MEMORANDUM

August 13, 2019

For Public Comment

COSAC Proposals to Amend Rules 4.2, 4.3, 8.1, 8.3, and 8.4 of the New York Rules of Professional Conduct

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The New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") is engaged in a comprehensive review of the New York Rules of Professional Conduct. In this memorandum, COSAC is circulating for public comment proposals to amend various New York Rules of Professional Conduct and their Comments. We invite comments. **Comments are due at 5:00 p.m. on Friday, October 25, 2019.**

Please email comments to roy.simon@hofstra.edu, and please submit any proposed new or different language in redline style (like COSAC's proposals below).

Below are COSAC's proposals to amend the following Rules (and to amend or add certain Comments to these Rules):

- Rule 4.2: Communication with Person Represented by Counsel
- Rule 4.3: Communicating with Unrepresented Persons (two proposals)
- Rule 8.1: Candor in the Bar Admission Process (two proposals)
- Rule 8.3: Reporting Professional Misconduct (two proposals)
- Rule 8.4: Misconduct (two proposals)

Proposed changes to the black letter Rules can take effect only if they are adopted by the Appellate Divisions of the New York state courts. In contrast, proposed changes to Comments can be made by the House of Delegates of the New York State Bar Association without judicial approval (although some proposed changes to the Comments are contingent on Appellate Division approval of the related changes to the black letter Rules).

We first summarize the proposals, then explain the issues and reasoning that led COSAC to propose each particular amendment. We set out each proposed amendment in redline style, striking out deleted language (~~in red~~) and underscoring added language (in blue).

Summary of Proposals

- ***Rule 4.2.*** Amend Comment [4] to Rule 4.2 to reference proposed new Comment [2A] to Rule 4.3, which refers to communications with represented persons via social media.
- ***Rule 4.3 (first proposal).*** Amend Comment [2] to resolve the current discrepancy between uses of the terms "person" and "party" in the Comment.
- ***Rule 4.3 (second proposal).*** Add new Comments [2A] and [2B] to provide additional guidance as to how Rule 4.3 applies in the context of social media.
- ***Rule 8.1 (first proposal).*** Add a new Rule 8.1(b) to clarify that the disclosure requirements of Rule 8.1(a) are subject to certain confidentiality requirements in the Rules.
- ***Rule 8.1 (second proposal).*** Amend Comment [1] to make clear that the Rule applies to applications for reinstatement just as it applies to applications for admission.
- ***Rule 8.3 (first proposal).*** Amend Rule 8.3(c)(1) to provide that the exception to mandatory reporting where information regarding a lawyer's violation of law or rules is confidential under Rule 1.6 also extends to information that is confidential under Rules 1.9 or 1.18. Also amend Comment [2] to make clear that the disclosure obligations of the Rule cannot be avoided by entering into confidential settlements or other private agreements.
- ***Rule 8.3 (second proposal).*** Amend Comment [3] to provide guidance on the application of the Rule by making clear that a lawyer's conversion or theft of a client's or third party's funds raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer.
- ***Rule 8.4 (first proposal).*** Amend Comment [2] to provide guidance on the application of the Rule by making clear that conversion or theft of a client's or third party's funds reflects adversely on a lawyer's fitness to practice law.
- ***Rule 8.4 (second proposal).*** Amend Rule 8.4(c) (i) by adding a provision to make clear that the Rule does not prohibit a lawyer from conducting an otherwise lawful covert investigation, and (ii) by adding a new Comment [2A] to provide guidance on the scope of the covert investigation provision.

The remainder of this report will explain each of COSAC's recommendations one by one.

Rule 4.2
Communication with
Person Represented by Counsel

Proposed amendment to Comment [4] to Rule 4.2

COSAC proposes to amend Comment [4] to Rule 4.2 as follows:

> [4] This Rule does not prohibit communication with a represented party or person or an employee or agent of such a party or person concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person or between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. A lawyer is also not prohibited from accessing the publicly available online information of a represented person or "following" that person's publicly available social media account. *See* Rule 4.3, Comment [2A]. Nor does this Rule preclude communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer having independent justification or legal authorization for communicating with a represented party or person is permitted to do so.

COSAC Discussion of Rule 4.2, Comment [4]

The proposed change to Comment [4] to Rule 4.2 makes clear that mere notice that a lawyer is "following" the social media account of a represented person is not, without more, a communication "about the subject of the representation" for purposes of Rule 4.2.

The amendment to Rule 4.2, Cmt. [4] is consistent with COSAC's proposal to add a new Comment [2A] to Rule 4.3 to address certain issues regarding social media. The new Comment [2A] to Rule 4.3 – which is cross-referenced in the amended language in Rule 4.2, Cmt. [4] – would provide as follows:

> [2A] A lawyer representing a client may, directly or through an agent, access the publicly available online information of an unrepresented or ***a represented person***, including the person's social networking sites, without giving notice to or seeking consent from the unrepresented person, and without giving notice to or seeking consent from the ***represented person or the represented person's attorney.*** Moreover, a lawyer may also, directly, or through an agent, "follow" the public social

> media account of a unrepresented or a ***represented person***, even if that generates a notice of the "follow" to the account holder. [Emphasis added.]

The proposed amendment to Rule 4.2, Cmt. [4] thus reflects the interpretation of Rule 4.3 set forth in the proposed new Rule 4.3, Cmt. [2A]. The final sentence of proposed Comment [2A] is meant to address concerns discussed below regarding a proposed amendment to Rule 8.4(a).

Also relevant to Rule 4.2 is COSAC's proposed new Comment [2B] to Rule 4.3 which would include the following reference to Rule 4.2: "The provisions of this Rule [4.3] and its application to social media are not meant to inhibit activities of a lawyer in advising or supervising an otherwise lawful covert investigation that does not violate Rule 4.2." This sentence is explained below in COSAC's discussion of Rule 4.3 (second proposal).

Rule 4.3 (first proposal)
Communicating with Unrepresented Persons

Proposed amendments to Comment [2] to Rule 4.3

COSAC believes that Comment [2] to Rule 4.3 should be made internally consistent. Currently, it is internally inconsistent as to "party" vs. "person," sometimes using one term, sometimes the other, without any apparent rationale. We propose amendments to address this point as follows:

> [2] The Rule distinguishes between situations involving unrepresented ~~parties~~ persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented ~~party~~ person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

COSAC Discussion of Rule 4.3, Comment [2]

The proposed amendments to Comment [2] (changing "parties" and "party" to "persons" and "person") clarify that the protections of Rule 4.3 are not limited to persons who are

formal "parties" to a proceeding and make the language of Comment [2] internally consistent. The text of the Rule covers a lawyer's dealings with an unrepresented "person," unlike the narrower scope of its predecessor DR 7-104(A)(2), which pertained to an unrepresented "party." At the time Rule 4.3 was adopted, COSAC reasoned that the ABA language of "person" was more consistent with the purpose of the Rule than the narrower term "party" because the term "person" would also apply to (i) an actual or potential witness, (ii) a person with an interest in a matter who is not currently a party, and/or (iii) a person involved in a transaction or other non-litigation matter. Yet Comment [2] continues to refer to "party" in two places, for no discernible reason. "Party" can also have a broader meaning similar to "person," but replacing "party" with "person" would avoid potential confusion. A narrower understanding of the word "party" would seem inconsistent with the text and policy of Rule 4.3.

Rule 4.3 (second proposal)
Communicating with Unrepresented Persons

Proposed new Comments [2A] and [2B] to Rule 4.3

Increasingly, lawyers are locating and communicating with witnesses, potential opposing parties, and others via social media. How does Rule 4.3 apply in the context of social media? The Comments to Rule 4.3 do not currently address social media, so COSAC is proposing the following new Comment [2A]:

> [2A] A lawyer representing a client may, directly or through an agent, access the publicly available online information of an unrepresented or a represented person, including the person's social networking sites, without giving notice to or seeking consent from the unrepresented person, and without giving notice to or seeking consent from the represented person or the represented person's attorney. Moreover, a lawyer may also, directly, or through an agent, "follow" the public social media account of a unrepresented or a represented person, even if that generates a notice of the "follow" to the account holder.
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> [2B] A lawyer may also, directly or through an agent, request an unrepresented person's permission to access non-public information on the person's social media sites. However, a lawyer or lawyer's agent requesting access to non-public information should use his or her real name and an accurate profile. The lawyer or agent may not seek access to such information by using any inaccurate or misleading information or by using a pretextual or deceptive basis that is likely to cause the unrepresented person to misunderstand the lawyer's role in the matter – *see* Rules 4.1 and 8.4(c). If the unrepresented person requests any additional information, the lawyer or agent should either accurately provide the requested information or withdraw the request for access to the unrepresented person's private information. The provisions of this Rule and its application to social media are not

> meant to inhibit activities of a lawyer in advising or supervising an otherwise lawful covert investigation that does not violate Rule 4.2.

Consistent with the above proposal, COSAC further proposes to amend Comment [4] to Rule 4.2 by adding the following new sentence:

> [4] ... A lawyer is also not prohibited from accessing the publicly available online information of a represented person or "following" that person's publicly available social media account. *See* Rule 4.3, Comment [2A]. ...

The proposed new sentence in Rule 4.2, Cmt. [4] is discussed above.

COSAC Discussion of Rule 4.3, Comment [2A]

Although lawyer involvement with social media is subject to the same broad ethical principles as other lawyer conduct, social media sites have such particular functionalities and uses that additional guidance on the subject and its nuances may be appropriate.

Ethics authorities in New York and many other jurisdictions agree that a lawyer may access the public portions of social networking sites to gather publicly available information. *See*, *e.g.*, N.Y. State Ethics Op. 843 (2010) (providing that a lawyer may access publicly available online information of an opposing party, including the party's social networking sites). This is so whether the person about whom the information is gathered is represented or unrepresented.

Ethics authorities have also spoken, but not with a single voice, on whether a lawyer may initiate an action on a user's social networking site to gain access to nonpublic information, *e.g.*, by seeking to "friend" a user on Facebook. The authorities agree that a lawyer may not use deception or pretext to gain access to non-public information. Nor may a lawyer instruct or permit an agent (such as a paralegal or investigator, or the lawyer's own client) to use deception or pretext – *see* N.H. Ethics Op. 2012-13/05).

Ethics opinions have said that a lawyer may not have a third person "friend" an unrepresented witness to obtain non-public information for impeachment purposes without revealing to the witness either his or her association with the lawyer or real purpose for the "friend" request. *See* Philadelphia Ethics Op. 2009-02 (relying on rules against conduct involving dishonesty, fraud, deceit or misrepresentation and prohibiting a lawyer from making a false statement of fact or law to a third person); *accord*, *e.g.,* S.D. Ethics Op. 2011-2; N.H. Ethics Op. 2012-13/05. Penn. Ethics Op. 2014-300 permits a lawyer to connect with an unrepresented person through a social networking website if the attorney clearly provides his identity and purpose for contacting the individual. *Accord*, S.D. Ethics Op. 2011-2; Mass. Bar Op. 2014-5; N.H. Ethics Op. 2012-13/05.

Other authorities have adopted a more permissive approach. These more permissive authorities allow lawyers or their agents to use their real names and profiles to send a "friend" request to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request, as long as (i) only truthful

information is used to obtain access to the website and (ii) the lawyer complies with all other ethical requirements. *See* N.Y. City Ethics Op. 2010-2 (2010) (noting the New York Court of Appeals policy favoring informal discovery); *accord* Ore. Ethics Op. 2013-189 (providing, however, that if the person who owns the site asks the lawyer for additional identifying information, or if the lawyer has reason to believe the person misunderstands the lawyer's role, then the lawyer must either provide additional information or withdraw the request).

COSAC believes that the latter approach, though more permissive, provides sufficient safeguards and is the more appropriate option. Proposed Comments [2A] and [2B] to Rule 4.3 are based in part on Comment [3] to New Mexico's Rule 4.3, effective December 31, 2017, which says:

> [3] ... With the client's consent, a lawyer or a lawyer's nonlawyer assistant may request permission to view the restricted portions of an unrepresented person's social media, website, or profile, provided that the lawyer or the nonlawyer assistant (1) uses a full name, (2) provides status as a lawyer or nonlawyer assistant, and (3) discloses the name of the client and the matter. A lawyer or nonlawyer assistant must not use deception or misrepresentation to gain access to information about the unrepresented person that would otherwise be unavailable. Special caution must be used when a lawyer represents a client who is adverse to an unrepresented party. If the unrepresented person asks for additional information from the lawyer or the nonlawyer assistant in response to the request that seeks permission to view the social media profile, the lawyer must accurately provide the information requested by the person or withdraw the viewing request.

COSAC's proposed Comment [2A] differs in some particulars from New Mexico's Comment, but COSAC agrees with New Mexico that the Comments to Rule 4.3 should address issues relating to an unrepresented person's social media accounts.

The final sentence of proposed Comment [2B] to New York Rule 4.3 is meant to address concerns discussed below regarding a proposed amendment to Rule 8.4(a). The cross-reference Rule 4.2, Cmt. [4] is needed because proposed new Comment [2A] to Rule 4.3 refers in several places to a "represented person." Consistent with COSAC's proposal to amend Rule 4.2, Cmt. [4], proposed Comment [2A] makes clear that a mere notice that a lawyer is "following" the social media account of a represented person is not, without more, a communication "about the subject of the representation" for purposes of Rule 4.2.

COSAC is continuing to study Rule 4.3 and may propose additional amendments to Rule 4.3 and its Comments in the near future.

Rule 8.1 (first proposal)
Candor in the Bar Admission Process

Proposed amendment adding a new Rule 8.1(b)

Rule 8.1 requires lawyers to make disclosures in specified circumstances, but the Rule contains no exception for protected information. To remedy this shortcoming, COSAC proposes the following new paragraph (b) to Rule 8.1:

> (b) This Rule does not require disclosure of information protected by Rules 1.6, 1.9, or 1.18, or information gained through participation in a bona fide lawyer assistance program.

COSAC Discussion of Rule 8.1(b)

ABA Model Rule 8.1 has an explicit exception for information protected by Rule 1.6. The 2005 COSAC version of proposed Rule 8.1 followed the ABA's lead by explicitly providing that disclosure is not required of information otherwise protected by Rule 1.6. A provision in the 2008 NYSBA version of proposed Rule 8.1(b) included that same exception and added an additional clause providing that disclosure is not required of information gained while participating in a *bona fide* lawyer assistance program.

Consistent with the exception to ABA Model Rule 8.1 for confidential information, Comment [3] to ABA Model Rule 8.1 notes that a lawyer representing an applicant for admission is governed by Rule 1.6 (and in certain cases by Rule 3.3). Likewise, Comments to Rule 8.1 proposed by COSAC in 2005 and by the NYSBA in 2008 also referred to the applicability of Rule 1.6.

However, when the New York Courts adopted Rule 8.1 effective April 1, 2009, the Courts dropped proposed Rule 8.1(b), and thus eliminated the exceptions for information protected by Rule 1.6 or gained in a *bona fide* lawyer assistance program. Since Rule 8.1 as adopted did not contain any exception for confidential information, the textual basis for proposed Comment [3] no longer existed, so COSAC deleted it. The current version of Rule 8.1 has only two Comment paragraphs and does not refer to Rule 1.6 or to lawyer assistance programs.

Rule 8.1 is thus in tension with Rule 8.3, which ordinarily requires a lawyer to report a serious violation of the Rules by another lawyer, but includes an express exception providing that Rule 8.3 "does not require disclosure of: (1) information protected by Rule 1.6; or (2) information gained ... while participating in a bona fide lawyer assistance program." COSAC proposes adding similar confidentiality exceptions to Rule 8.1.

When the Courts omitted these exceptions in 2009 by rejecting the language of proposed Rule 8.1(b), it is not clear whether the Courts meant to require disclosure of information protected by Rule 1.6 and information obtained through a lawyer assistance program. Simon and Hyland suggest that the Courts did not mean to require lawyers to tell bar admission authorities about such confidential information, and further suggest that the Rule be interpreted to include an implied exception. *Simon's New York Rules of Professional Conduct Annotated* 1666 (2019 ed.) ("we should imply language in Rule 8.1 protecting

confidential information and information acquired through a *bona fide* lawyer assistance program").

COSAC recommends resolving this ambiguity by proposing a new Rule 8.1(b), using the same language that the NYSBA recommended in 2008, to clarify that there are indeed exceptions for information protected by Rule 1.6 and information gained while participating in a *bona fide* lawyer assistance program. The justification for these exceptions is similar to the justification that underlies the parallel exceptions in Rule 8.3(c). Moreover, the same justification extends to confidential information as to former clients under Rule 1.9, and as to prospective clients under Rule 1.18, so COSAC has added references to Rules 1.9 and 1.18. Finally, the proposed exceptions are justified by the need to avoid discouraging bar applicants who desire to retain counsel or to contact a lawyer assistance program for help with substance abuse, stress, or other problems.

Rule 8.1 (second proposal)
Candor in the Bar Admission Process

Proposed amendment to Rule 8.1, Comment [1]

While the Rule and Comment refer only to applications "for admission" to the Bar, COSAC proposes to make clear in a Comment that the Rule applies equally to applications for reinstatement. The amended Comment would read as follows:

> [1] If a person makes a material false statement in connection with an application for admission or reinstatement, it may be the basis for subsequent disciplinary action if the person is admitted or reinstated and in any event may be relevant in a subsequent admission or reinstatement application. The duty imposed by this Rule applies to a lawyer's own admission or reinstatement as well as that of another.

COSAC Discussion of Rule 8.1, Comment [1]

COSAC believes that the policies supporting discipline for false statements in bar applications apply just as strongly in the case of applications for reinstatement as they do in the case of original applications for admission. COSAC therefore proposes to make clear that the Rule applies equally in both contexts.

Rule 8.3 (first proposal)
Reporting Professional Misconduct

Proposed amendments to Rule 8.3(c)(1) and Comment [2]

COSAC proposes two changes to Rule 8.3 and its comments so as to refine or clarify the scope of that Rule's reporting obligation and its exceptions.

First, Rule 8.3 requires that lawyers in certain circumstances report professional misconduct, and Rule 8.3(c) sets forth certain exceptions to that requirement. While the exceptions currently apply to information confidential pursuant to Rule 1.6, they do not currently extend to information that is confidential under Rules 1.9 or 1.18.

Second, some lawyers and law firms may believe that they can escape from the duty to report another lawyer in their own firm by entering into a confidential settlement agreement (or other form of nondisclosure agreement) with an accuser.

To remedy these shortcomings, COSAC proposes both (i) an amendment to the text of Rule 8.3(c)(1) and (ii) a corresponding explanatory amendment to Comment [2] to Rule 8.3. The proposed amendment to the text of Rule 8.3 provides that there is an exception to the reporting requirement for information that is confidential under certain rules other than Rule 1.6. The proposed amendment to Comment [2] makes clear that confidential settlement agreements by themselves do not excuse otherwise mandatory reporting. The amended versions of the Rule and Comment would provide as follows:

> **(c) This Rule does not require disclosure of:**
>
> **(1) information otherwise protected by Rules 1.6, 1.9, or 1.18; or ...**

Comment

> [2] A report about misconduct is not required where it would result in violation of Rules 1.6, 1.9, or 1.18. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests. If a lawyer knows reportable information about misconduct that is not protected by Rule 1.6 or other confidentiality Rules, then Rule 8.3(a) requires a lawyer to report the information to a tribunal or other appropriate authority even if there are contractual restrictions on disclosing the information, such as in a settlement agreement or nondisclosure agreement. For example, if a lawyer is accused of sexual harassment, and if other lawyers in the firm come to know that such misconduct occurred and raises a substantial question about the alleged harasser's fitness as a

lawyer, the other lawyers in the firm cannot avoid their reporting obligations under Rule 8.3(a) by signing a confidential settlement agreement with the accuser.

COSAC Discussion of Rule 8.3(c)(1) and Comment [2]

The proposed change to the text of Rule 8.3(c)(1) would provide that the exception includes not only information that is confidential with respect to current clients under Rule 1.6, but also information that is confidential with respect to former clients under Rule 1.9 and with respect to prospective clients under Rule 1.18. COSAC believes that the policy considerations supporting the exception apply equally no matter which of these Rules provides the basis of confidentiality. This proposal would align the confidentiality exception to Rule 8.3 with the confidentiality exception to Rule 8.1 as COSAC has proposed to amend the latter (discussed above), and for the same reasons.

The second issue addressed in this proposal concerns the relationship between Rule 8.3 and nondisclosure agreements ("NDAs") or other contractual confidentiality provisions. This issue came to COSAC's attention in March 2018 when the Solicitors Regulation Authority in the U.K. sent lawyers a notice reminding them that lawyers are required to report potential professional misconduct to disciplinary authorities, and warning law firms that nondisclosure agreements do not negate that reporting requirement. "The authority noted that it has received 'relatively few' complaints of inappropriate sexual behavior, just 21 complaints over a two-year period ending in October 2017," and noted that media reports have suggested that "the low levels of reporting may be the result of NDAs and cultural issues within some firms." Coe, *UK Regulator Sends Law Firms Gag Order Warning Shot* (Law360 Mar. 12, 2018).

The proposed amendment would clarify that a lawyer otherwise required to report misconduct cannot expand the exceptions to the reporting requirement set forth in Rule 8.3(b) by contracting to keep the information confidential. *See* Krane, *You Can't Stop Client from Complaining* (NYPRR Sept. 2003).

Rule 8.3 (second proposal)
Reporting Professional Misconduct

Proposed amendment to Comment [3] to Rule 8.3

Many lawyers are uncertain about when Rule 8.3(a) requires them to report another lawyer's violation of the Rules of Professional Conduct. COSAC proposes to add some guidance in this area by amending Comment [3] to Rule 8.3 as follows:

> [3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions, but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is therefore required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. For example, when a lawyer learns that another lawyer has violated the Rules through conversion or theft of a client's or third party's funds, such a violation raises a substantial question as to the accused lawyer's honesty, trustworthiness or fitness as a lawyer. For other examples of violations that would mandate reporting, see Rule 8.4, Comment [2]. A report should be made to a tribunal or other authority empowered to investigate or act upon the violation.

COSAC Discussion of Rule 8.3, Comment [3]

Rule 8.3(a) mandates reporting when a lawyer's known violation of the Rules "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer." That standard is extremely ambiguous. None of the terms triggering a reporting obligation are defined in Rule 1.0 ("Terminology") or elsewhere in the Rules. Comment [3] to Rule 8.3 is relevant but not particularly helpful to the practitioner – it merely states that a "measure of judgment" is required, and that the word "substantial" refers to the "seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." By contrast, ABA Model Rule 1.0(*l*) defines the term "substantial" as follows: "'Substantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance." (New York has not adopted this definition and the New York Rules do not define the term "substantial.")

Comment [2] to Rule 8.4 (not Rule 8.3) says more about the types of conduct that meet the mandatory reporting test. It says:

> [2] ... Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

Simon and Hyland comment that it is easy to come up with examples of violations that implicate a lawyer's "honesty" (*e.g.*, fraud, deception, misrepresentation, backdating documents, creating false evidence, and stealing funds from trust accounts), but it is difficult

to come up with examples of conduct that implicates "fitness as a lawyer." *Simon's New York Rules of Professional Conduct Annotated* 1681 (2019 ed.).

In Massachusetts, the Office of Bar Counsel (the Massachusetts disciplinary authority) has published an official Policy Statement that provides some additional guidance on conduct lawyers are required (or not required) to report. Of particular import here, the Policy Statement says:

> *There are some such matters that clearly fall within the scope of "substantial" misconduct: theft, conversion, or negligent misuse of client funds resulting in deprivation to the client*; a felony conviction, or perjury or a misrepresentation to a tribunal or court. As to an impaired or disabled lawyer, certainly when a mental or physical problem results in the abandonment of clients or law practices, the lawyer with knowledge of these types of problems is required to report the situation to Bar Counsel.
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> There are other matters that must be reported, such as when, as noted in Comment [1] to Rule 8.3, in a lawyer's judgment, there is likelihood of harm to a victim who is unlikely to discover the offense. For example, an attorney with knowledge of a lawyer's misrepresentation to a client and concomitant failure, or impending failure, to file a claim within the statute of limitations, which does not fall within the confidentiality exception, is required to report that lawyer if the client is unaware of the problem and would likely suffer substantial damage as a result of the lawyer's misconduct.
>
> There also are some violations that clearly do not fall within the scope of Mass. R. Prof. C., 8.3. For example, the failure of a lawyer to return a file as promptly as might have been optimal would not require a report, nor would knowledge that a lawyer failed to act with reasonable diligence, if the matter caused little or no potential injury to the client or others. [Emphasis added.]

Reporting Professional Misconduct: An Analysis of the Duties of a Lawyer Pursuant to Mass. R. Prof. C. 8.3 (1998) (citations omitted). *See also* S. Best, *The Snitch Rule and Beyond, Mandatory and Permissive Reports of Lawyer Misconduct under Mass. RPC 8.3* (2016).

The Massachusetts Bar Counsel's Policy Statement thus "clearly" mandates reporting of misconduct involving client financial matters.

Courts in New York have also consistently emphasized the serious nature of escrow account violations and other financial malfeasance by lawyers. Each Appellate Department has in recent years disbarred lawyers who misused or misappropriated escrow funds or otherwise breached fiduciary duties regarding money. *See, e.g., In re Bloomberg,* 154 A.D.3d 75 (1st

Dep't 2017) (disbarment for lawyer who intentionally converted $200,000 of client funds); *Matter of McMillan,* 164 A.D.3d 50 (2d Dep't 2018) (disbarment for lawyer who deprived sister of inheritance while acting as administrator of deceased mother's estate); *Matter of Castillo*, 157 A.D.3d 1158 (3d Dep't 2018) (disbarment for converting client funds to personal use); *In re Agola,* 128 A.D.3d 78, 6 N.Y.S.3d 890 (4th Dep't 2015) (disbarment for misappropriating client advances earmarked for expenses).

Likewise, all four Appellate Departments have suspended lawyers who engaged in financial misconduct. *See, e.g., Matter of Pierre*, 170 A.D.3d 36 (1st Dep't 2019) (five year suspension for commingling client and personal funds using escrow account to pay personal and business expenses); *Matter of Costello*, 174 A.D.3d 34 (2d Dep't 2019) (one year suspension for misappropriating client funds and failing to maintain required bookkeeping records for attorney escrow accounts); *Matter of Kayatt,* 159 A.D.3d 101 (3d Dep't 2018) (two year suspension for using escrow accounts as business and personal accounts to shield personal funds from tax authorities); *In re McClenathan*, 128 A.D.3d 193 (4th Dep't 2015) (one year suspension for misappropriating client funds and engaging in other escrow account violations).

Ethics opinions also emphasize the importance of abiding by the rules relating to honesty and escrow accounts. *See* N.Y. State Ethics Op. 1165 (2019) (under Rule 1.15, a lawyer "must not remove from the trust account those sums that the client questions until the dispute is resolved"); N.Y. City 2017-2 (a lawyer who learns that another lawyer has fraudulently billed a client must report the other lawyer pursuant to Rule 8.3 unless the report would reveal client confidences without client's consent); N.Y. State Ethics Op. 965 (2014) (under Rules 1.15 and 8.4, "[c]lient funds in a lawyer's escrow account may not be shielded from lawyer's creditor by transferring them to an escrow account held by the lawyer's lawyer").

COSAC believes it would make sense for the Comments to Rule 8.4 to include a statement recognizing the consistent treatment by courts of lawyers who convert or steal client funds, or otherwise breach their duty to maintain "a high degree of vigilance" to ensure that funds entrusted to lawyers in a fiduciary capacity are returned upon request. *See Matter of Galasso*, 19 N.Y.3d 688 (2012) (affirming finding of Rule 1.15 violation by a lawyer who had failed to supervise his law firm's bookkeeper, resulting in loss of client funds). The proposed amendment to Comment [3] to Rule 8.3 therefore makes clear that offenses such as conversion or theft of client funds must be reported. The proposed amendment also cross-references Comment [2] to Rule 8.4, which provides additional and helpful guidance as to what kinds of misconduct reflect adversely on fitness to practice law.

Rule 8.4 (first proposal)
Misconduct

Proposed amendment to Comment [2]

Comment [2] to Rule 8.4 provides some guidance as to the types of "illegal conduct" that reflect adversely on a lawyer's "fitness to practice law." COSAC recommends adding a sentence about conversion or theft of client or third-party funds, as follows:

> [2] Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. Conversion or theft of a client's or a third party's funds constitutes conduct that reflects adversely on a lawyer's fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

COSAC Discussion of Rule 8.4, Comment [2]

This proposed amendment provides additional guidance as to what kinds of illegal conduct reflect adversely on a lawyer's fitness to practice law and therefore violate Rule 8.4(b). The basis for concluding that conversion or theft of client funds meets a similar test is discussed above in the context of the proposed amendment to Rule 8.3, Comment [3].

Rule 8.4 (second proposal)
Misconduct

Proposed amendment to Rule 8.4(c) and a new Comment [2A]

Many lawyers have questions about whether they may ethically engage in, supervise, order, or otherwise play a role in covert investigations, but neither Rule 8.4 nor the Comments to Rule 8.4 address these questions. COSAC believes that guidance about the propriety of covert or undercover investigations would be helpful, and proposes the following amendment to Rule 8.4 and a new Comment [2A] to help interpret the amendment:

> A lawyer or law firm shall not:
>
> ...
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; provided, however, that this Rule does not prohibit a lawyer from conducting an otherwise lawful covert investigation that does not violate Rule 4.2.

Comment

[2A] Notwithstanding the general restriction against engaging in dishonesty, fraud, deceit, or misrepresentation, a lawyer may conduct, and may advise or supervise another who engages in, an otherwise lawful covert or undercover investigation. This is permitted regardless of the nature of the matter or substantive area of criminal or civil law involved. (A covert investigation for purposes of this Comment is one in which the investigator does not disclose his or her true identity and motivation.) This Rule does not change the scope of a lawyer's obligations under Rule 4.2. A lawyer must not (or if supervising another, must take reasonable measures to ensure that the investigator does not): (i) communicate with a represented party in a way that violates Rule 4.2, (ii) seek to elicit privileged information, or (iii) otherwise violate these Rules, court orders, or civil or criminal law. Even if a particular undercover investigation is lawful, there may still be restrictions on the means used to advance that investigation. For example, some techniques, such as the use of purported but fictitious grand jury subpoenas or other court process, may be impermissible even in service of an otherwise lawful undercover investigation.

COSAC Discussion of Rule 8.4(c) and Comment [2A] to Rule 8.4

Rule 8.4(c) straightforwardly prohibits conduct that involves dishonesty, fraud, deceit or misrepresentation. Comments [2] and [3] to Rule 8.4 provide examples of prohibited conduct. However, Rule 8.4 and the Comments do not address covert or undercover investigations. COSAC believes that this topic should be addressed.

In a few jurisdictions around the country, ethics opinions and disciplinary proceedings have concluded that Rule 8.4(c) bars prosecutors from supervising or participating in undercover investigations, which are inherently deceptive, despite the well-established role of such techniques in law enforcement. Some jurisdictions have also amended their Rules of Professional Conduct to make clear that undercover investigations are not prohibited, or are permitted under some circumstances.

For example, a 2002 Colorado Supreme Court opinion condemned direct or supervisory lawyer involvement in committing deception under any circumstances, essentially precluding lawyer involvement in undercover operations. However, Colorado Rule 8.4(c) has since been amended to provide that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities."* (Emphasis added.)

In Oregon, the code of ethics was amended to permit attorneys to supervise covert investigations, but only when there is sufficient basis to engage in those investigations. Oregon Rule 8.4(b) provides:

> (b) Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

In civil litigation, several courts have rejected challenges to the ethical propriety of plaintiff-side lawyers directing undercover investigations in areas such as trademark enforcement and civil rights testing. *See, e.g., Mena v. Key Food Stores Co-Operative, Inc.*, 195 Misc. 2d 402, 758 N.Y.S.2d 246 (Sup. Ct. Kings County 2003); *Gidatex, S.r.L. v. Campaniello Imports, Ltd.*, 82 F. Supp.2d 136 (S.D.N.Y. 2000). Based largely on these court decisions, the New York County Lawyers Association issued an ethics opinion concluding that a lawyer's use of such undercover operatives using dissemblance must be limited to instances where violations of civil rights or intellectual property rights are at issue. *See* N.Y. County Op. 737 (2007).

Learned commentary on this issue has increased in recent years. *See., e.g.*, B. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethical Analysis*, 32 Seattle U. L. Rev. 123 (2008). COSAC agrees with what it believes is the weight of existing precedent and authority: that attorney involvement in covert investigations should be allowed in appropriate circumstances. COSAC further believes that to avoid uncertainty, this conclusion should be made explicit.

A joint report of three committees of the New York City Bar (the Professional Responsibility Committee, the Professional Ethics Committee, and the Professional Discipline Committee) issued a report on this subject in August 2011 proposing an amendment to the text of Rule 8.4(a) as well as the addition of a new Comment [6A] to Rule 8.4, as follows (with proposed new language in *italics*).:

> A lawyer or law firm shall not:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another,

> *provided however, that this Rule does not prohibit a lawyer from advising or supervising another in conducting an otherwise lawful undercover investigation that does not violate Rule 4.2*;
>
> *[6A] Notwithstanding the general restriction against engaging in deceit, a lawyer may advise or supervise another who engages in an otherwise lawful and ethical undercover investigation, in which the investigator does not disclose his or her true identity and motivation, regardless of the nature of the matter or substantive area of law involved. This Rule does not effect any change in the scope of a lawyer's obligations under Rule 4.2, and thus a lawyer must take reasonable measures so that the investigator does not communicate with a represented party in violation of Rule 4.2, does not seek to elicit privileged information, and otherwise acts in compliance with these Rules, court orders, and civil and criminal law.*

This proposal of the three City Bar committees was largely endorsed by the Commercial and Federal Litigation Section of the New York State Bar Association. The proposed amendments set forth above are based on the New York City Bar's proposal.

The proposed new Comment [2A] includes the caveat that particular investigative techniques may be impermissible even when used to advance an otherwise proper undercover investigation. *See*, *e.g.*, *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988) (prosecutor violated no-contact rule by having informant use a grand jury subpoena to create pretense that might help informant elicit admissions from a represented suspect); *United States v. Harloff*, 807 F. Supp. 270 (W.D.N.Y. 1992) (a lie about purported surveillance and investigations of the defendant "stands on a completely different footing than the unauthorized and ultimately illegal use of court process which produces and employs a counterfeit sham grand jury subpoena to secure evidence outside the grand jury room").