

MEMORANDUM

April 27, 2022

TO: Executive Committee and House of Delegates

FROM: Committee on Standards of Attorney Conduct (“COSAC”)

SUBJECT: Proposed New Comments to Rules 1.4 and 5.6 Regarding Departing Lawyers

As part of COSAC’s comprehensive review of the New York Rules of Professional Conduct, COSAC is proposing new Comments to Rules 1.4 and 5.6 (set out below). These new Comments provide guidance to departing lawyers and law firms regarding their obligations to notify clients when a lawyer with primary or substantial responsibility for specific matters or clients intends to leave a law firm to join a different firm.

By way of background, in July 2021 COSAC proposed a new Rule 5.9 (entitled “Procedures for Lawyers Leaving Law Firms and Procedures for Dissolving Law Firms”). That proposal generally would have prohibited both the departing lawyer and the law firm from unilaterally notifying the firm’s clients until the departing lawyer and the firm had engaged in bona fide negotiations to craft a joint notice regarding the departing lawyer’s anticipated departure. Public comments on proposed Rule 5.9, especially the requirement to try to negotiate a joint notice by the departing lawyer and the law firm, were mixed. For example, a comment from the NYSBA Committee on Legal Aid (“COLA”) urged COSAC to exempt not-for-profit, institutional provider, and pro bono programs.

In October 2021, COSAC presented a revised version of proposed Rule 5.9 to the House of Delegates for informational purposes only. (Among other things, the revised proposal added an exemption for qualified legal assistance organizations, government law offices, and in-house legal departments.) The House of Delegates did not debate or vote on COSAC’s revised proposal for a new Rule 5.9, thus allowing more time for public reaction and internal COSAC debate.

On February 7, 2022, COSAC sent a further revised proposal for new Rule 5.9 to the Executive Committee and House of Delegates. This proposal also met with mixed reviews.

On the one hand, in March 2022 the NYSBA Committee on Professional Ethics submitted a lengthy memorandum opposing proposed Rule 5.9 or any further guidance in the black letter ethics rules (the disciplinary rules). The Ethics Committee summarized its views as follows (p. 1):

[W]e ... oppose adoption of the proposed Rule 5.9 because the proposal restricts the right of a “departing lawyer” ... 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.

The Ethics Committee also said (p. 2) that if any further guidance was needed:

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

The Ethics Committee then set out several proposed paragraphs of suggested Comments to existing Rule 1.4, which obligates lawyers and law firms to notify clients of “material developments” in a matter.

On the other hand, noted New York Law Journal columnist and professional responsibility lawyer Anthony Davis wrote a column taking issue with the Ethics Committee’s position and generally praising COSAC’s proposed new Rule 5.9. Mr. Davis said:

[T]he adoption of a rule ... as proposed by COSAC would be worthwhile and beneficial for clients as well as individual lawyers, law firms and the profession as a whole. Importantly, ... the proposed rule would protect clients’ interests by avoiding the all too frequent situation where they become “piggies in the middle” in the kinds of dispute which all too frequently arise between departing lawyers and their law firms, and which the proposed rule is intended and designed to eliminate.

Anthony E. Davis, *Proposed New Procedures for Lawyers Leaving Law Firms* (N.Y.L.J. April 5, 2022).

After considering the substance and proposed language in the Ethics Committee’s memorandum, as well as the views of others, COSAC is proposing new Comments to Rule 1.4 as well as amendments to the Comments to Rule 5.6 (which governs agreements that restrict a lawyer’s right to practice law after leaving a firm). Unlike COSAC’s proposed black letter Rule 5.9, COSAC’s proposed Comments do not require the departing lawyer and the law firm attempt to negotiate a joint notice—but the proposed Comments expressly note that joint notice is “preferable.”

To gain a wider perspective, COSAC solicited reactions from a number of people who had commented on COSAC’s earlier proposals for a new black letter Rule 5.9. These reactions are mostly favorable, endorsing both the concept of putting the guidance in Comments (rather than a black letter Rule) and approving much of the language. Here are some sample reactions from prominent lawyers who write about or represent departing lawyers or their firms:

Bob Hillman (author of HILLMAN ON LAWYER MOBILITY)

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.

* * *

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

Art Ciampi (co-author of LAW FIRM PARTNERSHIP AGREEMENTS) 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 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. ...

(Mr. Corwin also suggested three minor edits to COSAC's proposals.)

Attached to this report is a compendium of the reactions to COSAC's earlier drafts of proposed Comments to Rule 1.4.

At COSAC's plenary meeting on April 13, 2022, which was attended by more than twenty COSAC members, COSAC discussed all of the reactions in the compendium and implemented many of the suggested changes. COSAC's final proposals, for action at the Association's June 2022 quarterly meeting, are below.

Proposed New Comments to Rule 1.4

Note from COSAC: All of the proposed Comments below are new. To make them easier to read, COSAC has not underscored them.

Departing Lawyers

[8] The duty to keep a client informed about "material developments" in a matter under paragraph (a)(1)(iii), and about the "status of the matter" under paragraph (a)(3), applies when a lawyer with primary or substantial responsibility for one or more particular matters or clients is leaving a law firm to join another law firm (a "departing lawyer"). Thus, after a departing lawyer has informed a responsible member or members of the current firm of the decision to move to another firm, the departing lawyer must give prompt notice of that decision to any potentially affected clients of the current firm. A law firm has a corresponding duty, upon receiving the departing lawyer's notice of intended departure, to notify clients of the firm about the departing lawyer's decision to

join another law firm. Neither the departing lawyer nor the law firm has a duty to notify clients of the impending departure, however, if they know that the other (or another departing lawyer) has already provided such notice and the lawyer or law firm reasonably believes that the notice meets the criteria in Comment [10] to this Rule.

[9] The duties that Rule 1.4 imposes on lawyers and law firms to notify clients when a lawyer has notified a law firm of a decision to leave the firm (as described in Comment [8]) also apply when a law firm has decided to cease operations as a going concern. When a law firm has decided to cease operations as a going concern, the firm or the lawyers with primary or substantial responsibility for one or more particular matters or clients must give prompt notice to all potentially affected clients of the firm (in accordance with Comment [10]) of the decision to cease operations.

[10] Any unilateral or joint notice pursuant to Comments [8] or [9] should be in writing, must not be false, deceptive, or misleading, and should include the following information:

- (i) the departing lawyer's intention to leave the current law firm and the anticipated date of departure;
- (ii) the departing lawyer's future contact information;
- (iii) with respect to each relevant matter, the fact that the client has the right to choose counsel, and thus has the option to be represented by the departing lawyer after departure, or to remain a client of the current firm, or to be represented by other lawyers or law firms; and
- (iv) the fact that the current firm will need the client to inform the firm of its choice of counsel and, if the client wishes to transfer the client's files to the departing lawyer or to another lawyer or law firm, the firm will need the client to authorize the firm (preferably in writing) to transfer the client's files or other property accordingly (unless the client has

already notified the firm or the departing lawyer of its choice or has already provided such authorization to transfer the client's files).

[11] To avoid prejudicing or confusing clients, it is preferable (but not required) that the departing lawyer and law firm jointly notify all potentially affected clients. Accordingly, as soon as a firm knows that the departing lawyer has made a decision to leave the firm, the departing lawyer and the firm should make a bona fide effort to craft a joint notice. Whether the notice is unilateral or joint, notice must be given to the potentially affected clients promptly.

[12] Notification to clients may initially be given orally, but if notice is given orally, it should be followed promptly by a writing containing the information set forth in Comment [10]. The content of the oral and written notice may be altered, however, to reflect special circumstances that make it highly unlikely or impossible for the affected clients to move their matters with the departing lawyer.

[13] The time frame for "promptly" communicating with a client may depend on the circumstances, but neither the departing lawyer nor the firm may delay the process longer than is necessary to ensure that accurate and meaningful notice is provided to clients in accordance with Comment [10] to this Rule.

[14] Because Rule 1.4 mandates prompt notice of a departing lawyer's decision to change firms, a law firm may not include provisions in its partnership, shareholder, operating, employment or other similar type of agreement, or engage in other conduct, that prohibits, unduly delays, or discourages the departing lawyer (through financial disincentives or otherwise) from providing the requisite notice to potentially affected clients. *See* Rule 5.6(a)(1).

[15] These Comments are intended to address the obligations of lawyers and law firms solely under Rule 1.4. They are not intended to address the rights or obligations of a law firm or a departed lawyer under the law of fiduciary duties, partnership law, contract law, tort law, or other law.

[16] A lawyer or law firm representing a client in a matter pending before a tribunal may also have duties to notify the tribunal and to seek permission to withdraw if a lawyer leaves the firm or if a law firm has dissolved or is in the process of dissolution. *See* Rule 1.16(d).

[17] Notwithstanding the definition of “law firm” in Rule 1.0(h), the foregoing Comments regarding departing lawyers do not apply to a qualified legal assistance organization, a government law office, the legal department of an organization, or lawyers working at those organizations.

Proposed Amendments to Comments to Rule 5.6

Note from COSAC: COSAC proposes to add new Comments [1F] and [1G] to Rule 5.6 and to amend existing Comments [1A], [1F] and [1G] as indicated below, and to renumber existing Comment [1I], and to change the reference to “Comment [1F]” in Comment [1D] to “Comments [1F] and [1G].” New language is underscored in blue and deleted language is ~~stricken through in red~~. All other language remains unchanged from the current version of the Comment to Rule 5.6.

Comment

[1] An agreement restricting the right of a lawyer who has left a firm (a “departed lawyer”) to practice after leaving a firm limits the freedom of clients to choose a lawyer and limits the professional autonomy of lawyers. Paragraph (a) prohibits such agreements, except (i) restrictions incident to provisions concerning retirement benefits for service with the firm or (ii) restrictions justified by special circumstances described in this Comment. Throughout this Comment, the phrase “law firm” shall have the meaning given in the definition in Rule 1.0(h).

[1A] This Rule and this Comment are intended to address the obligations ~~duties~~ of lawyers and law firms solely under Rule 5.6 ~~the Rules of Professional Conduct~~. They are not intended to

address the [rights or](#) obligations of a law firm or a departed lawyer under the law of fiduciary duties, partnership law, contract law, tort law, or other **substantive** law.

[1B] Paragraph (a)(1) applies to any written or oral agreement governing or intended to govern:

- (i) the operation of a law firm;
- (ii) the terms of partnership, shareholding, or of counsel status at a law firm; and
- (iii) the terms of an individual lawyer’s full-time or part-time employment at a law firm or other entity.

[1C] Paragraph (a)(1) applies whether the agreement is embodied in a written or oral contract, a firm or employee handbook, a memorandum, or any other kind of document. Paragraph (a)(1) prohibits any agreement (other than a provision relating to retirement benefits) that prohibits or limits a departed lawyer from contacting or serving the firm’s current, former, or prospective clients, except that:

- (i) an agreement may include provisions to protect confidential or proprietary information belonging to the law firm or to the law firm’s current, former, or prospective clients; and
- (ii) an agreement may include provisions that impose reasonable restrictions or remedies on a departed lawyer in the circumstances described in Comment [\[1H\]](#) ~~[1F]~~.

[1D] Paragraph (a)(1) applies not only to agreements regarding lawyers in private practice but also to agreements between employed (“in-house”) attorneys and the clients or entities that employ them, whether in a legal or non-legal capacity. However, paragraph (a)(1) does not prevent an entity and its employed lawyers from agreeing to restrictions on post-departure non-legal functions. In every type of law firm, the departed lawyer and the law firm must balance their rights

and obligations to each other in a manner consistent with the Rules of Professional Conduct and the law governing contracts, partnerships, and fiduciary obligations, all while recognizing the primacy of client interests and client autonomy. With this in mind, Comment [1E] addresses restrictions that ordinarily violate the Rule, and Comments [1F] [and \[1G\]](#) addresses restrictions that ordinarily do not violate the Rule.

Prohibited Agreements

[1E] Agreements that ordinarily violate paragraph (a)(1) (unless they fit within the exception for retirement benefits) include, but are not limited to, agreements that purport to do any of the following:

- (i) prohibit or limit a departed lawyer from contacting or representing some or all current, former, or prospective clients of the firm;
- (ii) prohibit or limit a departed lawyer from practicing law for any period of time following his or her withdrawal (e.g., imposing a mandatory “garden leave”);
- (iii) prohibit or limit a departed lawyer from contacting or soliciting law firm employees after the lawyer has departed from the firm; or
- (iv) impose more severe financial penalties on departed lawyers who intend to compete, actually compete, are suspected of competing, or are presumed to be competing with the firm than are imposed on departed lawyers who do not compete.

Permissible Agreements

[1F] Agreements that ordinarily do not violate paragraph (a)(1) include, but are not limited to, [agreements prescribing a minimum period between a departing lawyer’s notice to the firm and](#)

the lawyer's departure, as long as the notice period is reasonable. Notice periods should be applied flexibly and should not unduly restrict lawyer mobility, because a notice period that is unreasonably long or inflexibly applied impairs client choice and lawyer autonomy. Whether the minimum period after notice is reasonable in this context will depend on the facts and circumstances, but the length of the notice period should balance three broad factors:

- (i) the firm's need for the departing lawyer to complete administrative tasks connected to departure, such as notifying clients, sending invoices, and transitioning files;
- (ii) the client's right to the lawyer of the client's choice; and
- (iii) the lawyer's right to autonomy and mobility.

[1G] Likewise, because the purpose of Rule 5.6 is to facilitate each client's choice of counsel, after a departing lawyer has announced a decision to leave, a law firm may not suspend, prohibit, or limit the departing lawyer from continuing to practice at the firm unless the firm has good cause, such as:

- (i) a reasonable, good faith belief that the lawyer may be accessing or planning to access the firm's confidential or proprietary information or the firm's property or personnel for improper or illegal reasons, or
- (ii) a reasonable, good faith belief that the lawyer, due to diminished capacity, is harming the client or is incapable of continuing to serve the client.

[1H] [1F] Other Agreements that ordinarily do not violate paragraph (a)(1) include, ~~but~~ are not limited to, agreements permitting a firm to impose reasonable restrictions or remedies if:

- (i) a departed lawyer has approved, within a reasonable time before departing from the firm, a specific, significant financial undertaking with respect to the firm that

remains outstanding where the lawyer's departure will have a material effect on the firm's ability to satisfy that undertaking; or

- (ii) a departed lawyer has, before leaving the firm, breached material employment or partnership responsibilities to the firm in a manner that has caused or is likely to cause material financial or reputational harm to the firm.

Reasonable Management Discretion

[\[11\]](#) ~~HG~~ Paragraph (a)(1) is not intended to prohibit a law firm in the ordinary course of its operations from exercising reasonable management discretion regarding case assignments, case staffing, promotions, demotions, compensation, or other aspects of a law firm's operations, finances, and management. The Rule is intended to prevent overly restrictive practices with respect to lawyers who have provided notice of an intention to leave a firm, or who have taken affirmative steps toward planning to leave the firm (with or without notice to the firm).

[End of Memo]