subscribed to in order to view and/or receive updates about the contents of those accounts. The term “public online information” refers to information available to anyone viewing a social media network without the need for express permission from the person whose account is being viewed. Public online information includes content available to all members of a social media network and content that is accessible to non-members. However, communications with jurors or prospective jurors are governed by Rule 3.5, not by this Rule, and the definition of “communication” under this Rule may not apply to the definition of

“communication” under Rule 3.5.

COSAC revised the April 14 version of proposed new Comment [4A] in light of public comments (discussed below).

The current proposal makes clear that mere notice that a lawyer is accessing the social media account or other internet presence (such as a website) of a represented person is not, without more, a “communication” about the subject of the representation within the meaning of Rule 4.2.

The proposed final sentence to Comment [4A] is intended to avoid the implication that guidelines for accessing a social media account or other online presence of a represented person under Rule 4.2 also apply to efforts to access the same online information with respect to a juror or prospective juror. Whether accessing social media accounts and online information constitutes an improper “communication” with a juror or prospective juror is to be determined by Rule 3.5, not by Rule 4.2. Differing treatment under Rule 4.2 and 3.5 may make sense because the policies underlying restrictions on communications with jurors and prospective jurors under Rule 3.5 are different from the policies underlying restrictions on communications with represented persons under Rule 4.2. As a consequence of these differences, Rule 3.5 may prohibit lawyers from (for example) reviewing public social media content of jurors or prospective jurors if the social media platform automatically notifies (“pings”) a juror or prospective juror, even though Rule 4.2 would permit lawyers to review the public social media content of a person represented by counsel under those circumstances. *See, e.g.,* N.Y. City Ethics Op. 2012-2 (2012) (“Attorneys may use social media websites for juror research as long as

no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication.”); New York County Lawyers’ Ass’n Ethics Op. 743 (2011) (concluding that “sending a ‘friend request,’ attempting to connect via LinkedIn.com, signing up for an RSS feed for a juror’s blog or ‘following’ a juror’s Twitter account” are prohibited by Rule 3.5). COSAC is not taking any position on the proper interpretation of Rule 3.5 at this time. It is simply alerting lawyers that Rule 3.5, not Rule 4.2, applies to communications with jurors or prospective jurors.

COSAC’s original August 13, 2019 proposal regarding Rule 4.2 was limited to adding a single sentence (with a citation) to existing Comment [4]. Some of the public comments below thus respond to the following proposal, which has now been superseded by the proposal in this memorandum:

[4] This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. A lawyer is also not prohibited from accessing the publicly available online information of a represented person or “following” that person’s publicly available Internet or social media account. See Rule 4.3, Comment [2A]. Nor does this Rule preclude communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so.

The public comments on COSAC’s original proposal led COSAC to alter its proposal and to circulate a revised version on April 14, 2020. The public comments on the revised proposal, taken together with some of the public comments on the 2019 proposal, caused COSAC to revise its proposal substantially again. Below we set forth public comments received on the current proposal and, where relevant, on the earlier proposal.

Public comments regarding Rule 4.2 and COSAC’s response

United States Department of Justice and United States Attorney Offices in New York

The United States Department of Justice and the United States Attorney Offices in New York submitted the following comment on currently⁹ proposed Comment [4A]:

COSAC has already taken into consideration previous comments by the Department on this proposal and we support COSAC’s proposed amendment.

COSAC’s response to DOJ/United States Attorney Offices

COSAC found the suggestions of the DOJ/United States Attorney Offices on COSAC’s August 2019 proposals very helpful and is glad to have their support.

NYSBA Commercial and Federal Litigation Section (“CFLS”)

The Commercial and Federal Litigation Section (“CFLS”) submitted extensive and perceptive comments on COSAC’s April 14, 2020 proposal to add a new Comment [4A] to Rule 4.2. CFLS “supports the proposed amendment of Rule 4.2, with certain edits to the proposed text,” as follows:

We support the portion of the proposed amendment, which clarifies that Rule 4.2 does not prohibit a lawyer from accessing the public information of a represented person, even where accessing that information generates an automated notice to that person that the information has been accessed. We would suggest though that the current proposed language for Comment [4A] is unduly complex, confusing and may be misleading. We suggest COSAC revert to its original proposed language or revise the language of the comment as suggested in these comments.

The original proposed language was:

[4A] A lawyer is also not prohibited from accessing the publicly available online information of a represented person or “following” that person’s publicly available Internet or social media account. See Rule 4.3, Comment [2A].

The revised text reads as follows:

[4A] Rule 4.2 does not prohibit a lawyer from accessing or following the public online information of a represented person, even where accessing or following that information generates a notice to that person that the information has been accessed

or followed. See Rule 4.3, Comment [2A]. The term “following” refers to accounts that a particular user has subscribed to in order to view and/or receive updates about the contents of those accounts. The term “public online information” refers to information available to anyone viewing a social media network without the need for express permission from the person whose account is being viewed. Public online information includes content available to all members of a social media network and content that is accessible to non-members. However, communications with jurors or prospective jurors are governed by Rule 3.5, not by this Rule, and the definition of “communication” under this Rule may not apply to the definition of “communication” under Rule 3.5.

To fully understand the scope of the first sentence in the revised text a reader must (1) read and cross-reference the 2 , 3 and 4 sentences, and then (2) apply all of those definitions to the multitude of social media and online data sources. Respectfully, the burden of the additional language adds confusion, not clarity.

It should be noted that some prior comments from others regarding COSAC’s initial proposal cited this Section’s *Social Media Ethics Guidelines* (hereinafter the “Guidelines”) as support for extensive revisions to COSAC’s original language. There were some oversights in those comments that may have materially affected the revised text.

1. The comments draw definitions for “following” and “public”
2. The “*Social Terminologies*” section is part of the Guideline’s “APPENDIX – Social Media Definitions.” The appendix states it “...is designed for attorneys seeking a basic understanding of the social media landscape.” The Appendix does not suggest the included terms should be used to limit or increase the boundaries of ethical obligations.
3. The “Social Terminologies” section includes three uses of the word “follow”, to wit:
 - Follow: Process of subscribing to another user in order to receive access to their content. This is a unilateral connection as it does not provide access to one’s own content.
 - Follower: Refers to a user who subscribes to another user’s account and thereby receives access to the latter’s content.
 - Following: Refers to those accounts that a particular user has subscribed to in order to view and/or receive updates about the content of those accounts.

Both in the definitions above and in common usage, “following” is generally a unilateral decision. A social media user chooses to follow a second user. The second user need not take any action for the first user to be subscribed to content created by the second user. This is also the common understanding of following someone – it is a unilateral decision by the first user. In contrast, “friending” (terminology popularized by Facebook) or “connecting” (LinkedIn’s terminology) requires the second user to approve the first user’s request for access to the second user’s content.

This distinction is important. While the automated notice generated by a social media platform after a lawyer’s unilateral decision to follow a represented party may not be “contact” under Rule 4.2, sending a friend request to a represented party, who then must approve the request to grant access, would ordinarily be impermissible. *See* NY Ethics Op. 843, fn. 1. The Section fears that this distinction is lost in the complex revised language.

A related problem is attempting to define social media activities without the context of the particular social platform. For example, Facebook users can send a friend request, follow or like a page, join a group, or check in or suggest edits. Are all or some of these activities encompassed by the reference to “follow?”

We recommend that in order to avoid confusion, COSAC should revert back to their original revised text above or simplify the current version by removing the multiple definitions and focusing on the intent of this new comment as proposed below:

[4A] ~~Rule 4.2 does not prohibit a~~ A lawyer is also not prohibited from accessing ~~or following~~ the public online information of a represented person, or unilaterally “following” that person’s public social media account even ~~where~~ if accessing or following ~~that information~~ the account generates ~~a~~ an ~~automated~~ notice to that person ~~from the social media platform~~ that ~~the information~~ their account has been accessed or followed. ~~See Rule 4.3, Comment [2A]. The term “following” refers to accounts that a particular user has subscribed to in order to view and/or receive updates about the contents of those accounts. The term “public online information” refers to information available to anyone viewing a social media network without the need for express permission from the person whose account is being viewed. Public online information includes content available to all members of a social media network and content that is accessible to non-members. However,~~ This rule only addresses communications with persons represented by counsel and not communications with jurors or prospective jurors ~~are, which are governed by Rule 3.5, not by this Rule, and the definition of “communication” under this Rule may not apply to the definition of “communication” under Rule 3.5.~~

COSAC’s response to CFLS

COSAC has enormous respect for the views of CFLS, which originally published the Social Media Guidelines more than five years ago and has kept the Guidelines up to date with several subsequent editions. COSAC agrees that its April 14, 2020 proposal should be shorter and should contain fewer definitions. COSAC has decided to avoid confusion by not using the word “follow” in any form in Comment [4A]. COSAC has also simplified its proposal by eliminating some of the definitions and by shortening the final sentence regarding Rule 3.5.

NYSBA Committee on Professional Ethics

The NYSBA Committee on Professional Ethics submitted the following comment on COSAC's original August 2019 proposal, and it remained relevant to the April 2020 revised proposal:

COSAC has not yet revisited Rule 3.5, so we assume that nothing in its proposal is considered applicable to communications with jurors or venire members (though surely a Comment so clarifying would be useful).

We have no quarrel with COSAC's treatment of lawyer access to the public portions of a person's social media site as long as the lawyer (or the lawyer's agent) does not engage in deceptive practices.

We are concerned about COSAC's proposal to allow a lawyer to "follow" on social media a person known to be represented by counsel. The protocols of social media are changing so rapidly that a use of the phrase "follow" may be an anachronism in the blink of an eye. One site's "follower" could be another site's "friend" with a change in a site's policies. We agree that a mere notice that a lawyer is "following" a person on social media may not be a "communication" about the subject matter of the representation, but gaining access to the private portions of a represented person's site is, in our view, inconsistent with the purpose of Rule 4.2.

COSAC's response to the NYSBA Ethics Committee

In response to the ethics committee's concerns, COSAC added a new sentence at the end of new Comment [4A] to Rule 4.2 to make clear that the interpretation of Rule 4.2 in new Comment [4A] does not necessarily apply to similar conduct with respect to jurors and prospective jurors, because that conduct is governed by Rule 3.5, not by Rule 4.2.

COSAC also now agrees with the ethics committee (and others) that the term "follow" may become an anachronism, so COSAC has eliminated that term and its definition from Comment [4A].

NYSBA Real Property Law Section

The NYSBA Real Property Law Section found the August 2019 proposed addition of new Comment to be acceptable and did not object to COSAC's revised April 2020 proposal.

COSAC's response to the Real Property Law Section

COSAC is glad that the Real Property Law Section found COSAC's original proposal acceptable and trusts it will also find COSAC's current proposal acceptable.

NYSBA Trusts and Estates Law Section, Practice and Ethics Committee

The NYSBA Trusts and Estates Law Section's Practice and Ethics Committee said: "We are overall

in agreement with the proposed new Comment [4A].”

COSAC’s response to the Trusts and Estates Law Section

COSAC is grateful for the Trusts and Estates Law Section’s overall agreement with proposed new Comment [4A] to Rule 4.2.

New York County Lawyers’ Association

The New York County Lawyers’ Association Committee on Professional Ethics submitted the following comments on proposed Comment [4A]:

1. The NYCLA Committee on Professional Ethics considered this proposal in email correspondence between April and May 2020. Our Committee agrees with the proposal, but expresses a concern similar to that expressed by the NYSBA Committee on Professional Ethics, namely that the term “follow” on one social media platform is the same as a “friend” request on a different platform, which can have very different implications in terms of whether or not the lawyer who seeks access is communicating with social media subscriber. We note, in particular, the issue we addressed in NYCLA’s Formal Opinion 750, in which we considered whether a lawyer could add an adverse party or witness as a “friend” on Snapchat, which would permit the lawyer to access the adverse party or witness’s Snapchat posts and stories accessible only to the Snapchat user’s “friends.” We explained that upon making the “friend” request, the first subscriber will send a notification to the second subscriber and can immediately view the second subscriber’s public stories if the second subscriber has set his or her profile to make stories visible by “Everyone.” If the second subscriber only permits “friends” to view the subscriber’s posts, the first subscriber can only see the posts if the second subscriber responds to the first subscriber’s “friend” notification by adding the first subscriber as a “friend.” If the second subscriber adds the lawyer as a friend, the lawyer will have gained access to restricted postings without having revealed the purpose for seeking to be added as a friend – finding out useful information to impeach the adverse party or witness available in that person’s Snapchat posts. We concluded that the inability for the lawyer to disclose this purpose made the attempt at access impermissible.
2. We are comfortable with the proposed addition of Comment [4A] because it excludes from the definition of “public online information” information that requires express permission from the person whose account is being viewed.” We also advise caution in considering modifications to the rules or comments that expressly focus on social media. As we observed in NYCLA Formal Op. 750, “[d]etermining what is or is not permissible when lawyers wish to mine social media of an adverse party or witness has become more complicated with the increasing number of social media platforms and changes in the way that each platform is accessed by users.” It will be important to be aware of the variety of platforms and means of access when making pronouncements about whether different forms of notifications

constitute impermissible communications under the Rules of Professional Conduct.

3. We have enclosed with this comment a copy of NYCLA Opinion 750.

COSAC's response to the NYCLA Ethics Committee

COSAC agrees with the views of the NYCLA Committee on Professional Ethics and has revised its proposal accordingly. COSAC appreciates the expertise that the NYCLA Committee on Professional Ethics has developed in the technology area.

New York City Bar

The New York City Bar Committee on Professional Ethics “generally supports” COSAC’s proposed amendments to Rule 4.2, but one member urged that proposed new comment [4A] to Rule 4.2 should “be clarified to explain what it means by ‘follow’ in the social media sphere.” Specifically, the member said:

I think what it means is that you can “follow” a represented party, even if doing so generates a notice to that represented party, but you cannot send a Linked In invite or ask to be added to a group of “friends” who receive information that is restricted to that group (I don’t use Facebook so my terminology probably isn’t quite right). If my understanding above is correct, I think the comment needs to be clear that the prohibited types of contacts are indeed prohibited (i.e., sending the LinkedIn invite or “friend” request). I anticipate that COSAC may be of the view that the definition of “public online information” provides the necessary clarity, but I was still confused, and I suspect that others may be as well.

A member of a different New York City Bar committee (either Professional Responsibility or Professional Discipline) submitted the following comment:

The last sentence of the comment is not that compelling logically and could be potentially confusing: "However, communications with jurors or prospective jurors are governed by Rule 3.5, not by this Rule, and the definition of “communication” under this Rule may not apply to the definition of “communication” under Rule 3.5." One could reach the result that COSAC reaches – i.e., that it is acceptable for a social media notification to be generated when an attorney views information about a represented party (because the contact may not necessarily be about the subject of the representation/matter) but that the same is not permissible for jurors – without generating confusion about the definition of a communication. As I understood it, the distinction is that the contact with the juror is impermissible in all circumstances, whereas contact with the represented party is not impermissible unless it touches on the subject of the representation. You can either accept or reject the rationale that viewing a represented party’s profile (and generating the notification) is or is not related to the representation subject matter depending on the circumstances. But, it should not be because following or friend requesting is not a “communication” under R. 4.2 -- the definition of “communication” should not be tortured under the rules to achieve that result.

COSAC's response to the New York City Bar

COSAC largely accepts the City Bar's views. COSAC has reduced possible confusion by eliminating the term "following" from proposal Comment [4A], and COSAC has shortened and simplified the cross-reference to Rule 3.5 in the closing sentence of the proposed Comment.

NEW YORKS STATE BAR ASSOCIATION
LOCAL AND STATE GOVERNMENT LAW SECTION

TO: Executive Committee
FROM: Ethics Committee
RE: COSAC Proposals to Amend Rules 1.6, 3.4, 4.2 and 8.3
DATE: May 11, 2020

The Ethics Committee has reviewed the Memorandum dated April 14, 2020 setting forth COSAC's proposals to amend Rules 1.6, 3.4, 4.2 and 8.3 of the New York Rules of Professional Conduct, and to amend the Comments to those rules. It is respectfully recommended that the Local and State Government Law Section support the proposed amendments with one modification.

COSAC proposes to add Comment 17A (Duty to Preserve Confidentiality) to the Comments to Rule 1.6 (Confidentiality of Information):

[17A] The prevalence of hacking, phishing, spoofing, Internet scams, and other unauthorized digital intrusions into electronic or digital means of communications and data storage used by lawyers underscores the need for lawyers and law firms to use reasonable and proportionate technology to safeguard information protected by Rules 1.6, 1.9, or 1.18. To protect such information, lawyers and law firms should use reasonable administrative, technical and physical safeguards that are proportionate to (a) the size, nature, and complexity of the practice, and (b) the sensitivity of the confidential information the practice maintains.

Rule 1.6 protects the confidential information of a client; Rule 1.9 protects the confidential information of a former client; and Rule 1.18 protects the confidential information of a prospective client.

Local and state government lawyers are bound by an additional duty of confidentiality owed to persons who are neither clients, former clients, nor prospective clients. Rule 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees) provides, in pertinent part, that:

(c) Except as law may otherwise expressly provide, a lawyer having information that the lawyer knows is confidential government information about *a person*, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental

authority and that, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely and effectively screened from any participation in the matter in accordance with the provisions of paragraph (b).

(Emphasis added).

Rule 1.11(c) is a rule of disqualification. It does not explicitly prohibit disclosure of confidential government information, but Comment 4A to the Rule states, in pertinent part, that

[T]he purpose and effect of the prohibitions contained in Rule 1.11(c) are to prevent the private client of a law firm with which the former public officer or official is associated from obtaining an unfair advantage by using the lawyer's confidential information about the private client's adversary.

Because the purpose and effect of Rule 1.11(c) is to protect confidential information from a source other than those contemplated by Rules 1.6, 1.9 and 1.18, it is recommended that the proposed Comment 17A to Rule 1.6 be modified to include a reference to Rule 1.11, as follows (in red):

[17A] The prevalence of hacking, phishing, spoofing, Internet scams, and other unauthorized digital intrusions into electronic or digital means of communications and data storage used by lawyers underscores the need for lawyers and law firms to use reasonable and proportionate technology to safeguard information protected by Rules 1.6, 1.9, 1.11 or 1.18. To protect such information, lawyers and law firms should use reasonable administrative, technical and physical safeguards that are proportionate to (a) the size, nature, and complexity of the practice, and (b) the sensitivity of the confidential information the practice maintains.

Representatives of the Local and State Government Law Section will be prepared to move for such an amendment during the House of Delegates meeting. However. This will be unnecessary if this amendment is accepted by COSAC.

Thank you.

PLEASE NOTE, comments must be submitted to COSAC no later than May 29, 2020 in order to be considered by that committee for incorporation in its proposal to the House of Delegates on June 14, 2020.