**M E M O R A N D U M**

April 27, 2022

**TO: NYSBA Executive Committee and House of Delegates**

**FROM: Roy Simon, Chair, Committee on Standards of Attorney Conduct**

**SUBJECT: Compendium of Reactions to Proposed Comments to Rules 1.4 & 5.6**

After draft proposals to add Comments to Rule 1.4 were circulated to COSAC members in advance of COSAC’s April 13, 2022 plenary meeting, the draft proposals were also circulated to a prominent professor and a few lawyers who work and write in this area (departing lawyers and dissolving law firms). Most of these people had submitted comments on COSAC's earlier proposals to add a new black letter Rule 5.9, which addressed many of the same issues. Their reactions (lightly edited) are below.

***Bob Hillman (combining two emails in quick succession)***

Thanks for the update and for soliciting my comments.

The proposal is excellent and offers important guidance and clarity.  I have only one very minor suggestion.  “Notice” is used to describe both notice to clients and notice to firms.  You may want to describe the notice to firms as “departure notice,” although I doubt that anyone who gives this a careful read would be confused.

…  But my point was really minor, and I doubt that anyone will be confused the way it now stands.

Thanks for including me in this process.  Law reform in the right direction is a pleasure to watch.

***Art and Maria Ciampi***

We’ve had a chance to review the Proposed New Comments to Rule 1.4.  We  
feel that they are very well balanced, clear, concise and comprehensive.

***Les Corwin (co-author of the treatise Law Firm Partnership Agreements)***

Hi Roy, I have reviewed the proposed Comments to Rule 1.4. You and your Committee have done an excellent job and I fully endorse it. I have provided some suggested edits [in track changes form on COSAC's proposals] – all my best, Les

***Richard Hamburger (Chair of NYSBA Committee on Professional Ethics)***

I don’t like comment 15.  I think the firm should be able to immediately let go a lawyer who announces her departure.

***Anthony Davis***

Thank you for your interest in getting my comments. … The only change I want to highlight here is that legal assistance organizations ought not to be exempted from the rule because their lawyers regularly deal with clients and their clients have no less of a right to receive notification, at least that the lawyer who will be helping them is changing, than the clients of law firms. If you wish you could make the point that the notification duty is narrower because these clients may not have the same degree of choice; nevertheless the duty to notify should apply in my opinion.

***Jim Townsend (member of NYSBA Ethics Committee and its Rule 5.9 Subcommittee)***

Thanks for including me on this.  I continue to be troubled by the separate provision regarding Dissolution and wonder whether it adds anything at all.  I believe that the departure of one partner in a general partnership terminates the partnership and technically the remaining firm partners have a new partnership (with fresh accounting and tax implications).

Is this provision aimed at small firms where the, say three, partners decide to go their separate ways?  Or one leaves and two stay in partnership?  Perhaps it's neither and the firm is ceasing business in which case these comments don't add to the existing obligation to advise clients and courts where necessary. Perhaps I don't appreciate some hidden ramifications and would be helped by a problem statement. …

***Geri Krauss***

Thanks so much for this. I have enclosed my comments [as marginal comments on the Word document containing COSAC's proposals]. The biggest issue I see with this is that while the comments speak to when notice is REQUIRED, they do not provide guidance on the question foremost in every departing lawyer's mind and where guidance is most needed: when it is ethically PERMISSIBLE to contact a client, both as pertains to before or after notice to the firm or how soon after notice to the firm. Perhaps that is more a legal question than an ethical one, but I think the comments have to make clear that there is a difference with respect to the two questions and either provide some guidance with respect to the "permissible" question or punt and say it is only a legal not an ethical issue. My preference is the former as I do think there are guiding ethical principles on this which I elaborate on further in the comments I made on the attached. I will continue to study further look but I wanted to get my initial comments to you quickly and am happy to speak further about them. Enjoy your weekend.

*Geri’s marginal comments on COSAC's earlier draft proposals were as follows:*

*On Comment [8], first sentence:*

See comment below. While this applies to who must notify, there is nothing that precludes a lawyer who has had a lesser role on a case from speaking to the client or even soliciting the case. Thus, perhaps there should be clarification that this does not limit who may notify a client about a departure or solicit their business, and refer to the solicitation rules.

*On Comment [8], second sentence:*

Several issues with this: 1. while the rule is addressing the need and obligations to tell clients of the departure and seeking instructions with respect to the file, most attorneys want to know when they can tell clients that they are leaving or thinking of leaving. These are two different questions which raise different concerns. Moreover, when an attorney "has made a decision" is ambiguous and could be viewed as including a period of looking for a new position or prior to receiving an offer. Although adding "after giving notice" narrows it down with respect to the time by which formal notice needs to be given, there is nothing in the rule that actually addresses timing for either the obligation or the permissibility of giving such notice. That is based in fiduciary law which at least at present suggests that there may be situations where notice can precede notice to the firm. Thus, I think it is very important to distinguish between when an attorney and a firm have an affirmative obligation to provide notice (which this does) and either specifically comment on whether this or any other ethical rules governs when it is permissible to notify clients (i.e., whether prior to notice to the firm or how soon after notice to the firm), if so, what is the ethical rule but also caution that there is law that applies here as well.

*On Comment [10]:*

The key issue that comes up in this area is how quickly after notice of the departure is given to the when notice can be given by either side, particularly where there is no desire to give a joint notice or whether either side can speak to clients about the departure before even if the parties are considering a joint notice. This is complicated by the case law that suggests that if a departing partner immediately starts contacting clients right after telling the firm, or where a firm may instruct that it is interested in joint notice but contacts clients anyway. If the goal is to insure an even playing field and consistency of message, maybe the comment should impose a short time limit -- maybe a day or two -- after notice before either party can unilaterally contact clients so there is at least an opportunity to discuss a joint notice and erase the ambiguity as to how soon is too soon.

*On Comment [12], first sentence:*

Is this talking about joint or separate or both?

*On Comment [12], second sentence:*

Similarly, if the firm is discontinuing practice in the area, it should so state.

*On Comment [13]:*

Delay is rarely the issue, though it is an important point to make. As set forth above, the issue is how quickly can they be told. Maybe this is the place to address those concerns.

*On Comment [14], at end of first sentence (before citation to Rule 5.6):*

or having communications with the client regarding the transfer of its files

*On Comment [14], at end of second sentence (after “the period is reasonable”):*

and not pre-determined

*On Comment [14](i):*

Clarify that to the extent that these activities can be satisfactorily addressed after a move, they should not be used to delay a move so long as the attorney cooperates after the transition.

*On Comment [15], first sentence (after “continuing to practice at the firm”):*

in the same manner and with access to the same attorneys, staff, resources, files and facilities