

AMERICAN BAR ASSOCIATION
COMMISSION ON ETHICS 20/20
STANDING COMMITTEE ON CLIENT PROTECTION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE
STANDING COMMITTEE ON PROFESSIONALISM
STANDING COMMITTEE ON SPECIALIZATION
NEW YORK STATE BAR ASSOCIATION
GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION
SECTION OF INTERNATIONAL LAW
YOUNG LAWYERS DIVISION
NEW YORK COUNTY LAWYERS' ASSOCIATION
SECTION OF BUSINESS LAW

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).

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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 ...

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105C

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.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. 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, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Law Firms And Associations

Rule 5.3 Responsibilities Regarding Nonlawyer Assistances

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.

69 Comment

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

81

82 Nonlawyers Within the Firm

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

91

92 Nonlawyers Outside the Firm

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

149 **Comment**

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

155 assist a person in practicing law in violation of the rules governing professional conduct in that
156 person's jurisdiction.

157 ...

158 [21] Paragraphs (c) and (d) do not authorize communications advertising legal services to
159 ~~prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other
160 jurisdictions. Whether and how lawyers may communicate the availability of their services to
161 ~~prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.