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.

Resolution

RESOLVED: That the American Bar Association amends Model Rule 1.1 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Client-Lawyer Relationship
Rule 1.1 Competence

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

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, 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. When using the services of nonfirm lawyers in providing legal services to a client, a lawyer also should reasonably believe that such services meet the standard of competence under this Rule.

[7] Where the client has chosen or suggested lawyers from other law firms to assist in the provision of legal services to the client on a particular matter, the law firms who will be assisting the client on that matter should consult with each other and the client about the allocation or scope of representation and responsibility, including the allocation of responsibility for monitoring and supervising any nonfirm nonlawyers who will be working on the client's matter. See Rules 1.2 and 5.3. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

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

FURTHER RESOLVED: That the American Bar Association amends Model Rule 5.3 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck through):

Law Firms And Associations

Rule 5.3 Responsibilities Regarding Nonlawyer Assistancets

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

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

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

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

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

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

Comment

[2~~.~~1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the Rules of Professional Conduct. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1~~.~~ (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over ~~the work of a nonlawyer.~~ such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of ~~a nonlawyer~~ such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[1~~.~~2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and

supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

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

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

FURTHER RESOLVED: That the American Bar Association amends Rule 5.5 of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions struck through):

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this

jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized

expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide *pro bono* legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

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 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 some of those 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 in order 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 existing legal principles that already govern lawyer conduct; rather, they are designed to ensure

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[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); 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); Colo. Bar Ass'n, Formal Op. 121 (2009); Prof'l Ethics of the Fla. Bar, Op. 07-02 (2008); N. Carolina State Bar, 2007 Formal Op. 12 (2008); N.Y. City Bar, Ass'n of the Bar of the City of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006); N.Y. State Bar Ass'n., Comm. on Prof'l Ethics, Formal Op. 762 (2003); Ohio S.Ct. Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2009-06 (2009); San Diego Bar Ass'n, Op. 2001- (2001); 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.

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 growth of outsourcing 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.

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 attractive option within the legal profession. 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 may be of particular benefit to 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 practice management tools (e.g., "cloud computing" services), and creation and maintenance of

[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."

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] *Supra* note 2.
[5] *See* 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 non-lawyer 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." Model Rules, Scope, par. [15]. Second, the comments to the Model Rules are often used to provide guidance as to these additional obligations. *See id.* (observing that "comments are sometimes used to alert lawyers to their responsibilities under…other law"). 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 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). Even Model Rule 1.6 (Confidentiality of Information) is clearly applicable to the lawyer who engages in outsourcing.

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. Model Rule 1.1, cmt. [1]. 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 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 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 the various state and local ethics opinions cited in this Report: lawyers should 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 Rules that lawyers should consult when retaining nonfirm lawyers. The Commission concluded that these 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. 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.

The third sentence provides guidance regarding the lawyer's assessment of the work that the nonfirm lawyer performs. In particular, the lawyer should ensure that the nonfirm lawyer's work is performed in a manner that is consistent with the lawyer's own duty of competence. This sentence differs from the first sentence in the Comment in that the first sentence requires the lawyer to conclude, before retaining the nonlawyer, that the nonlawyer will contribute to the competent representation of the client. The last sentence suggests, however, that the lawyer should conclude that the services that the nonlawyer actually performed after being retained were performed competently. In many circumstances, the lawyer will not have to independently confirm that the work performed by the nonfirm lawyers was performed competently. In other circumstances, however, it may be necessary to do so (e.g., the lawyer has reason to believe that the work of the nonfirm lawyer may not have been performed competently).

Proposed Comment [7] is intended to describe a lawyer's obligations when a client requests multiple firms to perform discrete legal tasks concerning the same legal matter. In such situations, the law firms that will be assisting the client on that matter should consult with each other and the client about the allocation or scope of representation and responsibility, including the allocation of responsibility for monitoring and supervision of any nonfirm lawyers who will be working on the client's matter. (The word "monitoring" is drawn from new proposed language in Rule 5.3 and is described in Part V of this Report.) When making any allocations of responsibility, 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's 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, the Commission concluded that additional comments would help to clarify the meaning of the Rule with regard to the use of nonlawyers *outside* the firm.

As an initial matter, nonlawyer services are provided not only by individuals, such as investigators or freelancing paralegals outside the firm, but also by entities, such as electronic discovery vendors and "cloud computing" providers. To make clear that the Rule applies to nonlawyer services of all kinds, even services performed by entities, the Commission decided to recommend a change in the title of Model Rule 5.3 from "Nonlawyer Assistants" to "Nonlawyer Assistance." For the same reason, the first sentence of proposed Comment [3] expressly includes a "cloud computing" example to make clear that the Rule applies to services offered by entities (such as services provided over the Internet) as well as to individual service providers.

The Commission also concluded that Comment [2], which offers an overview of Rule 5.3, should be renumbered as Comment [1] and should be revised to make clear that Rule 5.3 applies to the use of nonlawyers within and outside the firm. This revision is consistent with existing interpretations of Rule 5.3, but the Commission concluded that greater clarity on this issue was desirable.

Although Rule 5.3 applies to the use of nonlawyers within and outside a firm, the particular considerations that lawyers need to take into account may differ depending on where the nonlawyers are located. An existing Comment (now 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.

Proposed Comment [3] states that, when a lawyer uses nonlawyer services outside the firm, 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 relative to nonlawyer service providers. These factors essentially parallel the factors that are recited in the proposed new Comment to Rule 1.1, which addresses the retention of nonfirm lawyers. 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 a particular 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.

As is the case with the proposed Comment to 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 such 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.

Proposed Comment [4] acknowledges that clients sometimes instruct 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" was chosen intentionally to reflect the idea that, under these circumstances, a lawyer may have a duty to remain aware of how the nonlawyer service provider is performing its services, even if the lawyer has not chosen the provider and may not have any direct supervisory obligations. When the lawyer or law firm chooses the nonlawyer service provider, there would likely be no reason to discuss the responsibility for monitoring, because the lawyer or law firm would have that 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 by complying 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 responsibility for monitoring the vendor to the client, given that the lawyer may have to make certain representations to a tribunal regarding the vendor's work.

The proposed Comments do not describe the lawyer's obligation to 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 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. The Commission concluded that lawyers would benefit from further clarification of this issue in the form of an opinion from the Standing Committee on Ethics and Professional Responsibility and has requested that the Committee undertake consideration of this issue.

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.

Conclusion

The Commission believes that continuing 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.