Rule 2.4
Lawyer Serving as Third-Party Neutral

COSAC recommends amending Rule 2.4(b) to require increased disclosures by lawyer-neutrals, and recommends amending Comment [3] to Rule 2.4 to elaborate on this change.

Rule 2.4 first became part of the New York Rules of Professional Conduct in 2009 – the Code of Professional Responsibility had no equivalent. COSAC has examined Rule 2.4 and recommends amendments to the existing text of Rule 2.4(b) and to Comment [3], which elaborates on paragraph (b). The amended Rule and Comments would provide as follows:

> (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them and~~. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer~~ shall explain to them the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COSAC also recommends corresponding changes to Comment [3] to Rule 2.4 which, as amended, would read as follows:

> [3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving ~~in this role~~ as third-party neutrals may experience unique problems as a result of differences between the role of a third-party neutral and the role of a lawyer~~'s service~~ as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. 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 extent of disclosure required under this paragraph will depend on the particular parties involved and the

subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

COSAC Discussion on Rule 2.4

Currently Rule 2.4 requires a lawyer-neutral to inform all unrepresented parties that the lawyer-neutral does not represent them, but does *not* require the lawyer-neutral to provide a slightly fuller disclosure (explaining "the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client") unless "the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter." In contrast, Virginia Rule 2.4 requires a lawyer-neutral to give the fuller disclosure to all parties (represented or unrepresented), and Illinois Rule 2.4 requires a lawyer-neutral to give the fuller disclosure to all unrepresented parties.

We believe that the fuller disclosure should be made to all unrepresented parties for three reasons.

First, it is likely that in many cases unrepresented parties will lack a full understanding of the lawyer's role. *See* N.Y. State 900 (2011) ("In nearly all instances where parents are unrepresented by counsel and inexperienced in mediation and other legal matters, Inquirer 'reasonably should know' that the parents do not understand Inquirer's role...").

Second, a bright-line rule would be a reasonable safeguard, avoiding the need for the lawyer-neutral to assess whether any party "does not understand the lawyer's role in the matter."

Third, the additional disclosure would not have to be lengthy, individualized or burdensome, and would not differ substantially from the simple disclosure that is already routinely required. Even requiring the fuller disclosure to all parties, as in Virginia, would not be very burdensome, but because represented parties presumably would not need Virginia's detailed disclosure, we are proposing a narrower requirement like the one adopted in Illinois.