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COMMITTEE ON PROFESSIONAL ETHICS

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March 16, 2022

To: NYSBA Executive Committee and House of Delegates

Re: New Proposed Rule 5.9

The Committee on Professional Ethics ("CPE") opposes the adoption of new Rule 5.9 proposed by the Committee on Standards of Attorney Conduct ("COSAC"). Attached is the report of the CPE Subcommittee, dated March 10, 2022, and adopted by the CPE at its March 16, 2022, meeting, which sets forth the grounds of CPE's opposition and its analysis of the proposed new rule.

Although CPE disagrees with COSAC concerning the benefits and utility of the proposed new rule, we respect and admire COSAC's hard work and thoughtful analysis of the thorny issues that may arise when a lawyer departs a firm. It is our view, however, that the proposed new rule, on balance, would not significantly add to the existing legal and ethical rules that already govern lawyer departures and would also have the potential to complicate that process in ways that would not necessarily protect the interests of the affected clients.

Richard Hamburger, Esq.

Richard Hamburger, Esq.
Chair

M E M O R A N D U M

March 10, 2022

TO: Committee on Professional Ethics ("Committee")

FROM: Subcommittee on Proposed Rule 5.9

SUBJECT: Comments and Recommendations on Proposed Rule 5.9

At its meeting on February 16, 2022, the Committee asked the undersigned to constitute a subcommittee to comment on and, if appropriate, to make recommendations about an addition to the N.Y. Rules of Professional Conduct ("Rules"), namely a new Rule 5.9, proposed by the State Bar Association's Committee on Standards of Attorney Conduct ("COSAC").

In summary, we recommend that the Committee oppose adoption of the proposed Rule 5.9 because the proposal restricts the right of a "departing lawyer" (as defined there) in an ongoing or dissolving law firm to communicate unilaterally with the departing lawyer's current and former clients consistent with his or her existing ethical, fiduciary, and contractual duties.

Our chief objections are that, in prohibiting the departing lawyer to communicate with current and former clients without first negotiating with his or her current or dissolving firm, the proposal is more concerned with the commercial competition between departing lawyers and law firms – what the COSAC Report rightly depicts (p. 8) as "intrafirm disputes" – while treating clients as unwitting and disinterested bystanders; conflicts with other existing Rules and vibrant public policies favoring client choice and lawyer mobility; and engages the Rules in legal issues on fiduciary and contractual obligations

properly outside the purview of the Rules. We think, too, that the proposal ignores market realities, contains language that is easily evaded and hence a summons to litigation, overlooks the many ways that law firms may protect their pecuniary interests, and will upset widely-held expectations in the New York legal community about how to behave in these circumstances, sowing the perceived "confusion and uncertainty" that COSAC (p. 6) seeks to allay.

The Preamble to the Rules says that a lawyer "is a representative of clients and an officer of the legal system with special responsibility for the quality of justice." Preamble ¶ [1]. "The "touchstone of the lawyer-client relationship is the lawyer's obligation to assert the client's position under the rules of the adversary system, to maintain the client's confidential information except in limited circumstances, and to act with loyalty during the period of the representation." *Id.* ¶ [2]. The Rules do not regulate internal law firm governance except to protect clients' interests, *e.g.,* Rules 1.10(e-g), 1.15, 5.1, 5.6(b), 8.4(g). The Rules do not regulate the commercial interests of a firm and its partners. The Rules should not do so.

Although we oppose any new rule, we present changes in the proposal to afford more robust protection for a client's freedom of choice and a departing lawyer's freedom of movement. Our preference is to incorporate elements of COSAC's proposal in Comments accompanying existing Rules, thereby giving hortatory effect to principles COSAC advances without the unnecessary impact of a disciplinary rule that even the COSAC Report admits (p. 8) is unlikely to be enforced.

We appreciate COSAC's work. Its proposal and Report are at times impressive, thought-provoking, and the product of much careful consideration. In the end, however, we conclude that the result of these

worthy efforts is an unprecedented regulation of the fiduciary and contractual relationships between lawyers and their existing or dissolving firms that is harmful to the paramount obligations of a lawyer to communicate with the client about a client's matter, as well as the rights of a client to choose counsel and a lawyer to change firms.

The Proposal

COSAC's proposal is unique in this country.

Of the 51 jurisdictions in the United States, only two – Florida and Virginia – have adopted disciplinary rules akin to COSAC's proposal in mandating pre-departure negotiations on a joint communication to clients before a lawyer may communicate with clients about a lawyer's decision to change law firms. At least one jurisdiction has rejected such a requirement, and apparently for the reason – the preeminent need to protect client choice – that we oppose it. *See* Virzi, *Clients Are Not Property: ABA Formal Opinion 489 & Phantom Rule 5.8*, 31 S. Carolina Lawyer 39 (2020) (discussing state's rejection of proposal tracking COSAC's Rule 5.9).

Moreover, although we do not agree with the Florida or Virginia rules, COSAC's proposal differs from them in two significant ways that only compound its problems.

One is that, unlike COSAC's proposal, each of the other two states allows for agreements among partners or with clients to negate the prohibition on unilateral lawyer-client communication pending mandatory negotiation with the departing lawyer's law current firm. *See* Fla. Bar Reg. R. 4-5.8(a) & (c)(1); Va. Sup. Ct. R. pt. 6, § II, 5.8(a). This is not immaterial.

A law firm is free to address the subject matter of departing partners in its partnership agreements, engagement letters, or other policies. A law firm and lawyer may agree on a single communication from one or the other. A client is free to insist in an engagement letter on the legal services of particular lawyers even if the lawyers leave their current firms. We understand that to allow agreements to override the rule is to permit circumvention of the central goal of a joint communication, but we do not agree that this circumvention is invariably a bad thing.

The other difference is an ambiguity on the intended reach of the new Rule. The proposed text of Rule 5.9 applies to a "lawyer who is or has been primarily or substantially responsible" for a client's matter; neither the Florida nor Virginia rule says this. Comment [8] to COSAC's proposal defines a "client" to mean "any client for whom the departing lawyer is or has in the past been the primary lawyer for the client's active or prospective matters" and "any client for whom the departing lawyer is currently providing or supervising substantial legal services, or for whom the lawyer has done so in the past." This could mean either that the "client" is an existing client of the law firm for whom the departing lawyer was once but is no longer the "primary lawyer," or a client who is no longer an existing client of the firm. Comment [4] of COSAC's Proposed Rule does not help: "When a lawyer who is currently or has in the past been primarily or substantially responsible for a particular matter or for a client leaving the firm, this Rule requires" negotiation of a joint communication. The Florida Comments make no such statement and the Virginia Comments expressly say that the Rule applies only to clients with "active matters." Va. Sup. Ct. R. pt. 6, § II, 5.8(a), Comment [3]. If by its text and its Comments, COSAC presumes a fiduciary-like relationship between a law firm and former clients, it is one New York law

does not recognize. *See Eurycleia Partners, LP v. Seward & Kissel, LLP*¸ 12 N.Y.3d 553, 561-62 (2009) (existence of fiduciary duty essential to breach of duty claim). The Rules protect former clients solely to cover confidential information as defined in Rule 1.6 and safeguarded by Rule 1.9. *See also* Rule 1.16(e) ("upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client"). If COSAC's intent is to cover former firm clients – and the proposed Rule and Comments could be read either way – this connotes that a law firm has a protectable, proprietary interest in former clients inconsistent with the Rules and the law.

The COSAC Report says nothing about these two material differences.

Accordingly, to say that the proposed Rule 5.9 is *sui generis* is no exaggeration. Our survey of case law, ethics opinions, and commentaries throughout the United States uncovers not one – not one – that compels negotiation with the departing lawyer's firm before the departing lawyer may unilaterally communicate with current and former clients. The COSAC Report does not assert otherwise. To the contrary, the COSAC Report posits this paucity of precedent as a pretext to promote its proposal. In truth, there is no dearth of case law or ethics opinions on the subject matter of the proposed Rule. Ample guidance is readily available on the rights and duties of lawyers, law firms, and clients in these circumstances. This guidance teaches, first and foremost, that Rule 1.4(a)(iii) requires a departing lawyer "promptly" to communicate concerning "material developments in the matter" – of which the departing lawyer's change of firms is plainly one – whether or not the firm joins in the communication. *See, e.g.*, ABA 489 (2019); ABA 99-414 (1999); Alas. Op. 2005-02 (2005); Ariz. Op. 99-14

(1999); Cal. Op. 2020-201 (2020); Colo. Op. 116 (2007); D.C. Op. 273 (1997); Ky. Op. 424 (2005); Oh. Op. 2020-06 (2020); Ore. Op. 2005-70 (rev. 2015); Wash. Op. 201801 (2018); Wisc. Op. 97-2 (1997). The authority on this point is overwhelming. Running through these opinions is the requirement that the lawyer make clear to the client that the client is free to make a choice – to go with the departing lawyer, to stay with the law firm, or to pick new counsel. *See* Rule 1.4(b) (a lawyer "shall explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation"). This formidable body of ethics teaching – just a sample of the available instruction – chisels in stark relief the loneliness of COSAC's proposal in the nationwide field of ethics and the law of lawyering.

The Rules Are About Protecting Clients

The concern of the Rules is, as it should be, on the protection of clients, including a client's choice of counsel. Nothing better protects that choice than the right of the client's main lawyer in a law firm, upon notice to firm management, to inform the client of the lawyer's definite decision to leave the firm, while making clear that the client is free to stay with the firm or to choose some other counsel.

Although the first sentence of COSAC's Comments to the new Rule adopts the "rights of clients" as its focus, both the text of the Rule and many if not most of the Comments seem to us to focus primarily on the "intrafirm" business relationship between the firm and its partners. Yet within certain narrow and well-established limits such as Rule 5.6(a)(1), which is about client choice and lawyer mobility, the firm, unlike a departing partner or a client, has the ability to set out, in the firm's partnership agreement or other policies that manage partner behavior, all the rights and duties to structure lawyer departures, including reasonable notice provisions that

incorporate some elements of the proposed new Rule. Such partnership agreement provisions or policies – not disciplinary rules – are the rightful repository of regulations on the business relationships among partners that COSAC's proposal principally addresses. Nothing in the COSAC Report suggests its consideration of this option. We do not believe that the disciplinary rules should be used to arm law firms that lacked the foresight to anticipate, in their governing documents, the now-common occurrence of lawyer departures.

Even without such contract provisions and policies on the subject, a law firm has potent weaponry at its disposal, both in economic resources and superior information, to look after its pecuniary interests. In many cases, the firm's financial capacity will dwarf those of the departing lawyer(s). The firm, not the departing partner or client, has the ability to offer enhanced compensation or other enticements to keep the lawyer and client(s). Furthermore, typically, the law firm owns and controls and by policy may have the right to monitor any use of firm property such as computers to plan a departure; thus, the firm, unlike the departing lawyer or client, may without the departing lawyer's or client's knowledge, stay abreast of the use of firm property, including documents and email communications. Likewise, ordinarily, while the departing lawyer may enjoy equal access to them barring some action by the law firm refusing such access, the law firm has possession, custody, and control of client files, as well as the financial records associated with a client. In most cases, the law firm has a claim to any legal fees and expenses the client may owe. Many partnership agreements permit a firm to compel arbitration of any disputes, including, one must assume, a dispute over the content of a joint communication. If a matter is pending before a tribunal, the law firm has rights under Rule 1.16 to address withdrawal from a matter.

And no Rule is needed to alert a law firm of its rights strictly to enforce its partnership agreement and to assure compliance with a departing partner's ethical and fiduciary duties, and thereby make life difficult for the departing lawyer(s).

In our estimation, the only client interest that the proposal fulfills is to try to spare the current or former client from getting two communications about the departing lawyer's plan to move, one from the departing lawyer and one from the law firm (in our experience a rare event). This is patronizing to those clients. It suggests that clients cannot discern or act in their own self-interest without the law firm's assistance – a law firm to which, in many instances, they have no connection other than the departing lawyer. It also presupposes that a departing lawyer, as required, has not already told the client of the client's right to remain at the firm. Certainly nothing in the text of the proposed Rule facilitates the client's choice by, for example, requiring enclosure of an election form to enable the client to select an option quickly and easily. The only point of the proposal is to compel the departing lawyer to stall communication with clients during negotiations with a law firm over the content of the communication. At that point, the law firm and departing lawyer are adverse parties, and the clients have no say.

Notwithstanding the proposed Rule's escape clauses allowing one or the other to abandon the negotiations for reasons the Rule outlines, in the real world the law firm has much greater leverage, among other reasons because the firm may be able to hold the departing lawyer to pre-existing notice provisions for departures and other contractual, statutory, or common law duties unless the firm gets the content the firm wants. This has nothing to do with protecting clients.

The escape clauses, by which we mean proposed Rule 5.9(a)(1-3), do not abate this concern. One escape is that, if following bona fide negotiations, the firm and departing lawyer are "unable to agree" on a joint communication, then one or the other may walk away. The client is not a party to these talks. The case law is full of disputes, under statutes or contracts, over what constitutes "good faith" negotiations. *E.g., US Bank N.A.* v. *Sarmiento*, 121 A.D.3d 187, 202-04 (2nd Dep't 2014) (citing multiple cases and holding that the "totality of the circumstances," not isolated incidents of allegedly bad acts, reflect good faith). As we have said and say again below, the outcome is largely within the law firm's ability to control, and, if a joint communiqué is compelled, the leverage is only strengthened. This is not about clients, but "intrafirm disputes."

Another escape clause is that the "circumstances leading to the departing lawyer's departure, or the law firm's policies, past practices, or current actions directed at the departing lawyer's client contacts with regard to client notification, make such bona fide prompt negotiations reasonably unlikely to succeed." What does this mean, and who decides? Is it unreasonable for a law firm to escort the departing lawyer from the firm's property, and to cut off the departing lawyer's access to client files and the firm's computer, while insisting that the firm is committed to bona fide negotiations with the departing lawyer to reach a meaningful consensus on a joint communication? The proposed Rule and Comments do not tell us. *But see* Proposed Rule 5.9, Comment [10] (law firm may cut off access if the firm "has a reasonable, good faith basis for believing that the lawyer may be accessing or planning to access the firm's confidential or proprietary information or the firm's resources for reasons unrelated to fulfilling ongoing responsibilities to clients"); c*f.* Ill. Op. 01-01 (2001) (law firm wrong to refuse

to allow downloading of client files at client's request). How does a firm know whether a departing lawyer's access, or plan to access, "firm resources" is or is not related to "fulfilling ongoing responsibilities to client"? And why is COSAC delving into such subjective features of "intrafirm disputes"? To protect clients or the law firm? We think the latter.

The third escape clause addresses circumstances in which, in our judgment, only one – "the nature of the departing lawyer's professional activities after departure" – make it "highly unlikely that the client would consider retaining the departing lawyer after departure." COSAC's Comment [6] explains this circumstance as a departing lawyer "moving to a government, in-house, academic or non-legal position." This is easy enough to understand, and a circumstance in which the departing lawyer is unlikely to care to negotiate; a simple announcement suffices. More troubling are the other "circumstances" relieving the law firm of the duty to negotiate, namely, "the seniority of the departing lawyer, the role of the departing lawyer in the conduct of the matter, [and] the nature and extent of the departing lawyer's contacts with the client," each of which, on COSAC's view, would allow the law firm to conclude that it is "highly unlikely that the client would consider retaining the departing lawyer after departure." This could mean that the departing lawyer has reached the firm's mandatory retirement age, or has ceded day-to-day management of a client matter to another partner, or provides only limited input into the client's matter on specific issues. None of these circumstances refers to what the client may prefer; in each, proposed Rule 5.9 makes the client a secondary consideration.

Within the context of the Rules, this makes proposed Rule 5.9 a stranger to its surroundings. The other Rules that immediately precede it in the Rules – beginning with Rule 5.1 – are all rooted in sacred values of client

protection, lawyer independence, and lawyer mobility, the last of which is intended to preserve a client's autonomy in choosing counsel, *Cohen* v. *Lord, Day & Lord*¸ 75 N.Y.2d 95 (1989) (decided under an identical provision in the Code of Professional Conduct, the predecessor of the Rules). *See, e.g.*, Rules 5.1 (obligations of supervisory lawyers to ensure compliance with Rules); 5.2 (duties of a subordinate lawyer to comply with the Rules); 5.3 (duties of lawyers to supervise non-lawyers); 5.4 (assuring professional independence of a lawyer interfering with client relations); 5.5 (protecting against the unauthorized practice of law); 5.6 (banning restrictions on a lawyer's right to practice except in limited circumstances); 5.7 (protecting clients when a lawyer offers non-legal services); 5.8 (judicially regulating contractual relationships between lawyers and non-legal professionals to preserve a lawyer's independent judgment in favor of clients). Mindful of COSAC's position that its proposed Rule 5.9 is intended to protect clients, we think the proposal deviates from the lodestar that guides the values in the Rules that precede it.

Meriting mention, too, is the COSAC Report's neglect of small firms that comprise the majority of law firms and lawyers practicing in New York. We suspect that many of the concerns that the proposed Rule seeks to address arise from competition between large and mid-size firms in metropolitan areas; certainly that is the setting of much of the trade news on the subject of lawyer mobility. But that is a stage on which most New York lawyers never appear. Both in metropolitan areas where lawyers do not compete for big-ticket commercial matters or concentrate on discrete areas serving the less affluent, and in innumerable towns and villages in the 40-plus counties in this State outside metropolitan areas, many, many thousands of lawyers practice in firms consisting of a handful of partners. Inquire of them

– again, the vast majority of lawyers in New York – whether the issue of departing lawyers is a source of "confusion and uncertainty" to them, and we suspect that the question will perplex them and COSAC's proposed answer stun them.

Many of these small firms have no elaborate written agreements governing their relationship; sometimes, it is just a handshake. In the absence of an agreement on point, the New York Partnership Law regulates that relationship. Under that statute, a decision by one partner to leave effects a "dissolution" of the firm by operation of law. N.Y. Partnership Law ¶ 62. Although many of these dissolutions entail no acrimony, formal dissolution could involve judicial intervention, *id.* ¶ 63, enforcing statutory rights and duties of the erstwhile partners, *e.g.*, *id.* ¶¶ 64, 69, 75. None of these statutory provisions includes the mandates in COSAC's proposal on firm dissolutions. Those mandates, apart from the surprise they are likely to engender at the bar, may intrude on judicial oversight, or, in the absence of a court proceeding, impose previously unanticipated costs on the parties to the dissolution, befuddle clients who know little about dissolution but a lot about "their" lawyer, and feed the flames that COSAC sees blazing and wants to douse. Such are perils of drafting a unique, unprecedented, and unnecessary one-size-fits-all disciplinary rule to fill a gap in guidance that, in our judgment, is in COSAC's eyes only.

Ample Guidance Exists

In its Opinion 489 (2019), the ABA extensively considered the issues attending a lawyer's decision to leave a law firm to join another. Specifically addressing the mandatory negotiation provision in the Florida and Virginia rules that roughly parallel COSAC's proposed Rule 5.9, the ABA said that, under the Model Rules of Professional Conduct, on which our Rules

are based, "departing lawyers need not wait to inform clients of the fact of their impending departure, provided that the firm is informed contemporaneously." The ABA said that the law firm also has the right to contact those clients, and opined only that "the preferred *next* step is for the departing lawyer and the firm to agree upon a joint communication sent to the clients requesting that the clients elect who will continue representing them [emphasis added]." Note that these words express a preference not a mandate, and even then a preference that arises only after a departing lawyer has met that lawyer's duties under Rule 1.4. These words follow the ABA's client-focused treatment of, among other things, a lawyer's duties of diligence under Model Rule 1.3 (identical to Rule 1.3(a)) and "prompt communication" to clients under Model Rule 1.4 (identical to Rule 1.4(a)). *See also* ABA 09-455 (2009); ABA 99-414 (1999). The ABA thus rejected the view, which the Florida and Virginia rules embody and COSAC advocates, that the departing lawyer must first negotiate with his or her firm before informing clients of an intent to change law firms. The opinion says exactly the opposite – that no such predicate is either necessary or consistent with existing ethical norms.

The ABA did not reach this conclusion because the Model Rules have nothing like the proposed Rule 5.9; it did so despite acknowledging that two jurisdictions had one. Rather, the ABA relied on mature developments in the law of lawyering that draw on the Model Rules, ethics opinions in other jurisdictions (some of which we cite above), and principles of fiduciary law. To illustrate: Nothing in the Model Rules or the disciplinary rules of this or 48 other jurisdictions requires notice to firm management before a departing lawyer solicits present or past clients to change firms. Yet the ABA did not hesitate to say that such notice is necessary. Condemnation of such pre-notice surreptitious solicitation is

universal in the ethics opinions, commentaries, and cases, including ABA 489. This is important, for the point shows that the absence of something like new Rule 5.9 has not disabled ethics committees and commentators from saying that the ethical duties of a departing lawyer include an uncodified edict against a partner's pre-notice surreptitious solicitation of firm clients. No disciplinary rule was required to embed this principle in the ethics governing lawyer mobility. None is needed here.

As the COSAC Report acknowledges (p. 7), the relevant authorities "provide remarkably consistent guidance" on the rights and duties of departing lawyers. The COSAC Report lists (*id.*) some of the principles that these authorities "uniformly stress," but, for unstated reasons, the COSAC Report omits some of those principles set out in the authorities on point, including especially the ABA. Drawn from the Rules, ethics opinions, commentaries, and case law, these principles are (our additions to COSAC's list are in italics):

- Client choice and lawyer mobility are favored;
- Clients are not property of any lawyer or firm;
- Lawyers and firms, *whether separately or together*, must promptly notify clients about a lawyer's planned departure;
- *A departing lawyer must notify the firm before soliciting existing clients to join any new firm*;
- It is preferable (though not required) that the law firm and the departing lawyer provide joint notice of the move to the client;
- *Whether individually or jointly, the communicating lawyer(s) must advise the client(s) that the choice of counsel is solely within the power of the client(s), and that the client(s) may*

choose to retain the departing lawyer, the existing firm, or any other lawyer;

- *Ideally, the law firm and the departing lawyer should cooperate to assure a smooth transition either to new lawyers within the firm or, if the client chooses to retain a lawyer other than the law firm, to that other counsel.*

We agree with these principles. Taking account of COSAC's reference (p. 7) to differing "nuances" in the ethics opinions, we have been unable to locate any authority, anywhere, and certainly not in New York, that fundamentally departs from these principles. An impressive body of ethics opinions, cases, and commentary exists in which these principles are indeed "remarkably consistent" and "unifor[m]." We have found only a few cases in which courts have recently been required to adjudicate disputes over them, in each of which the courts applied, as the controversy presented them, the principles set forth above, and none of which directly interfered with a client's right to a free choice of counsel. Were the Committee to be asked, or to decide *sua sponte*, to address the issue in an opinion, we are confident that the Committee's conclusion would incorporate the substance of the foregoing principles, unburdened, like the ABA, by the absence of a Rule directly on point.

We thus find it difficult to understand COSAC's claim (p. 6) that a "relative lack of ethical guidance has created confusion and uncertainty for lawyers intending to leave a firm, for law firms they are leaving, for the law firms to which they are moving, and, ultimately and most importantly, for their clients." COSAC cites no empirical evidence for this claim. If there is a case reflecting client confusion in such matters, we have not found it and the COSAC Report cites none. Similarly, our canvass of the ethics literature

discovered no support for a Rule 5.9 regime in New York or, for that matter, elsewhere, and, once again, the COSAC Report identifies none. Our own experience is that, once one or more lawyers notify a law firm of a decision to leave, the departing lawyer(s) and the firm behave consistent with partnership provisions and policies and the principles set forth above, however unpleasant the initial reaction. The overwhelming majority of lateral movements occur without undue rancor, client confusion, litigation, or untoward effects, and precisely because the rules of the road are well marked.

This is consequential, because we detect no groundswell for proposed Rule 5.9, no widespread demand for regulation of the business interests of law firms and departing lawyers. Without such background, a new disciplinary rule coming out of the blue, lacking substantial empirical evidence that a need for one exists, missing years of reflection and debate, and having no basis in judicial decisions in this State, is destined to be met with something approaching shock. New disciplinary rules always have unintended and unforeseeable consequences. When adopted in a vacuum, they potentially undermine compliance with them and diminish trust in overseers of the legal profession.

We think the better part of discretion is in the axiom: "If it ain't broke, don't fix it."

COSAC's Rationale Is Not Sufficient

COSAC's reasons for abandoning this axiom are unpersuasive. COSAC does not explain why ABA 489 is inadequate to the task, other than that it is not a New York opinion and does not adopt COSAC's *ipse dixit* preference for compulsory negotiation of a joint communication, *i.e.*, that COSAC's unique proposal is "better" (p. 10).

COSAC complains (p. 8) that the Rules do not "squarely address the obligations of departing lawyers and their firms *before* the departing lawyer leaves the firm [emphasis in original]." This is not a reason to embrace COSAC's view of what should happen; it simply states a fact. As we have said, the Rules also do not "squarely address" pre-notice surreptitious solicitation by partners, yet the proscription on such conduct is widely accepted. Why isn't notice to the firm sufficient? The Rules likewise do not "squarely address" assorted other "intrafirm" features of the fiduciary and contractual duties among partners and their law firms, many of which may affect clients. Absent a compelling reason to codify those "intrafirm" relationships in a disciplinary rule, the lack of a disciplinary rule about one discrete feature of a business relationship – notification of clients about a departing lawyer's plan to leave – is no excuse to do so.

COSAC's reliance (*id.*) on Preamble ¶ [12] to the Rules – that the Rules are meant to provide "guidance to lawyers" and therefore the proposed Rule 5.9 is "consistent" with their purpose – is both inapt and proves too much. Paragraph [12] of the Preamble cautions against using disciplinary rules for non-disciplinary purposes. Yet this is what COSAC is proposing; its Report acknowledges (p. 8) the improbability of disciplinary enforcement. The sentence COSAC lifts from the Preamble's paragraph 12 is meant solely to discourage use of the Rules for non-disciplinary purposes such as disqualifying lawyers, as a basis for civil liability, and as "procedural weapons" by opposing counsel. The sentence is not meant to encourage new guidance, especially new Rules that may engender the collateral effects that the sentence was written to deter.

In addition, any disciplinary rule purporting to regulate "intrafirm disputes" over fiduciary and contractual relations between a lawyer and a law

firm could be said to provide "guidance to lawyers," such as a rule compelling a firm to incorporate arbitration provisions in partnership agreements or engagement letters, or one regulating compensation decisions or billing practices. These may be good ideas, or "preferable" to some, but they have no place in disciplinary rules. For us, the Preamble's emphasis on client protection, *see, e.g.*, ¶¶ [1], [2], [9], overcomes any other interest and supplies no basis to regulate essentially commercial "intrafirm disputes" between lawyers and their firms. To invoke the Preamble is an invitation for any disciplinary rule to which, on our view, an RSVP ought to be sparingly accepted. The Preamble in ¶ [8] so attests: "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, so no worthwhile human activity can be completely defined by legal rules."

We obviously disagree, too, that in New York, in COSAC's words (p. 7), "guidance on these issues has been remarkably thin." Here, COSAC cites two cases: *Gibbs* v. *Breed Abbot & Morgan*, 271 A.D.2d 180 (1st Dep't 2001) and *Graubard Mollen Dannett & Horowitz* v. *Moskowitz*, 86 N.Y.2d 112 (1995).

Gibbs did not involve the issues that proposed Rule 5.9 does. There, the issue was whether a departing lawyer could provide a potential new firm, without notice to his current firm, with confidential proprietary information about associates in whom the new firm might be interested; the court held that doing so breached the departing lawyer's duty to his existing firm. Although an argument could be made that this conduct violated Rule 8.4(c), *see* Temkin, *The Ethical Issues of Lateral Moves*, 2011 N.Y.S.B. Jnl. 47, 52 (2001), the court rested its holding on fiduciary duty, a not unreasonable result of the fact that the action claimed breach of fiduciary duty. Though surely of potential "guidance to lawyers" leaving a law firm,

COSAC's proposed Rule 5.9 says nothing about a lawyer's duties in this situation.

Graubard is more on point. There, a founding partner of the firm, without notice to the firm, furtively solicited a major client to follow him to a new firm. In an opinion by Chief Judge Kaye, the Court of Appeals unanimously held that the departing partner's "pre-resignation surreptitious 'solicitation' of firm clients for a partner's personal gain" is "actionable" as a breach of fiduciary duty. 86 N.Y.2d at 119. COSAC dismisses *Graubard* as failing to answer all questions about lateral movement, as focusing more on fiduciary obligations than on ethics rules, and as "decades old."

Graubard deserves more respect than COSAC pays it.

First, it is true that *Graubard* did not answer every question about lateral movement, but neither, like *Gibbs*, does proposed Rule 5.9. The proposal is about a single issue – unilateral communications with clients about a lawyer's impending move. Problems inhere in trying to legislate only a discrete fiduciary and contractual issue outside the context of all other relevant factors that a lawyer's departure from a firm may occasion. Precisely because Rule 5.9 is about only one issue, common sense strongly favors leaving these matters to a case-by-case examination of all the germane and specific facts – the "totality of the circumstances" – that attend such a move. To date, without Rule 5.9, controversies over these matters have yielded only a thimbleful of disputes provoking judicial intervention. Where COSAC sees this as a lamentably "thin" body of law, we see a system that is working just fine without a new rule and without a lot of litigation that, as we explain, the new Rule 5.9 might well foster.

Second, although Chief Judge Kaye's opinion is grounded in fiduciary law, her opinion heavily relies on legal ethics, including

commentary by ethics scholars and ethics opinions. *Id.* at 119-20 (citing, *e.g.*, Krane, *Ethical and Professional Issues Associated with Departing Lawyers*, Employment Law and Human Resource Issues in Law Firms and Professional Partnerships 473 (1993); Hillman, *Law Firms and their Partners: The Law and Ethics of Grabbing and Leaving*, 67 Tex. L. Rev. 1 (1988); Johnson, *Solicitation of Law Firm Clients by Departing Lawyers and Associates*, 50 U. Pitt. L. Rev. 1 (1988); Comment, *Lateral Moves and the Quest for Clients: Tort Liability of Departing Lawyers for Taking Firm Clients*, 75 Cal. L. Rev. 1809 (1987); Hazard, *Ethical Considerations in Withdrawal, Expulsion, and Retirement*, Withdrawal, Retirement and Disputes: What You and Your Firm Need to Know 36 [Berger ed. 1986]; Davis and Glen, *Practical Issues of Professional Responsibility: Musical Chairs: Key Issues When A Lawyer Makes a Lateral Employment Move*, N.Y.L.J. Nov. 26, 1990, at 1, col. 1 [part I]; NYCLA Op. 679 (1991); N.Y.C. Op. 80-65 (1982)). And while *Graubard* was a civil action sounding in tort, the allegations there, if true, also violated the Rules. *See* Rule 8.4(c) (a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

Third, and surpassingly important, the core holding in *Graubard* – that "pre-resignation surreptitious 'solicitation' of firm clients for a partner's personal gain" is "actionable" as a breach of fiduciary duty – supplies the entire foundation for the proposed Rule 5.9. Without that holding, we would not be here. *Graubard* taught that law partners owe fiduciary duties to each other, that a partner leaving a law firm creates issues, and that one clear limit on such departures is a prohibition on pre-notice, secret solicitation of firm clients. This last holding, as we have noted, has found its way into the ABA Opinions and those in other jurisdictions. It is part of the ethical regimen regulating lawyer behavior. That it may have arisen in the context of a

decision about fiduciary duties, albeit one infused with reliance on ethics authorities, is of no meaningful importance. It is now embedded in the law of lawyering. RESTATEMENT (THIRD) OF THE LAW OF LAWYERING § 9(3)(a)(ii) (requiring notice to firm before departing lawyer solicits clients).

Fourth, after the Court of Appeals decided *Graubard*, COSAC proposed and in 2015 the House of Delegates adopted Comments [18A-F] to Rule 1.6 entitled "Lateral Moves, Law Firm Mergers and Confidentiality," to which Comment [11] of COSAC's Report refers. Comments [18A-F] provide concise guidance on a departing lawyer's rights and duties, when contemplating a change in law firms, about sharing information with a prospective new law firm. Among other things, these Comments say the disclosure "without client consent in the context of a possible lateral move or law firm merger is ordinarily permitted regarding basic information such as (i) the identities of clients and other parties involved in a matter; (ii) a brief summary of the status and nature of a particular matter, including the general issues involved; (iii) information that is publicly available; (iv) the lawyer's total book of business; (v) the financial terms of each attorney-client relationship; and (vi) information about aggregate current and historical payment of fees." *See also,* Rule 1.10, Comments [9H-I]. Hence, in the wake of *Graubard,* the Rules with Comments facilitated lawyer mobility and client choice. *See also* N.Y. County 679 (1994).

Fifth and finally, however dated COSAC may regard Chief Judge Kaye's well-reasoned opinion, *Graubard* has shown remarkable stamina, including in courts in New York and elsewhere, especially in its core holding about pre-notice covert solicitation of clients – a concept nowhere articulated in the Rules but now widely accepted as an ethical principle. That *Graubard* remains spry is evident not only in ABA Opinions noted above, as well as in

the RESTATEMENT, but also in cases and commentaries such as, among others, *Kantor* v. *Bernstein*, 225 A.D.2d 500, 501 (1st Dep't 1996); *Raymond H. Wong PC* v. *Xue*, 2005 N.Y. Misc. LEXIS 3264 *3-4 (Sup. Ct., N.Y. Co. 2005); *Dowd & Dowd, Ltd.* v. *Gleason*, 181 Ill. 460, 470 (1998); *Wenzel* v. *Hopper & Galliher, P.C.*, 779 N.E.2d 30, 38 (Ind. Ct. of App. 2002); *Buckingham, Doolittle & Burroughs, LLP* v. *Bonasera*¸157 Ohio Misc.2d 1, *14 (Ct. of Common Pleas 2010); Note, *Ethical Obligations When a Lawyer Changes Firms*, 29 Pa. L. 66, 69 (2007); Corwin & Miller, *What Baggage Can Withdrawing Law Partners Carry Out the "Revolving Door?"* 49 R.I. Bar Jnl. 529 (2001). Thus, despite its age, *Graubard* remains good law in New York, undisturbed after all these years, and, as best we can tell, has never been criticized anywhere for its central ruling on secret solicitation by a partner.

The Comments to COSAC

The COSAC Report discloses the reactions from outside commentators to its proposed new Rule 5.9. It is interesting that, with the exception of Leslie Corwin, Esq., a co-author of the treatise *Law Firm Partnership Agreements*, none of the persons COSAC lists as providing comments on the proposal gives an unequivocal endorsement of it. Tellingly, Mr. Corwin's co-author of the treatise, Arthur Ciampi, Esq., disagrees with Mr. Corwin's view and agrees with the position we espouse. In responding to Mr. Ciampi, who believes (as we do) that ABA 489 fully addressed the issues, COSAC says (p. 10) that its proposal is only "slightly" different from ABA 489; this is tantamount to equating the words "shall" and "may," words that signify very different things in the Rules, *see* Preamble ¶ [6] (rules using "shall" denote "imperatives" whereas those using "may" are "permissive"). Prof. Robert Hillman, who has been studying the issues of lawyer mobility for

three decades, rightly warns (p. 11) that "there may be problems with the 5.9(a) prohibition of unilateral notification of clients of departure plans" and notes, as we have done, that existing "ethics standards indicate clients have a right to know, and the attempt to delay any notification until after post-notice bona fide negotiations with the firm is inconsistent with these standards." We agree.

Closer to home, COSAC's recital of the comments of this Committee's longstanding member and former chair, Marjorie Gross, Esq., mentions that she raised the RESTATEMENT; to this, COSAC says that it is fully aware of the cases the American Law Institute cites but that, despite those citations and without quarreling with them, COSAC simply disagrees with the RESTATEMENT's conclusion. COSAC omits Ms. Gross's reference to the Committee's recent opinion, N.Y. State 1221 (2021), which, while not specifically addressing the business relationship between a departing lawyer and the departed law firm, makes clear that a departed lawyer has the right, under Rule 7.3, to approach clients with whom the departed lawyer had a prior relationship. Rule 7.3(c)(5) excludes from Rule 7.3's regulation of solicitation one that is directed to, among others, a "former or existing client." We do not understand why COSAC has decided to amend Rule 7.3, without saying so, to constrain the departing lawyer from rights to solicit current or onetime clients in the same way that an already departed lawyer may do so, provided, in the departing lawyer's case, the lawyer notifies the firm of the lawyer's intention to leave. This has real world effects.

Some Real World Effects

This is not the only practical, real world, effect of the proposal.

A word, to begin, about that world. Forty years ago, lawyers changing firms was both very rare and mostly uncontroversial, and bonds

between clients and law firms stable and enduring. Today, however, "clients often prefer to have relationships with lawyers rather than firms and are wary of firms' attempts to weaken these bonds through methods that increase costs to clients and provide few corresponding improvements to the quality of service." Hillman, *Law Firms and Their Partners Revisited: Reflections on Three Decades of Lawyer Mobility*, 96 Tex. L. Rev. 787, 790 (2018). More and more, clients choose lawyers, not law firms, and do not care about the effect of their choice on the law firm. The Rules, if they are to remain meaningful in the regulation of the profession and in the real world, must take account of this fact. We think they do, or ought to do so, by stressing client choice and lawyer mobility without undue regard to the commercial interests of law firms or "intrafirm disputes." No balancing between, on one scale, client choice and lawyer mobility and, on the other, a law firm's business concerns, is appropriate. We fear that, in real world situations, the new Rule may give the law firm a thumb on the scale and a reason to make life difficult for the departing partner(s), if for no other reason than to deter other flights.

Imagine Lawyer A who is considering leaving a current firm. The reasons for this could be manifold – dissatisfaction with the culture of the existing firm, quarrels with partners or management, unhappiness with an opaque compensation system, the desire for a platform or firm perceived to be of higher promise or greater prestige, a belief that another firm is a better fit for the practice or a client base more suitable, apprehension about the current firm's future, an unwillingness to retire on the firm's clock, and, of increasingly common moment, a client's insistence; the list could go on and on. So, too, could the sources of the desire to move – family issues, a shorter commute, fewer hours, a mid-life crisis that a change of scenery may cure, friendships at the other firm. Our point is not to exhaust a list of why lawyers

decide to move but to note only that, while doubtless many are, not every move is about money or business or warring over clients. Every move has its own story. And that story frequently has multiple chapters, ranging from consideration of a move to an unalterable decision to move. The distance between those two points is fertile ground for controversy. In a laudable attempt to achieve closure, COSAC's proposal instead creates chasms that work to the benefit of the law firm.

For instance, according to proposed Comment [4] of the Rule, only "concrete plans to leave the firm" trigger the new Rule. What does that mean? To us, it means definitive, specific, and unchanging. It means, too, that the departing lawyer has already found a new home. Other than a lawyer leaving private practice, rare is the departing partner who tells a firm that he or she is leaving unless the departing partner knows for sure where he or she will be practicing law upon departure. COSAC seems to assume as much.

In the real world, a difference exists between considering a move and forming a "concrete plan" to move. One significant factor in shifting a lawyer from the thought to the deed is whether the lawyer's clients will move with the lawyer. As we read the proposed Rule as explicated in its Comments, nothing would prevent a lawyer who is thinking about a move from discussing with existing, past, or prospective clients whether they would follow the lawyer were he or she to decide on a "concrete plan" to move. The lawyer, then, will have already unilaterally communicated with client about whether the client will follow the lawyer to some new firm. If this is so, then the cat, as it were, is already out of the bag. We see no problem with this; our issue is, in such a circumstance, why do we need Rule 5.9? Ample authority is already there to tutor the lawyer to be clear that the choice is the client's alone. The proposed new Rule is of no use in this commonplace circumstance. What

is the point of the mandatory negotiation over a joint communication when the lawyer has already had the presumptively permissible unilateral communication with a client and, it is fair to presume, comfort from the client in forming a "concrete plan" that the client would follow the lawyer? There is no point, except to protect the law firm, not the client, and to provide the law firm with a shot at disrupting the lawyer's plan to move or to assert that the lawyer violated the new Rule.

The same is true of another real world and common situation. Law firms considering prospective laterals typically conduct due diligence on those prospects, not only on their character, competence, and fitness but also, in many cases, on the portability of the prospective lateral's clients and the potential for conflicts between the receiving firm's existing clients and any that the departing lawyer may bring. Many lateral hires are made in quest of so-called "books of business" a potential lateral may bring to the firm. Comment [11] of the proposed new Rule says that a lawyer "contemplating" departure – that is, without a "concrete plan" – may disclose confidential information about existing or prospective clients to a new firm, without notice to the existing firm, upon "informed consent" of the affected client. *But see* Rule 1.6, Comments [18A-F] (outlining circumstances in which a departing lawyer may disclose information without client consent). Rule 1.0(j) defines "informed consent" to mean an "agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." We cannot imagine a potentially departing lawyer satisfying this "informed consent" requirement without telling the affected client that the lawyer is considering a move to a new firm

to which the lawyer seeks to disclose the information. And, to complete the loop, the due diligence is likely to involve inquiry by the prospective new firm into whether the client will in fact move its business to the new firm. Here, again, the proposed Rule strikes us as a formality for the benefit of the departing lawyer's current firm, without attendant benefit to the client or the departing lawyer. And, again, the law firm that faces a loss of business may well decide, whether as a deterrent to others or in hopes of keeping some of the "book," to complicate the lawyer's mobility or assert that the departing lawyer violated the new Rule.

Finally – and we do not claim thereby to discard other scenarios not mentioned here – the proposed Rule 5.9 takes no account of the increasingly common event in which the client asks the lawyer to move to a new firm. Multiple causes may animate such a request, many characterized by a desire for lower costs or greater efficiency. By way of illustration, the client may want to consolidate all its legal services in one firm, or to marry its favored legal service provider in one concentration (*e.g.*, financing) with its favorite in a related area (*e.g.*, mergers and acquisitions), or simply to obtain fee discounts on legal services based on the volume of work. No matter the reason, the proposed Rule 5.9 makes no sense in the context of client-initiated lawyer movement from one firm to another. And here, again, though the old firm may have little chance to retain any of the client's work, this fact may only increase the incentive for the old firm to raise suspicions about what really inspired the decision of the client and lawyer to leave. The old firm has no disincentive to make life difficult for the departing lawyer and to convert its suspicions into some action against the departing lawyer.

Each of these circumstances, and doubtless others that may occur (*e.g.*, a lawyer asked to leave a firm, a contract partner offered equity in

another firm, a group of lawyers wishing to set up their own shop), is fraught with jeopardy for the departing lawyer under the proposed new Rule. This is because, contrary to Prof. Hillman's advice, COSAC's proposal regulates not just solicitation of but any communication with current and former clients, at least once the lawyer has formed a "concrete plan." But the boundaries between the permissible and the impermissible are difficult to map. The lines dividing first "considering" a move to somewhere, then "contemplating" a move to a particular firm, and then making a "concrete" decision to move – not to mention gradations in between these mental states – are at times fuzzy. Ambiguity, not clarity, prevail until the end. The end point is when a new law firm has tendered and a lawyer has accepted an offer to join that law firm. At that point, everyone agrees – and, on pain of repetition, ample authority already exists – that the departing lawyer must timely notify his or her current law firm. What troubles us (apart from, obviously, the Rule's usurpation of a lawyer's Rule 1.4 duty to notify clients), is that the ambiguity infesting the period before the end point is ripe for exploitation by law firms.

Disciplinary rules ought to be written not for precatory effect but to be enforced. Yet, as noted, the COSAC Report says (p. 8), and we agree, that these situations are unlikely to excite the attention of disciplinary authorities. Nevertheless, disciplinary rules carry consequences well beyond the grasp of professional discipline. A violation of a disciplinary rule may not alone create a private right of action, *see, e.g., Weinberg* v. *Sultan*, 142 A.D.3d 767, 769 (1st Dep't 2016), but a disciplinary rule may be incorporated into standards governing civil actions, including actions for legal malpractice or breach of fiduciary duty, *see, e.g.*, *Estate of Re* v. *Kornstein Veisz & Wexler*, 958 F. Supp. 907, 927-28 (S.D.N.Y. 1997); *Tabner* v. *Drake*, 9 A.D.3d 606, 610 (3rd Dep't 2004); Preamble ¶ [12] ("a lawyer's violation of a Rule may be

evidence of a breach of the applicable standard of conduct"). Also a potential target is the receiving firm, which could be exposed to a claim for aiding and abetting a breach of fiduciary duty. *See* Rule 8.4(a) (a law firm shall not "knowingly assist or induce another" to violate a disciplinary rule). To imagine a law firm developing allegations of such a breach, whether to intimidate or to sue, is easy, as is the potential for entangling current and former clients in a dispute not of their making, of little concern to their interests, and of damage to the legal profession. The scanty evidence presented for new Rule 5.9 does not justify even a modest risk of such an unseemly prospect.

An Alternative

It should come as no surprise that we do not think any new disciplinary rule is necessary or appropriate to regulate the business relationship between a law firm and departing lawyer(s). Nor do we think any new guidance is needed beyond ABA 489, though doubtless a Committee opinion could relieve COSAC's anxiety on the issue.

If any changes are to be made, then at most we would incorporate the following principles into Comments to Rule 1.4:

> **Notice of Departing Lawyer**
>
> *[8] When a lawyer has made a definite decision to leave the lawyer's current ongoing or dissolving law firm to join another law firm ("departing lawyer"), then the departing lawyer shall promptly give notice of the departing lawyer's decision to leave to (i) a responsible member of the current or dissolving firm and, subject to Rule 5.2(b), (ii) clients of the current or dissolving firm for whom the departing lawyer is performing substantial legal services. A law firm receiving notice of a*

departing lawyer's decision to leave the law firm may notify clients of the firm of the departing lawyer's decision to join another firm.

[9] Any notice to clients pursuant to this Rule shall state, in writing: (i) the departing lawyer's intention to leave the law firm and the anticipated date of departure; (ii)the departing lawyer's future contact information; (iii) with respect to each matter in which the departing lawyer represented the client, that the client alone has the right to choose counsel, and that the client has the choice to be represented by the departing lawyer after departure, to remain a client of the current firm, or to be represented by other lawyers or law firms; and (iv) that, by an enclosed form, the client may make the client's selection, which selection shall constitute authorization by the client concerning the transfer or maintenance of client files and other property, unless the client has already provided such direction.

[10] *Notwithstanding the definition of "law firm" in Rule 1.0(h), the foregoing comments on departing lawyers do not apply to a qualified legal assistance organization, a government law office, or the legal department of an organization.*

This proposal incorporates all the principles we set out above. We see no need to incorporate the proposed Rule 5.9(d), which by default says that a client who fails to make a choice remains a client of the current firm; this merely restates existing law that the attorney-client relationship continues until terminated. Our reference to Rule 5.2(b) is to excuse departing associates or other subordinate lawyers from bearing the burden Rule 5.9 seems to impose, which the COSAC Report does not address. We decidedly

do not favor any textual language or Comment that would extend a new rule to former clients, who are well protected in existing Rules and rightly play no role – none – in what happens between a departing lawyer and a law firm.

We should add that we have no issue with encouraging cooperation between departing lawyers and the firms that departing lawyers have concrete plans to leave. We have no problem with an additional Comment, in keeping with ABA 489, and without intrusion into a lawyer's obligation to communicate under Rule 1.4 and right to solicit under Rule 7.3, which says that a joint communication is a "preferred" means of communicating with clients. Experience tells us that cooperation is always preferable to conflict, civility always better than hostility. Forces external to the Rules – the "moral and ethical considerations" to which the Preamble refers – are the proper motivation for such instincts. The self-interest of all concerned favors these instincts. The heavy hand of a disciplinary rule is not needed to promote them.

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