NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION
HON. JOSEPH A. ZAYAS
CHIEF ADMINISTRATIVE JUDGE
HON. NORMAN ST. GEORGE
FIRST DEPUTY CHIEF ADMINISTRATIVE JUDGE
DAVID NOCENTI
COUNSEL

MEMORANDUM

To: All Interested Persons

From: David Nocenti

Re: Request for Public Comment on a proposal to amend Rules 1.8, 1.10, 1.11, 1.12 and 1.18 of the Rules of Professional Conduct regarding conflicts of interest

Date: December 26, 2024

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The Administrative Board of the Courts is seeking public comment on a proposal recommended by the New York State Bar Association ("NYSBA") to amend the Rules of Professional Conduct relating to conflicts of interest. In particular:

- Rule 1.10 generally governs imputation of conflicts of interest. However, paragraph (h) of that rule does not relate to imputation of conflicts, and instead relates to conflicts of family members. NYSBA therefore recommends moving paragraph (h) to Rule 1.08, which governs specific conflict of interest rules.

- Rule 1.11 governs conflicts of interest of current and former government employees. NYSBA is recommending four changes to this rule:

    - eliminating the "appearance of impropriety" standard;
    - expressly stating that conflicts of government lawyers are imputed to other lawyers in the office, but providing that imputation can be overcome through screening and recusal;
    - conforming provisions regarding notice to government agencies that formerly employed a lawyer who moved to private practice and is being screened from a conflicting matter; and
    - clarifying that a law clerk to a judge may negotiate for employment with lawyers or parties appearing before the judge after notifying the judge.

- Rule 1.12 governs former judges, arbitrators and others, and their law clerks, and NYSBA recommends changes to Rule 1.12 similar to the above changes being recommended to Rule 1.11.

- Rule 1.18 addresses conflicts arising from dealings with prospective clients, and NYSBA recommends that the certain provisions of that rule (relating to notice to prospective clients when lawyers are being screened) be aligned with the recent amendments to Rule 1.10 on this issue.

The proposed amendments are attached as Exhibit 1.

A letter from NYSBA setting forth the background and reasons for the proposed amendments is attached as Exhibit 2.

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Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: David Nocenti, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 10th Fl., New York, New York, 10004. Comments must be received no later than Friday, February 14, 2025.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT 1

Proposed Amendments

Rule 1.8 of the Rules of Professional Conduct (22 NYCRR Part 1200) is amended to add a new paragraph (l) to read as follows (additions underlined):

Rule 1.8. Current Clients: Specific Conflict of Interest Rules

* * * * *

(l) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client gives informed consent to the representation and the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the client.

Paragraph (h) of Rule 1.10 of the Rules of Professional Conduct (22 NYCRR Part 1200) is amended to read as follows (deletions in ~~strikethrough~~, and additions underlined):

Rule 1.10. Imputation of Conflicts of Interest

* * * * *

(h) ~~A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.~~ The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11 and not by this Rule.

Rule 1.11 of the Rules of Professional Conduct (22 NYCRR Part 1200) is amended by amending paragraphs (b) and (d), adding a new paragraph (e), and re-designating paragraphs (e) and (f) as paragraphs (f) and (g), respectively as follows (deletions in ~~strikethrough~~, and additions underlined):

Rule 1.11. Special Conflicts of Interest for Former and Current Government and Employees

* * * * *

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in

such a matter unless the firm acts promptly and reasonably to:

~~(1) the firm acts promptly and reasonably to:~~

~~(i)~~ (1) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

~~(ii)~~ (2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

~~(iii)~~ (3) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

~~(iv)~~ (4) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6, then the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the government agency or is otherwise no longer protected by Rule 1.6.~~; and~~

~~(2) there are no other circumstances in the particular representation that create an appearance of impropriety.~~

* * * * *

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee ~~shall not~~:

(1) is subject to Rules 1.7 and 1.9 but is not subject to Rule 1.10;

~~(1)~~(2) shall not participate in a matter, unless under applicable law no one is (or by lawful delegation may be) authorized to act in the lawyer's stead in the matter, ~~in which~~ if the lawyer either (i) has a conflict under Rule 1.7 or 1.9, or (ii) participated personally and substantially in the matter while in private practice or nongovernmental employment; and ~~unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or~~

~~(2)~~(3) shall not negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment as permitted by Rule 1.12(c) and subject to the conditions stated therein.

(e) When a lawyer is disqualified from representation under paragraph (d), no lawyer

serving in the same government office, agency or department may knowingly undertake or continue representation in the matter unless the office, agency or department acts promptly and reasonably to:

(1) notify, as appropriate, lawyers and nonlawyer personnel within the office, agency or department that the personally disqualified lawyer is prohibited from participating in the matter;

(2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the office; and

(3) give written notice to any affected current or former client to enable it to ascertain compliance with the provisions of this Rule, except (i) if the notice to such client is prohibited by law no notice shall be given or (ii) if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to such client or is otherwise no longer protected by Rule 1.6.

~~(e)~~ (f) As used in this Rule, the term "matter" as defined in Rule 1.0(l) does not include or apply to agency rulemaking functions.

~~(f)~~ (g) A lawyer who holds public office shall not:

(1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

(2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

(3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's action as a public official.

Paragraphs (c) and (d) of Rule 1.12 of the Rules of Professional Conduct (22 NYCRR Part 1200) are amended to read as follows (deletions in ~~strikethrough~~, and additions underlined):

Rule 1.12. Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals

* * * * *

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-

party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may, subject to any applicable tribunal or agency rules, negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless the firm acts promptly and reasonably to:

~~(1) the firm acts promptly and reasonably to:~~

~~(i)~~ (1) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

~~(ii)~~ (2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

~~(iii)~~ (3) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

~~(iv)~~ (4) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the parties and tribunal or is otherwise no longer protected by Rule 1.6.~~; and~~

~~(2) there are no other circumstances in the particular representation that create an appearance of impropriety.~~

Subparagraph (iv) of paragraph (d) of Rule 1.18 of the Rules of Professional Conduct (22 NYCRR Part 1200) is amended to read as follows (deletions in ~~strikethrough~~, and additions underlined):

Rule 1.18. Duties of Prospective Clients

* * * * *

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

* * * * *

(iv) written notice is promptly given to the prospective client, except that if the notice would disclose confidential information protected by Rule 1.6, the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the prospective client or is otherwise no longer protected by Rule 1.6; and

EXHIBIT 2

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December 2, 2024

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25 Beaver Street
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RE: Proposed Amendments to New York Rules of Professional Conduct

Dear Mr. Nocenti:

As you know, the New York State Bar Association ("NYSBA"), through its Committee on Standards of Attorney Conduct ("COSAC"), has conducted a comprehensive review of the New York Rules of Professional Conduct (the "Rules"), and the House of Delegates has voted to approve the proposals contained in this memorandum. NYSBA recommends that the Courts consider the following proposals at this time, as they are closely related to the changes to Rule 1.10 that the Courts have recently adopted.

Summary of Proposals

NYSBA recommends the changes to the Rules described below. After the Administrative Board of the Courts has acted, NYSBA plans to align the Comments that explain the amended Rules.

- ***Rule 1.8.*** Move Rule 1.10(h) to Rule 1.8.

- ***Rule 1.10.*** Move Rule 1.10(h) to Rule 1.8 and add a provision making clear that imputation of conflicts of lawyers working in government service is governed by Rule 1.11 and not Rule 1.10.

- ***Rule 1.11.*** In Rule 1.11, which applies to lawyers working in government or other public service, the State Bar recommends the following changes:

    - Eliminate the "appearance of impropriety" standard that limits the use of screening to address conflicts of former government lawyers.

- State expressly that the conflicts of lawyers entering or serving in government law offices are imputed to other lawyers in the office, but provide that imputation can be overcome by screening and recusal of the disqualified lawyer; provide for screening procedures that parallel those for screening in private law offices; and add a provision in Rule 1.10 stating that imputation of conflicts for lawyers in government service is governed by Rule 1.11.

- Align the provisions for notice to the government agency that formerly employed a lawyer who moved to private practice, and is being screened from a conflicting matter, with those in the recent amendments to Rule 1.10.

- Clarify (by means of a cross-reference to a proposed provision in Rule 1.12 discussed below) that a law clerk to a judge or other adjudicative officer may negotiate for employment with lawyers or parties appearing before the judge or other adjudicative officer after notifying the judge or adjudicative officer.

- ***Rule 1.12.*** In Rule 1.12, which governs judges, other adjudicative officers, arbitrators, other neutrals, and their law clerks, the State Bar recommends the following changes (which parallel changes being recommended for Rule 1.11):

  - Eliminate the "appearance of impropriety" standard that limits the use of screening to address conflicts of former judges and arbitrators.

  - Align the provisions for notice to parties and the tribunal where a former judicial officer or law clerk is being screened from a conflicting matter with those in the recent amendments to Rule 1.10.

  - Clarify that a law clerk to a judge or other adjudicative officer may negotiate for employment with lawyers or parties appearing before the judge or other adjudicative officer after notifying the judge or adjudicative officer.

- ***Rule 1.18.*** In Rule 1.18, which addresses conflicts arising from dealings with prospective clients, align the provisions for notice to a prospective client where lawyers are being screened from a conflicting matter with those in the recent amendments to Rule 1.10.

This letter summarizes the considerations that led COSAC to develop each proposed amendment to the black letter text of the Rules. The proposed amendments are set out in legislative style, striking out deleted language (~~in red~~) and underscoring added language (in blue), attached as Appendix A. Below are details regarding these recommended changes.

Rule 1.8 Current Clients: Specific Conflict of Interest

Rule 1.10(h) currently reads:

> A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

This rule is not a rule governing imputation of conflicts to lawyers in a law firm (the subject matter of Rule 1.10), but rather a special conflict rule dealing with family conflicts. The rule, which does not appear in the ABA Model Rules at all, presumably appears in Rule 1.10 in order to *avoid* imputation, which would otherwise apply if it appeared in Rule 1.8. In the amendments to the Rules that the Administrative Board recently adopted, personal conflicts are no longer subject to imputation, so Rule 1.10(h) can safely be moved to Rule 1.8, which deals with "Current Clients: Specific Conflict of Interest Rules." That is where the rule logically belongs. Thus, NYSBA proposes to move Rule 1.10(h) to Rule 1.8, as a new paragraph (*l*) at the end of existing Rule 1.8.

In addition, NYSBA proposes to update the language in existing Rule 1.10(h) to make it consistent with wording used elsewhere in the New York Rules of Professional Conduct. In particular, NYSBA proposes to change the phrase "client consents after *full disclosure*" to the phrase "client gives *informed consent*," which is the phrase used in Rule 1.7(b)(4), and to change the phrase "the lawyer *concludes* that the lawyer can adequately represent the interests of the client" to the phrase "the lawyer *reasonably believes* that the lawyer will be able to *provide competent and diligent representation*" to the client, which is the phrase used in Rule 1.7(b)(1). Here is a redline showing the changes NYSBA recommends making to former Rule 1.10(h) to create new Rule 1.8(*l*):

(*l*) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client gives informed consents to the representation ~~after full disclosure~~ and the lawyer ~~concludes~~ reasonably believes that the lawyer ~~can adequately represent~~ will be able to provide competent and diligent representation to the client.

Rule 1.10 Imputation of Conflicts of Interest

For the reasons set forth in the discussion of Rule 1.8, NYSBA proposes moving Rule 1.10(h) to Rule 1.8, and for the reasons set forth in the discussion of our proposal to amend Rule 1.11(d) below, relating to imputation of conflicts of current government employees, NYSBA proposes to add a new paragraph (h) to Rule 1.10.

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

NYSBA recommends several changes to Rule 1.11. We explain each of these changes below.

Proposal # 1: Delete the "appearance of impropriety" standard in Rule 1.11(b)(2)

NYSBA proposes the elimination of 1.11(b)(2), which requires that "there are no other circumstances in the particular representation that create an appearance of impropriety" in order for a firm's screening of a disqualified former government lawyer to prevent imputation. The "appearance of impropriety" standard was intentionally omitted from the ABA Model Rules and has drawn criticism from courts and commentators due to its vagueness and the difficulty of providing any definition, and therefore its inherently subjective and unpredictable application. The rationale

for deleting the phrase from the ABA Model Rules was explained by one commentator as follows:

> When it comes to disciplining a lawyer for an appearance of impropriety, the primary criticism is that the standard is too vague and its contours are too difficult to define. The Restatement (Third) of the Law Governing Lawyers asserts that the breadth of the provision "creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it." Courts in several jurisdictions concurred.
>
> Kathleen Maher, *Keeping Up Appearances,* available at http://bit.ly/3ZiU352.

Accordingly, NYSBA now recommends that the appearance of impropriety standard be eliminated from Rule 1.11(b). Courts that apply the appearance of impropriety standard in deciding motions for disqualification may still, of course, continue to do so as their jurisdictions' jurisprudence allows. However, we do not think it advisable to make lawyers and firms subject to discipline under an ethical standard that provides so little guidance as to the contours of its scope (On the same basis, we also recommended the elimination of Rule 1.12(d)(2)'s reference to "the appearance of impropriety" in the context of various former judges, arbitrators, mediators or other third-party neutrals). This change will align the screening procedures with those in the recently adopted amendments to Rule 1.10, applicable to screening in private law offices. There will thus be a single standard set of requirements for screening applicable to private law offices and government law offices.

Proposal # 2: Amend Rule 1.11(d) to provide for screening of lateral-hire lawyers

The text of the present New York Rules does not address the extent to which Rules 1.7, 1.9 and 1.10 apply to current government lawyers. In contrast, the ABA Model Rules provide in Rules 1.10(d) and 1.11(d) that current government lawyers are governed by Rule 1.7 and 1.9 but not by Rule 1.10. Comment [2] to ABA Rule 1.11 explains why such conflicts are not imputed to other lawyers in a government law office:

> [2] ... Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

There is no parallel language in the New York Rules. As a result, Comment [9B] to the New York Rules has provided that all three Rules (Rules 1.7, 1.9, and 1.10) apply fully to current government lawyers, which meant that if a lawyer entered a government office that was conducting a matter adverse to the lawyer's former client and the entering lawyer was conflicted from working on the matter, then the entire government office was disqualified unless the former client consents. This paralleled the treatment of private lawyers.

Amendments to Rule 1.10 currently pending before the Appellate Division would permit private law firms to prevent imputation of conflicts arising from the work of moving lawyers' work at prior

firms by screening with notice. If the Appellate Division approves those amendments, a parallel change should be made to Rule 1.11 so that government law offices can also avoid imputation of conflicts by screening with notice. While this result could be obtained simply by continuing to apply the amended version of Rule 1.10 to government law offices, particular aspects of government law offices (such as the rule of necessity, discussed below) militate in favor of having a separate rule to govern imputation in government law offices. Further, Rule 1.11 has several other conflicts provisions specific to government lawyers, and it would enhance clarity to have all of the conflicts provisions applicable to government lawyers in one place to the extent practicable.

If government law offices could *not* avoid imputation via screening and notice (as private firms could avoid imputation under an amended Rule 1.10), then imputation within government law offices would have two anomalous effects: (1) private law practices could avoid imputation by screening and notice but government law offices with entering lawyers could not avoid imputation despite the "screening" amendment to Rule 1.10, and (2) private law firms employing lawyers *leaving* government jobs could resolve conflicts by screening and notice under Rule 1.11(b), while lawyers *entering* government service would either have to obtain consent from their former client (which might be difficult to obtain) or risk disqualification of the entire government law office due to an imputed conflict.

Further, unlike Rule 1.11(d), which has a so-called "rule of necessity" in a closely analogous situation, Rule 1.11(e) has no equivalent rule of necessity that would allow the particular personally disqualified lawyer to work on the matter if no one else would be authorized by law or lawful delegation to act—and, worse, if Rule 1.9 conflicts were imputed within government law offices, *no one* in the government office could work on the matter. (Rule 1.11(d) bars a government lawyer from working on any matter on which they worked personally and substantially in private practice "unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter." That provision applies both to lawyers who worked on the *same* side as the government law office while in private practice, as well as to lawyers who worked on the *opposite* side of the government law office. But Rule 1.9, which is imputed by Rule 1.10, applies only to lawyers whose clients were *adverse* to the government.)

It is also important to bring clarity to conflicts affecting government lawyers. The conclusion that Rules 1.7, 1.9, and 1.10 apply to government law offices is, we believe, compelled by a strict reading of the Rules (and in particular by the definition of "law firm" in Rule 1.0(h), which expressly includes a "government law office"), but that reading is not obvious from the face of Rule 1.11. Indeed, COSAC believes that government law offices in New York have not agreed with (or rigorously applied) the interpretation of the Rules expressed in Comment [9B]. Instead, COSAC has heard, government law offices often simply recuse an incoming lawyer who worked on conflicting matters in private practice. This recusal practice is common even if the government office is directly and materially adverse to the incoming lawyer's former private client. New York case law is generally consistent with this recusal practice (or at least has not condemned it). Depending on the nature of the conflict and the size of the government law office, New York courts have frequently declined to disqualify counsel, or have declined to reverse convictions, where a conflicted government lawyer did not participate in the matter causing a conflict.[1]

[1] *See, e.g., People v. English*, 88 N.Y.2d 30, 34 (1996) (no reversal of conviction where defendant's former lawyer was employed by a "huge" metropolitan DA's office and assigned to bureaus that had nothing to do with

From 1970 until 2009, the Code of Professional Responsibility treated government law offices the same as private law firms with respect to imputation. Screening was not a substitute for client consent under the Code, so neither a private firm nor a government law office could avoid imputation of an incoming lawyer's conflict with a former client without obtaining consent from the affected former client.

In 2008, just as in the current proposed Rule 1.11(e), the NYSBA proposed to continue the aligned treatment of private and government law offices by providing that screening within a government office, combined with notice to any affected former client of the disqualified government lawyer, would cure any conflict with a disqualified lawyer's former clients. But the New York Courts rejected that proposal, so (as under the Code) both private firms and government law offices could avoid imputation only by obtaining a former client's informed consent to a conflict. If the Courts now amend Rule 1.10 to permit *private* firms to avoid imputation by screening a conflicted lateral hire and notifying the lateral hire's former clients, then we believe the Courts should similarly amend Rule 1.11, putting private and government law offices on an equal footing, as they were under the Code.

We emphasize that the proposal to impose on government law offices imputation of conflicts and the screening and notice procedures set forth in proposed Rules 1.11(e) reflects a policy decision. The policy decision balances competing interests. On one hand, the public has a strong interest in encouraging lawyers to serve in government, minimizing undue financial and practical administrative burdens on government law offices, and avoiding the potentially drastic consequences arising out of disqualification of an entire government law office. On the other hand, the former clients of lawyers entering government have a strong interest in receiving notice of a conflict within a government law office and the resulting opportunity to challenge the recusal procedures (*i.e.*, screening measures) put in place in the government law office. Also, the public has an interest in preventing government overreach by ensuring that lawyers moving into government service cannot abuse confidential information learned from their former private clients by using that information on behalf of the government against those former private clients.

In balancing these competing interests, the ABA Model Rules omit Rule 1.11(e) entirely, thus giving more weight to encouraging government service, minimizing administrative burdens on government law offices, and avoiding total disqualification of a government law office. NYSBA's proposed Rule 1.11(e), in contrast, gives more weight to the confidentiality interests of former clients, and to the goal of bolstering public confidence in the fairness of government law offices, by requiring formal screening procedures and notice to former clients before a government law office can avoid imputation of conflicts to the entire office. COSAC recognizes the strength of both sets of competing interests but has concluded that the latter set of interests is weightier.

NYSBA thus proposes to amend Rule 1.11(d), and add a new Rule 1.11(e), as follows:

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prosecution); *People v. Dennis*, 141 A.D.3d 730, 733 (2d Dep't 2016) (same); *In re Stephanie X*, 6 A.D.3d 778, 780 (3d Dep't 2004) (concluding that former-client conflicts of current government lawyers are not imputed under the former Code of Professional Responsibility). *But see People v. Gaines*, 277 A.D.2d 900, 901(4th Dep't 2000) (conviction reversed where conflicted lawyer joined a smaller DA's office).

(1) state explicitly that Rules 1.7 and 1.9 apply to government lawyers (so, for example, government lawyers may not act if they have a personal conflict or former-client conflict), but also state explicitly that Rule 1.10 does not apply to government lawyers;

(2) make clear that a conflict under Rules 1.7 and 1.9 can be overridden in the case of necessity (*i.e.,* where no one else can act); but

(3) provide for screening procedures within the government law office that parallel those that will be applicable to former government lawyers in private law firms if the Appellate Division approve the pending amendments to Rule 1.10.

To make room for new paragraph (e), existing subparagraphs (e) and (f) in Rule 1.11 would be re-designated as subparagraphs (f) and (g). This will not disrupt consistency with the numbering of the ABA Model Rules of Professional Conduct because ABA Model Rule 1.10 ends with paragraph (d).

In addition, NYSBA proposes to insert a new black letter paragraph into Rule 1.10 making clear that in private firms and in government law offices, disqualification based on the presence of current or former government lawyers is governed by Rule 1.11 and not by Rule 1.10 (a position now stated only in the Comments to New York Rule 1.10). The new paragraph is modeled on ABA Model Rule 1.10(d). As in the ABA Model Rules, it would duplicate the proposed new provision in Rule 1.11(d)(2), so that lawyers looking at either Rule will be notified of the point.

Proposal # 3: Amend the notice requirement of Rule 1.11(b) to protect confidential information

NYSBA also proposes a modification to the screening procedures set out in existing New York Rules 1.11, 1.12 and 1.18, which will align those procedures with the screening procedures that will apply if the Appellate Division approves the proposed amendments to Rule 1.10 to permit screening to cure lateral-hire conflicts in private law offices.

Specifically, NYSBA proposes a self-executing provision that would permit the law firm to postpone sending the screening notice to lateral-hire's former client if the notice would disclose confidential information protected by Rule 1.6. The notice would usually disclose confidential information, for example, (a) in merger and acquisition matters where the new firm was working for a potential bidder in an auction where the lateral-hire had previously worked for the target on the sale process, but the bidder's interest has not yet been disclosed; or (b) in litigation matters where the new firm was in the process of investigating a claim that might be asserted against the lateral-hire's former client. When the exception allowing a delayed screening notice applies, the notice would be provided to the former client once the confidential aspect of the work was otherwise disclosed to the former client or was otherwise no longer subject to protection under Rule 1.6.

NYSBA's proposal for delayed notice to former clients roughly resembles a District of Columbia provision permitting a law firm to file the required notice with the D.C. Disciplinary Council if a firm's current client has requested confidentiality, with the notice to be released to the former client when the new matter is no longer confidential. This D.C. provision is designed for situations where the existing or new matter at the lateral-hire's new firm is confidential. It is a sensible innovation, but it would require constructing new infrastructure in New York authorizing disciplinary authorities to receive and embargo such notices. We do not believe that infrastructure would be worth the cost,

because we think our proposed self-executing provision will achieve the same purpose without the new infrastructure.

Proposal # 4: Insert in Rule 1.11(d) a reference to law clerk employment applications

For the reasons set forth below in connection with Rule 1.12, NYSBA proposes to add a provision to Rule 1.12(c) to specifically address employment applications by law clerks to parties or counsel involved in a matter in which the law clerk is participating, in line with the ABA Model Rules. NYSBA also proposes to include in Rule 1.11(d) a reference to that new provision, as in the ABA Model Rules.

Rule 1.12 Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third-Party Neutrals

NYSBA recommends changes to Rule 1.12(c) and (d). We explain each of these changes below.

Proposal # 1: Amend Rule 1.12(c) to address law clerk employment applications

NYSBA recommends including a provision addressing law clerk employment negotiations or applications with a party, law firm, or lawyer currently involved in a matter before the law clerk's employer (such as a judge or arbitrator). Currently, New York Rule 1.12(c) is silent on law clerks—it simply provides that a lawyer "shall not negotiate for employment with parties or their lawyers in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral." This same language appears in the ABA Model Rules, but the ABA Rules go on to address law clerk employment applications in a separate sentence.

As commentators have noted, the ABA Model Rule provision for law clerks is more relaxed than the rule for judges. Unlike judges, law clerks can "negotiate over future employment even when they are personally involved in a matter, but they are required to disclose these negotiations to the current employer ... [in order to] allow the judge to factor in the possibility of bias in the clerk's work and to respond accordingly". GEOFFREY HAZARD, WILLIAM HODES & PETER JARVIS, THE LAW OF LAWYERING § 17.06 (4th ed. 2017). NYSBA proposes adopting an additional sentence from the ABA Rules, with one modification, which is to add a reference to any rules that tribunals or agencies may have adopted to deal with law clerk employment negotiations and applications. We suggest adding the reference, because court rules and rules of other tribunals and agencies frequently address this issue.

Proposal # 2: Amend the notice requirement of Rule 1.12(d) to protect confidential information

For the reasons set forth above in connection with Rule 1.11 above, NYSBA proposes to modify Rule 1.12(d) to permit the law firm to postpone sending the required notice of screening to the parties and the tribunal if the notice would disclose information protected by Rule 1.6.

Proposal # 3: Amend Rule 1.12(d) to remove "appearance of impropriety" standard

For the reasons set forth in connection with the proposed amendment to Rule 1.11(b) above, NYSBA recommends deleting the reference to the "appearance of impropriety" as one ground for

disqualifying a firm that otherwise maintains a screen adequate to protect against disqualification under Rule 1.12(d).

Rule 1.18 Duties to Prospective Clients

For the reasons set forth above in connection with Rule 1.11, *supra*, NYSBA proposes to modify Rule 1.18(d) to permit the law firm to postpone sending the required notice of screening to the prospective client if the notice would disclose confidential information protected by Rule 1.6.

Respectfully,

President, New York State Bar Association

Appendix A (attached)

Appendix A

Redlined proposals to amend Rules 1.8, 1.10, 1.11, 1.12, and 1.18

NYSBA proposes to revise the indicated New York Rules to read as follows:

New Rule 1.8(*l*)

(*l*) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client gives informed consent to the representation and the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the client.

Rule 1.10(h)

(h) ~~A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.~~ The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11 and not by this Rule.

Rule 1.11(b), (d) & (e)

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless the firm acts promptly and reasonably to:

~~(1) the firm acts promptly and reasonably to:~~

~~(i)~~ (1) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

~~(ii)~~ (2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

~~(iii)~~ (3) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

~~(iv)~~ (4) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6, then the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the government agency or is otherwise no longer protected by Rule 1.6.; ~~and~~

~~(2) there are no other circumstances in the particular representation that create an appearance of impropriety.~~

....

(d) Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee ~~shall not~~:

(1) is subject to Rules 1.7 and 1.9 but is not subject to Rule 1.10;

~~(1)~~(2) shall not participate in a matter, unless under applicable law no one is (or by lawful delegation may be) authorized to act in the lawyer's stead in the matter, ~~in which~~ if the lawyer either (i) has a conflict under Rule 1.7 or 1.9, or (ii) participated personally and substantially in the matter while in private practice or nongovernmental employment; and ~~unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter~~; ~~or~~

~~(2)~~(3) shall not negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment as permitted by Rule 1.12(c) and subject to the conditions stated therein.

(e) When a lawyer is disqualified from representation under paragraph (d), no lawyer serving in the same government office, agency or department may knowingly undertake or continue representation in the matter unless the office, agency or department acts promptly and reasonably to:

(1) notify, as appropriate, lawyers and nonlawyer personnel within the office, agency or department that the personally disqualified lawyer is prohibited from participating in the matter;

(2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the office; and

(3) give written notice to any affected current or former client to enable it to ascertain compliance with the provisions of this Rule, except (i) if the notice to such client is prohibited by law no notice shall be given or (ii) if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to such client or is otherwise no longer protected by Rule 1.6.

*[**Note:** To make room for new paragraph (e), existing subparagraphs (e) and (f) in Rule 1.11 would be re-designated as subparagraphs (f) and (g).]*

Rule 1.12(c) & (d)

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may, subject to any applicable tribunal or agency rules, negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless the firm acts promptly and reasonably to:

~~(1) the firm acts promptly and reasonably to:~~

~~(i)~~ (1) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

~~(ii)~~ (2) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

~~(iii)~~ (3) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

~~(iv)~~ (4) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule, except that if the notice would disclose confidential information protected by Rule 1.6 the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the parties and tribunal or is otherwise no longer protected by Rule 1.6.~~;~~ ~~and~~

~~(2) there are no other circumstances in the particular representation that create an appearance of impropriety.~~

Rule 1.18(d)(iv)

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

...

(iv) written notice is promptly given to the prospective client, except that if the notice would disclose confidential information protected by Rule 1.6, the notice may be temporarily postponed but shall be sent promptly after such confidential information is known to the prospective client or is otherwise no longer protected by Rule 1.6; and