New York State Bar Association
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July 29, 2019

Professor Roy D. Simon
Co-Chair
NYSBA Committee on Standards of Attorney Conduct
roy.simon@hofstra.edu

Dear Professor Simon:

On behalf of the NYSBA Dispute Resolution Section ("Section"), I write to convey the Section's comments to the June 6, 2019 Memorandum from the NYSBA Committee on Standards of Attorney Conduct ("COSAC"), proposing amendments to certain of the New York Rules of Professional Conduct. Specifically, the Section has recommendations regarding the commentary accompanying COSAC's proposals to Rules 2.4 and 7.2.

Rule 2.4

The Section believes that the proposed changes to Rule 2.4 are generally desirable, but views a portion of the revisions to Comment 3 as potentially confusing. As discussed on pages 3-4 of the Memorandum, the proposed revision would read, in part, as follows:

> ". . . Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them and to ~~For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should~~ inform unrepresented parties of the important differences between the lawyer's role as a third-party neutral and the lawyer's role as a client representative, including ~~the inapplicability of~~ the fact that the attorney-client evidentiary privilege does not apply when the lawyer is serving as a neutral. . . ."

In the Section's view, the last clause of that sentence – "including the fact that the attorney-client evidentiary privilege does not apply when the lawyer is serving as a neutral" – is potentially confusing, in that the mediation privilege does apply to render mediation discussions confidential, and unrepresented parties may not comprehend the distinction between the two types of protection. Instead, the Section recommends that the last clause be deleted. Accordingly, the comment would read, in part, as follows:

> ". . . Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them and to ~~For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should~~ inform unrepresented parties of the important differences between the lawyer's role as a third-party neutral and the lawyer's role as a client representative., ~~including the~~

~~inapplicability of the fact~~ that ~~the attorney-client evidentiary privilege~~ ~~does not apply when the lawyer is serving as a neutral~~. . . ."

The Section has no other recommendations regarding the balance of the text in, or the other changes proposed by COSAC to, Comment 3 of Rule 2.4.

Rule 7.2(c)

The Section believes that the proposed changes to Rule 7.2 are also generally desirable. However, with regards to Comment 10 to Rule 7.2, which appears on page 18 of the Memorandum and specifically addresses Rule 7.2(c), the comment discusses certain exceptions to the general prohibition against lawyers holding her/himself out as having been "certified as a specialist." In addition to identifying the designation of lawyers practicing before the Patent and Trademark Office and the designation of admiralty practice, the Section believes that additional clarification regarding the designation of arbitrators and mediators by certain organizations in the alternative dispute resolution field would also be helpful to the bar and necessary to avoid unwarranted and unintended transgressions of the prohibition.

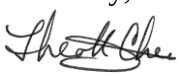
Specifically, before the final sentence – "A lawyer's communications about these practice areas are not prohibited by this Rule." – the Section recommends that the following additional language be inserted: "Similarly, organizations such as the Chartered Institute of Arbitrators, the Center for Effective Dispute Resolution, and the International Mediation Institute designate arbitrators and mediators as experienced in the alternative dispute resolution field." Thus, the entire comment would read as follows:

> The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. Similarly, organizations such as the Chartered Institute of Arbitrators, the Center for Effective Dispute Resolution, and the International Mediation Institute designate arbitrators and mediators as experienced in the alternative dispute resolution field. A lawyer's communications about these practice areas are not prohibited by this Rule.

The Section has no other recommendations regarding the balance of the text in, or the other changes proposed by COSAC to, Rule 7.2.

Thank you very much for your time and consideration. If you have any questions, please do not hesitate to contact me.

Sincerely,



Theodore K. Cheng
Chair
Dispute Resolution Section