NEW YORK STATE BAR ASSOCIATION

Report and Recommendations of the **New York State Bar Association Committee on Standards Attorney Conduct Proposed Revisions to Comments to Rule 4.1**

October 2026

Approved by the House of Delegates on October 31, 2026.

MEMORANDUM

August 17, 2026

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

FROM: **Roy Simon, Co-Chair of COSAC**
Jim Walker, Co-Chair of COSAC

RE: **Proposed Revisions to Comments to Rule 4.1**

Introduction

This memorandum reintroduces proposed amendments to the Comment to Rule 4.1 that COSAC asks the NYSBA Executive Committee and House of Delegates ("HOD") to consider.

By way of background, in 2016, COSAC began a comprehensive review of the New York Rules of Professional Conduct, which had been adopted in 2009. The HOD approved numerous COSAC proposals, including a one-word amendment to Rule 4.1 that would add the word "material" so that Rule 4.1 would read as follows:

> *Rule 4.1. Truthfulness in Statements to Others*
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> In the course of representing a client, a lawyer shall not knowingly make a false statement of ***material*** fact or law to a third person. [Emphasis added.]

To help explain and reinforce the addition of the word "material" to the black letter text of Rule 4.1, COSAC also proposed (and the HOD approved) changes to the Comments to Rule 4.1 that would go into effect if the Appellate Division approved the amendment to the black letter text. The proposed Comment changes provided as follows:

> [1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. This rule prohibits false statements only to third persons, but false statements to clients are prohibited by other provisions, such as Rules 1.5(d)(3) and 8.4(c). As to dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.
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> [2] This Rule refers to statements of material fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted

conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category; so is the existence of an undisclosed principal, except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

The NYSBA President recommended the Rule changes to the Administrative Board of the Courts, and on June 16, 2025 the Office of Court Administration ("OCA") circulated the proposed change to the black letter text of Rule 4.1 for public comment.

After the Administrative Board of the Courts had received some negative public comments on COSAC's proposal to add "material" to the black letter text of Rule 4.1 (but *before* the Appellate Division had approved this addition), OCA asked COSAC to have a dialogue with any objectors to attempt to resolve their objections by amending COSAC's proposals. COSAC engaged in that dialogue, and certain objectors agreed to drop their objections to adding "material" in exchange for COSAC's agreement to promote further amendments to the Comments to Rule 4.1 to respond to clarify the meaning of "material." COSAC presented those Comments to the NYSBA Executive Committee. The EC voted them down, and COSAC decided not to present the proposals to the House of Delegates.

Soon afterward, effective November 10, 2025, the Appellate Division amended the black letter text of Rule 4.1 to add the word "material" before the phrase "fact or law." As a result, the changes to the Comments that were approved in 2019 have gone into effect.[1] Given the approval of this addition to Rule 4.1, we are re-introducing proposed revisions to the Comments to Rule 4.1 to explain the meaning of the word "material" in the black letter text.

Details about Comments to Rule 4.1

In response to a comment from the French-American Bar Association ("FABA"),[2] COSAC proposes to amend Comment [2] to Rule 4.1 to clarify the meaning of the materiality requirement. In particular, COSAC proposes that, in light of Appellate Division approval of the addition of the word "material" to the text of Rule 4.1, Comment [2] to that Rule should be expanded to explain that (i) statements of "material" fact are statements that a third party might reasonably rely upon, and (ii) a series of immaterial misstatements may cumulatively be material. In addition, as set forth below, COSAC proposes to clarify a change to the language of Comment [1] that was adopted

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[1] We note that in the version of Comment [2] currently posted on the NYSBA website, the first sentence reads, "This Rule refers to material misrepresentation." That sentence should read, "This Rule refers to material statements of fact," which was the version approved by the House of Delegates in 2019 and more accurately reflects the language of the Rule. The amendments we propose today would delete the word "material" so as to improve the flow of the Comment.

[2] FABA initially opposed amending Rule 4.1 to add the word "material," but after discussion with COSAC FABA agreed to withdraw its opposition to amending the black letter text of Rule 4.1 provided that COSAC would explore amendments to the Comments to make the two points that COSAC now proposes to add to Comment [2]. After internal discussion, COSAC approved the proposed amendments.

by the HOD in 2019 contingent on Appellate Division approval of the addition of the word "material" to the black letter of Rule 4.1 (which has now happened).

With respect to Comment [2], we believe that the proposed changes to Comment [2] help to explain the meaning of the word "material," which the Appellate Division has now added to the text of the Rule (and which also appears in the corresponding ABA Model Rule). "Material" in this context refers to facts on which a third party might rely. It does not refer only to major or substantial facts because third parties may rely on what might otherwise be considered minor facts. "Material" facts thus contrast with generally accepted conventions in negotiation that allow what is colloquially known as "puffery," which is already permitted as set forth in existing Comment [2] , such as estimates of value placed on the subject of a transaction or whether a client will accept a proposed settlement amount. We also believe it is worthwhile to note that a series of immaterial false statements might cumulatively be material.[3] These changes should thus promote a narrow interpretation of the concept of "immaterial" false statements of fact or law.

The proposed changes are set forth below, underlined and in blue font for additions and in red with strike-through for deletions:

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. This Rule ~~prohibits~~ addresses false statements only to third persons~~,~~ in the course of representing a client. In the context of this Rule, the phrase "third persons" includes parties to a matter, including adversary parties, but false statements to clients are prohibited by other provisions, such as Rules 1.5(d)(3) and 8.4(c). As to dishonest conduct that does not amount

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[3] An example illustrating how a series of immaterial misstatements can cumulatively become material may be useful. Suppose that in the course of Company A's negotiation of a significant product development deal, the lawyer for Company A schedules a meeting between Company A's head product developer and the counterparty on the deal, but then cancels the meeting, falsely telling the counterparty that the developer is no longer available at the scheduled meeting time. The next week, the lawyer schedules a Zoom meeting between the counterparty and the head developer, but on the day of the Zoom the developer's assistant shows up and tells the counterparty that the head developer had a sudden emergency, which is also untrue. Another meeting attempt is made, but in lieu of the meeting the lawyer sends a memo signed by the head developer outlining the bona fides of the product line. The head developer authored the memo months ago, but in-house counsel at Company A directed outside counsel to change the date of the memo to the current date to reflect when it was sent to the counterparty rather than when it was written. All along, Company A knows that the head developer is negotiating a possible move to a competitor of Company A, but the lawyer for Company A does not disclose this fact. Company A is also working diligently to retain the head developer, who is critical to the success of the product in question.

Taken individually, the various excuses for not attending a meeting with the counterparty are the kinds of immaterial "white lies" that a third person might not take as literally true, and the information set forth in the memo by the head developer remains true. Nevertheless, we think that that in these circumstances a disciplinary authority could find that the series of otherwise immaterial false statements to the counterparty, all aimed at concealing from the counterparty the fact that the developer might leave Company A, have cumulatively become "material" misrepresentations in violation of Rule 4.1.

to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of ~~material~~ fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Statements of "material" fact are statements that a third party might reasonably rely upon. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Nevertheless, a pattern or series of knowingly false immaterial statements might cumulatively be material. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Given that the Appellate Division has added the word "material" to the text of Rule 4.1, and given that COSAC made a commitment to OCA and FABA to propose and promote changes to the Comments to Rule 4.1 to explain the meaning of "material," COSAC hopes that the EC and HOD will approve COSAC's proposed amendments to the Comments to Rule 4.1.

[End of memo]