

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

AMERICAN BAR ASSOCIATION

COMMISSION ON ETHICS 20/20

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED: That the American Bar Association amends the ABA Model Rules of Professional
2 Conduct dated August 2012, to provide guidance regarding the ethical implications of retaining
3 lawyers and nonlawyers outside the firm to work on client matters (i.e. outsourcing) as follows
4 (insertions underlined, deletions ~~struck through~~):

5
6 (a) the Comments to Model Rule 1.1 (Competence);

7 (b) the title and Comments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer
8 Assistants); and

9 (c) the Comments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice
10 of Law).

11
12
13 *Client-Lawyer Relationship*

14 **Rule 1.1 Competence**

15
16 A lawyer shall provide competent representation to a client. Competent
17 representation requires the legal knowledge, skill, thoroughness and preparation
18 reasonably necessary for the representation.

19
20 **Comment**

21 ...

22
23 **Retaining or Contracting With Other Lawyers**

24 [6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm
25 to provide or assist in the provision of legal services to a client, the lawyer should ordinarily
26 obtain informed consent from the client and must reasonably believe that the other lawyers'
27 services will contribute to the competent and ethical representation of the client. See also Rules
28 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6
29 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision
30 to retain or contract with other lawyers outside the lawyer's own firm will depend upon the
31 circumstances, including the education, experience and reputation of the nonfirm lawyers; the
32 nature of the services assigned to the nonfirm lawyers; and the legal protections, professional
33 conduct rules, and ethical environments of the jurisdictions in which the services will be
34 performed, particularly relating to confidential information.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

35 [7] When lawyers from more than one law firm are providing legal services to the client
36 on a particular matter, the lawyers ordinarily should consult with each other and the client about
37 the scope of their respective representations and the allocation of responsibility among them. See
38 Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal,
39 lawyers and parties may have additional obligations that are a matter of law beyond the scope of
40 these Rules.

41 **Maintaining Competence**

42 [6-8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in
43 the law and its practice, engage in continuing study and education and comply with all
44 continuing legal education requirements to which the lawyer is subject.

45 *Law Firms And Associations*

46 **Rule 5.3 Responsibilities Regarding Nonlawyer Assistances**

47 **With respect to a nonlawyer employed or retained by or associated with a lawyer:**

48 **(a) a partner, and a lawyer who individually or together with other lawyers**
49 **possesses comparable managerial authority in a law firm shall make reasonable efforts to**
50 **ensure that the firm has in effect measures giving reasonable assurance that the person's**
51 **conduct is compatible with the professional obligations of the lawyer;**

52 **(b) a lawyer having direct supervisory authority over the nonlawyer shall make**
53 **reasonable efforts to ensure that the person's conduct is compatible with the professional**
54 **obligations of the lawyer; and**

55 **(c) a lawyer shall be responsible for conduct of such a person that would be a**
56 **violation of the Rules of Professional Conduct if engaged in by a lawyer if:**

57 **(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies**
58 **the conduct involved; or**

59 **(2) the lawyer is a partner or has comparable managerial authority in the**
60 **law firm in which the person is employed, or has direct supervisory authority over**
61 **the person, and knows of the conduct at a time when its consequences can be**
62 **avoided or mitigated but fails to take reasonable remedial action.**

63 **Comment**

64 [21] Paragraph (a) requires lawyers with managerial authority within a law firm to make
65 reasonable efforts ~~to establish internal policies and procedures designed to provide to ensure that~~
66 the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and
67 nonlawyers outside the firm who work on firm matters will act in a way compatible with the
68 professional obligations of the lawyer, with the Rules of Professional Conduct. See Comment [6]
69 to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1- (responsibilities
70 with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory
71 authority over ~~the work of a nonlawyer.~~ such nonlawyers within or outside the firm. Paragraph
72 (c) specifies the circumstances in which a lawyer is responsible for the conduct of ~~a nonlawyer~~
73 such nonlawyers within or outside the firm that would be a violation of the Rules of Professional
74 Conduct if engaged in by a lawyer.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

79 **Nonlawyers Within the Firm**

80 [42] Lawyers generally employ assistants in their practice, including secretaries,
81 investigators, law student interns, and paraprofessionals. Such assistants, whether employees or
82 independent contractors, act for the lawyer in rendition of the lawyer's professional services. A
83 lawyer must give such assistants appropriate instruction and supervision concerning the ethical
84 aspects of their employment, particularly regarding the obligation not to disclose information
85 relating to representation of the client, and should be responsible for their work product. The
86 measures employed in supervising nonlawyers should take account of the fact that they do not
87 have legal training and are not subject to professional discipline.

88
89 **Nonlawyers Outside the Firm**

90 [3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal
91 services to the client. Examples include the retention of an investigative or paraprofessional
92 service, hiring a document management company to create and maintain a database for complex
93 litigation, sending client documents to a third party for printing or scanning, and using an
94 Internet-based service to store client information. When using such services outside the firm, a
95 lawyer must make reasonable efforts to ensure that the services are provided in a manner that is
96 compatible with the lawyer's professional obligations. The extent of this obligation will depend
97 upon the circumstances, including the education, experience and reputation of the nonlawyer; the
98 nature of the services involved; the terms of any arrangements concerning the protection of client
99 information; and the legal and ethical environments of the jurisdictions in which the services will
100 be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2
101 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a)
102 (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When
103 retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions
104 appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is
105 compatible with the professional obligations of the lawyer.

106 [4] Where the client directs the selection of a particular nonlawyer service provider
107 outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of
108 responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making
109 such an allocation in a matter pending before a tribunal, lawyers and parties may have additional
110 obligations that are a matter of law beyond the scope of these Rules.

111
112 ***Law Firms And Associations Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional***
113 ***Practice Of Law***

114 (a) **A lawyer shall not practice law in a jurisdiction in violation of the regulation of**
115 **the legal profession in that jurisdiction, or assist another in doing so.**

116 (b) **A lawyer who is not admitted to practice in this jurisdiction shall not:**

117 (1) **except as authorized by these Rules or other law, establish an office or**
118 **other systematic and continuous presence in this jurisdiction for the practice of law;**
119 **or**

120 (2) **hold out to the public or otherwise represent that the lawyer is admitted**
121 **to practice law in this jurisdiction.**

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

122 (c) A lawyer admitted in another United States jurisdiction, and not disbarred or
123 suspended from practice in any jurisdiction, may provide legal services on a temporary
124 basis in this jurisdiction that:

125 (1) are undertaken in association with a lawyer who is admitted to practice in
126 this jurisdiction and who actively participates in the matter;

127 (2) are in or reasonably related to a pending or potential proceeding before a
128 tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is
129 assisting, is authorized by law or order to appear in such proceeding or reasonably
130 expects to be so authorized;

131 (3) are in or reasonably related to a pending or potential arbitration,
132 mediation, or other alternative dispute resolution proceeding in this or another
133 jurisdiction, if the services arise out of or are reasonably related to the lawyer's
134 practice in a jurisdiction in which the lawyer is admitted to practice and are not
135 services for which the forum requires pro hac vice admission; or

136 (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are
137 reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is
138 admitted to practice.

139 (d) A lawyer admitted in another United States jurisdiction, and not disbarred or
140 suspended from practice in any jurisdiction, may provide legal services in this jurisdiction
141 that:

142 (1) are provided to the lawyer's employer or its organizational affiliates and
143 are not services for which the forum requires pro hac vice admission; or

144 (2) are services that the lawyer is authorized to provide by federal law or
145 other law of this jurisdiction.

146 **Comment**

147 [1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to
148 practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be
149 authorized by court rule or order or by law to practice for a limited purpose or on a restricted
150 basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the
151 lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not
152 assist a person in practicing law in violation of the rules governing professional conduct in that
153 person's jurisdiction.

154 ...

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

REPORT

Introduction

Law firms, lawyers, and corporate counsel are increasingly outsourcing legal and law-related work, both domestically and offshore. In 2008, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that provides guidance to lawyers about how to outsource ethically and in a manner that is consistent with the profession's core values.¹ State and local bar associations also have offered guidance in this area.² To date, however, the Model Rules of Professional Conduct and their accompanying Comments have not specifically addressed outsourcing.

The ABA Commission on Ethics 20/20 has concluded that, although changes to the text of the Model Rules are not necessary, Comments to certain Rules should be clarified to address this issue so that lawyers can more easily determine their ethical obligations. In particular, the Resolutions that accompany this Report propose three changes. First, the Commission proposes a new Comment to Model Rule 1.1 that identifies the factors that lawyers need to consider when retaining lawyers outside the firm to assist on a client's matter (i.e., outsourcing legal work to other lawyers). Second, the Commission proposes new Comments to Model Rule 5.3, in order to identify the factors that lawyers need to consider when using nonlawyers outside the firm (i.e., outsourcing work to nonlawyer service providers). Finally, the Commission proposes a new sentence to Comment [1] to Model Rule 5.5 to clarify that lawyers cannot engage in outsourcing when doing so would facilitate the unauthorized practice of law. In each of these cases, the Commission's goal is to clarify how existing rules and principles apply to the particular context of outsourcing.

The Commission's proposals also reflect the view that the evolution of law practice and the continued rapid changes in and diversity of outsourcing arrangements make bright lines impossible to draw. Like many obligations described in the Model Rules, the proposals are intended to be rules of reason and are not intended to preclude consideration of broader legal concerns, such as malpractice and tort liability as well as the law described in the Restatements of Agency and the Law Governing Lawyers. In sum, the proposals do not (and cannot) replace

¹ See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008).

² See, e.g., State Bar of Cal., Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-165 (2004); Colo. Bar Ass'n, Formal Op. 121 (2009); Fla. State Bar Prof'l Ethics Comm., Ethics Op. 07-2 (2008); N.C. State Bar, 2007 Formal Op. 12 (2008); N.Y. State Bar Ass'n. Comm. on Prof'l Ethics, Ethics Op. 762 (2003); N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006); Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2009-06 (2009); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Responsibility, *Report on the Outsourcing of Legal Services Overseas* (2009), <http://www.nycbar.org/pdf/report/uploads/20071813-ReportontheOutsourcingofLegalServicesOverseas.pdf>; Council of Bars and Law Societies of Europe, *CCBE Guidelines on Legal Outsourcing* (2010), http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Guidelines_on_leg1_1277906265.pdf.

existing legal principles that already govern lawyer conduct; rather, they are designed to ensure that lawyers engage in outsourcing in a manner that is consistent with applicable rules of professional conduct.

The Commission understands that certain outsourcing is controversial in light of the current employment market for lawyers and the economic hardships faced by lawyers currently seeking jobs. The changes to the Comments to Rules 1.1, 5.3, and 5.5 of the Model Rules of Professional Conduct are neither an endorsement nor a rejection of the practice of outsourcing. Rather, the proposals respond to the existence and continuing growth of these practices and are intended to clarify a lawyer's obligations in this context so that lawyers who decide to outsource do so in an ethical and responsible manner.

In addition to its analysis of the issues, the Commission has conducted extensive outreach, held public meetings and public hearings on outsourcing, invited and considered comments from numerous entities and parties, posted material on its website, and sought the views of all ABA groups. Also, throughout its consideration the Commission has worked with the ABA's Standing Committee on Ethics and Professional Responsibility and the ABA Section of International Law Task Force on International Outsourcing of Legal Services. Their participation was critical to the development of the Resolutions and this Report, and the Commission is grateful for their assistance.

I. An Overview of Outsourcing by Lawyers and Law Firms

Outsourcing refers generally to the practice of taking a specific task or function previously performed within a firm or entity and, for reasons including cost and efficiency, having it performed by an outside service provider, either in the United States or in another country.³ Among the factors that have contributed to the significant growth of outsourcing are globalization, the technology-driven efficiencies developed and utilized by many providers of outsourced services, and the demand by clients for cost-effective services.

Lawyers have found that the same technology-driven efficiencies that have led to an increase in outsourcing throughout the global economy are also making outsourcing an appealing option within the legal profession for certain work. In particular, lawyers have found that, if they exercise proper care in the selection of a provider, work can be completed with greater speed and lower costs without sacrificing quality. These efficiencies offer opportunities for solo practitioners and small and medium-sized U.S. law firms, allowing them to better compete for large matters without fear that they will lack adequate resources to perform the legal work involved. Also, by reducing the cost of legal services, outsourcing can improve access to justice by making legal services more affordable.

Lawyers use outsourcing for a variety of tasks. Examples of law-related work that is frequently outsourced includes investigative services, offsite online data storage or online

³ When outsourced work is sent outside the U.S., the activity is often referred to as "offshoring." Work outsourced within the United States has been referred to as "onshoring," "insourcing" or "homesourcing."

practice management tools (e.g., “cloud computing” services), and creation and maintenance of databases to manage discovery in litigation. Outsourcing also occurs when lawyers retain other lawyers and law firms to conduct a range of services, such as legal research, document review, patent searches, due diligence, and contract drafting. The Commission’s research indicates that lawyers still tend to outsource legal and law-related work domestically more often than they outsource work internationally. In fact, information reviewed by the Commission indicates that, more recently, the outsourcing industry is responding to client demand for greater availability of on-shore operations.

II. The Commission’s Research Regarding Outsourcing

As noted above, as it studied outsourcing the Commission benefited from the efforts of other ABA entities. In particular, the ABA Standing Committee on Ethics and Professional Responsibility had released Formal Opinion 08-451 in 2008, which addressed a variety of ethical issues associated with outsourcing. Moreover, shortly after the release of Formal Opinion 08-451, the ABA Section of International Law had created a Task Force on the International Outsourcing of Legal Services to examine related issues.

The Commission’s research focused on the ethics-related issues identified in ABA Formal Opinion 08-451: fees, competence, scope of practice, confidentiality, conflicts of interest, safeguarding client property, adequate supervision of lawyers and nonlawyers, unauthorized practice of law, and independence of professional judgment. The Commission also considered the ethics opinions issued by international, state and local bar associations, the vast majority of which identified issues similar to those in Formal Opinion 08-451.⁴

The Commission’s conclusions regarding these issues were informed by scholarly articles, studies, and surveys; testimony offered at the Commission’s public hearings; comments received in response to questions that were posed to clients, lawyers, law firms, and providers of outsourced services; and news reports. The Commission also reviewed materials from domestic and international outsourcing providers, finding substantial evidence that the providers are focused on the ethical considerations identified in the organized bars’ ethics opinions. For example, providers of outsourced legal and non-legal services have developed protocols that include increasingly sophisticated technology to ensure quality control, adequate security over personnel and information, and opportunities for and convenience of oversight by the lawyers and law firms that are outsourcing the work.⁵

The Commission was particularly interested in procedures to protect confidential information. Although procedures vary depending on the type of work that is being outsourced, the Commission found that lawyer and nonlawyer employees of many outsourcing providers are required to sign confidentiality agreements, with some firms requiring employees to sign new and separate confidentiality agreements for each new assignment. Providers also frequently use

⁴ See *supra* note 2.

⁵ See ABA Commission on Ethics 20/20,

http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html for a sample bibliography and other materials related to the Commission’s research.

security measures to protect electronic information (e.g., encryption, malware protection, firewalls). They use biometric and other security measures to ensure only authorized physical access to data, such as separate premises or areas for each project. They use continuous video monitoring, monitoring of employee computers, and repeated identity checks within buildings, elevators, and other areas where work is being performed. They frequently disable the portals on employee computers so that portable data storage devices cannot be used to remove information from the premises. They also perform extensive background checks on employees as well as periodic internal and external audits of all of the foregoing measures.

The Commission found that conflict-of-interest considerations are increasingly given careful attention. For example, a number of outsourcing providers employ conflicts checking procedures modeled after those used by large U.S. and U.K. law firms; others are developing similar systems. These systems include maintaining extensive databases for existing and former clients and screening the work history of new recruits and existing employees against both the information contained in the databases and information supplied by the client.

The Commission's research has revealed that a number of companies that provide outsourced services have established sophisticated training programs for nonlawyer and lawyer employees on a variety of topics, including U.S. substantive and procedural law, legal research and writing, and the rules of professional conduct. These companies also regularly seek input from and collaboration with the organized bar and lawyers and law firms in the development of ethics policies and training regimes for their lawyer and nonlawyer employees.

III. Guiding Principles for the Commission's Recommendations

In considering possible changes to the ABA Model Rules of Professional Conduct, the Commission relied on two important principles. First, the Model Rules are a critical, but not exclusive, source of the law governing lawyers. In particular, the Model Rules "presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."⁶ Second, the comments to the Model Rules are often used to provide guidance as to these additional obligations.⁷ In light of these guiding principles, the Commission concluded that lawyers should be given more guidance on outsourcing through changes to the Comments to the Model Rules.

The Commission's review of the Model Rules of Professional Conduct revealed that, in all but three instances, they are either easily recognizable as having application to outsourcing, or they bear no relation to it at all. For example, the extensive commentary accompanying the series of Model Rules dealing with conflicts of interest (Rules 1.7 through 1.13), when considered in conjunction with the wealth of ethics opinions, court cases, and scholarly discussion generally available on that subject, revealed that no special language needed to be added to those Rules to remind lawyers of how they apply to outsourcing practices. The

⁶ ABA MODEL RULES OF PROF'L CONDUCT, Scope, par. [15].

⁷ *See id.* (observing that "comments are sometimes used to alert lawyers to their responsibilities under...other law").

Commission reached the same conclusion about Model Rule 1.5 (Fees) and the wealth of ethics opinions available treating myriad specific questions relating to the reasonableness of fees for both legal and non-legal services, as well as regarding Model Rule 1.15 (Safekeeping Property).

The Commission ultimately determined, however, that the comments to Rule 1.1 (Competence), Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) and Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) were appropriate locations for clearer guidance.

IV. The Commission's Proposal Regarding Model Rule 1.1: Retention of Nonfirm Lawyers

Model Rule 1.1 requires a lawyer to perform legal services competently. The Commission concluded that, in light of the frequency with which lawyers now outsource work to another lawyer or law firm, the Comments to Rule 1.1 should be expanded to refer specifically to the practice.

The Commission concluded that Model Rule 1.1 is the appropriate location for this guidance for two reasons. First, Comment [1] to Model Rule 1.1 already addresses a related subject: a lawyer's duty to associate with another lawyer to ensure competent representation of a client. Second, as Formal Opinion 08-451 makes clear, the primary ethical consideration when retaining a nonfirm lawyer is whether the nonfirm lawyer is competent to assist in the representation. The Commission considered other locations for the new commentary, including Model Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer), but concluded that the primary ethical consideration when retaining nonfirm lawyers is the competence of those nonfirm lawyers and that Model Rule 1.1 is therefore the appropriate location for further guidance.

The first sentence of the proposed new Comment [6] restates a general position expressed in ABA Formal Opinion 08-451 and in various state and local ethics opinions: lawyers should take reasonable steps to ensure that the outsourced services will be performed competently and that they contribute to the overall competent and ethical representation of the client.

The first sentence also explains that, ordinarily, a lawyer should obtain a client's informed consent before retaining a nonfirm lawyer. The Commission was reluctant to conclude that consent is always required, because consent may not be necessary when a nonfirm lawyer is hired to perform a discrete and limited task, especially if the task does not require the disclosure of confidential information. Nevertheless, the Commission concluded that consent will typically be required, and will almost always be advisable, when a nonfirm lawyer is retained to assist on a client's matter.

Following the first sentence is a list of other Model Rules that lawyers should consult when retaining nonfirm lawyers. The Commission concluded that these Model Rules are commonly implicated in this context and that lawyers should be aware of their potential application.

The next sentence lists several factors that lawyers should consider when retaining nonfirm lawyers, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information. This list is not intended to be exhaustive, but is intended to give lawyers some guidance regarding some of the most important considerations to take into account when retaining nonfirm lawyers.

In early drafts of this proposal, the Commission had an additional sentence at the end of the Comment that would have required lawyers to reasonably believe that the nonfirm lawyer's work was competently performed. The Commission heard concerns that the sentence could be read to impose unnecessary, costly obligations to determine the competency of work performed by other lawyers in different firms to whom work was outsourced. The Commission concluded that these concerns were well-founded. Because the outsourcing of work to other lawyers takes many different forms, the Commission concluded that the level of oversight over those lawyers should be addressed in an ethics opinion, which can provide a nuanced treatment of the issue, rather than in a Comment to the Model Rules. The Commission has asked the ABA Standing Committee on Ethics and Professional Responsibility to address this issue either in a revised version of Formal Opinion 08-451 or a separate Formal Opinion.

Proposed Comment [7] emphasizes that, when multiple firms work together on a client's matter, the firms ordinarily should consult with the client and each other about the scope of the work being performed by each firm and the allocation of responsibility among them. When making such allocations of responsibility, however, the proposed Comment reminds lawyers that they (and their clients) might have additional obligations that are a matter of law beyond the scope of these Rules, particularly in the context of discovery.

Finally, although the new Comments address outsourcing, the Commission does not use the word "outsourcing" in its proposed additions to the official Comments. The Commission concluded that, in this context, lawyers are more familiar with the concept of "retaining" or "contracting with" a nonfirm lawyer and that the word "outsourcing" would create unnecessary confusion. Moreover, the word "outsourcing" may become dated or fall out of use, to be replaced by a new term-of-art. Thus, the Commission retained the traditional terminology, but concluded that outsourcing as it occurs today is conceptually identical to the retention of nonfirm lawyers.

V. Use of Nonlawyer Assistance Outside the Firm: Proposal Regarding Model Rule 5.3

Model Rule 5.3 was adopted in 1983, and was designed to ensure that lawyers employ appropriate supervision of nonlawyers. Although the Rule has been interpreted to apply to lawyers' use of nonlawyers within and outside the firm,⁸ the Commission concluded that lawyers

⁸ See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-398 (1995) (concluding that, "[u]nder Rule 5.3, a lawyer retaining . . . an *outside service provider* is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information") (emphasis added).

would benefit from additional guidance regarding the application of the Rule to outside nonlawyers.

A. Proposed Changes to Comment [1]

The Commission determined that Comment [2], which offers an overview of Model Rule 5.3, is more appropriately located in Comment [1]. The Commission also concluded that this overview Comment should make clear that, consistent with existing authority,⁹ Model Rule 5.3 applies to the use of nonlawyers within *and* outside the firm.

B. Proposed Changes to Comment [3]

An existing Comment (which would become Comment [2]) identifies the considerations that apply when the services are performed *within* the firm, and the Commission concluded that a separate Comment – proposed Comment [3] – should identify the distinct concerns that arise when the services are performed *outside* the firm.

As an initial matter, proposed Comment [3] recognizes that nonlawyer services can take many forms, including services performed by individuals and services performed by automated products (e.g., online data storage). To reflect the scope of the nonlawyer services now being provided outside of firms, the first sentence of the Comment [3] includes a “cloud computing” example. (For similar reasons, the Commission is proposing to change the title of Model Rule 5.3 from “Nonlawyer Assistants” to “Nonlawyer Assistance.”)

The rest of proposed Comment [3] describes a lawyer’s obligations when using nonlawyer services outside the firm. The Comment states that, when using such services, the lawyer has an obligation to ensure that the nonlawyer services are performed in a manner that is compatible with the lawyer’s professional obligations. The proposed Comment then identifies the factors that determine the extent of the lawyer’s obligations in this regard. The Comment also references several other Model Rules that lawyers should consider when using nonlawyer services outside the firm.

The last sentence of Comment [3] emphasizes that lawyers have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers. For example, a lawyer who instructs an investigative service may not be in a position to directly supervise how a particular investigator completes an assignment, but the lawyer’s instructions must be reasonable under the circumstances to provide reasonable assurance that the investigator’s conduct is compatible with the lawyer’s professional obligations.

Notably, the proposed Comment language does not describe whether a lawyer must obtain consent when disclosing confidential information to nonlawyer service providers outside the firm. The Commission concluded that there are many circumstances where such consent is

⁹ *Id.*

unnecessary. For example, lawyers regularly send documents to outside vendors for scanning or copying, but there is ordinarily no need to obtain the client's consent to have those services performed. There are, however, other situations where client consent might be advisable or required. As with the issue above relating to the level of oversight over nonfirm lawyers to whom work has been outsourced, the Commission concluded that lawyers would benefit from further clarification of this issue by the Standing Committee on Ethics and Professional Responsibility and has requested that the Committee undertake consideration of this issue.

Finally, as is the case with the proposed Comment to Model Rule 1.1, proposed Comment [3] does not use the term "outsourcing." The Commission concluded that lawyers may incorrectly conclude that they are not engaged in "outsourcing" when using nonlawyer services outside the firm. To avoid such a misunderstanding, the Commission decided to retain the original phrasing of the Model Rule within the Comment.

C. Proposed Changes to Comment [4]

Proposed Comment [4] recognizes that clients sometimes direct lawyers to use particular nonlawyer service providers. In such situations, the lawyer ordinarily should consult with the client to determine how the outsourcing arrangement should be structured and who will be responsible for monitoring the performance of the nonlawyer services.

The word "monitoring" reflects a new ethical concept. The Commission concluded that it was needed because, when a nonlawyer outside the firm is performing services in connection with a matter, it may not be possible to "directly supervise" the nonlawyer. The word "monitoring" makes clear that there is nevertheless a need to remain aware of how nonlawyer services are being performing. The Comment explains that, when the client directs the lawyer to use a particular nonlawyer, the lawyer and client should ordinarily agree who will have this "monitoring" responsibility. In contrast, if the client has not directed the selection of the nonlawyer, the lawyer or law firm would have the "monitoring" responsibility.

The final sentence of the proposed Comment [4] is intended to remind lawyers that they may have duties to a tribunal that are not necessarily satisfied through compliance with the Rules of Professional Conduct. For example, if a client instructs the lawyer to hire a particular electronic discovery vendor, the lawyer cannot cede all monitoring responsibility to the client, given that the lawyer may have to make certain representations to a tribunal regarding the vendor's work.

VI. Assisting the Unauthorized Practice of Law: Proposal Regarding Model Rule 5.5

When lawyers outsource work to lawyers and nonlawyers, it is important to ensure that those lawyers and nonlawyers are not engaging in the unauthorized practice of law. The Commission concluded that it is important to make this point explicitly in Comment [1] to Model Rule 5.5. The Commission's proposed amendment to that Comment serves that purpose.

Conclusion

The Commission believes that continued study by, and education of, the profession about outsourcing practices is essential, especially given that those practices will evolve and new ethics issues may arise. Thus, in addition to recommending the adoption of the amendments described in the Resolutions accompanying this Report, the Commission enthusiastically endorses a comprehensive, user-friendly website that would be managed by the ABA Center for Professional Responsibility and would track all significant news and developments relating to the ethics of outsourcing. This website will provide up-to-date access to both evolving outsourcing practices and the technological changes that make them possible. During the period in which the continued and rapid evolution in outsourcing practices renders the creation of a static, established set of practice standards both unwieldy and premature, this web-based resource will serve as an easily-updated “living document,” useful both to those who engage in outsourcing and to those who study it.

The Ethics 20/20 Commission respectfully requests that the House of Delegates adopt the proposed amendments to Model Rules 1.1, 5.3, and 5.5 in the accompanying Resolutions.