LEGAL PROCESS OUTSOURCING COMMENTS & SUMMARIES

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AMERICAN BAR ASSOCIATION

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DATE: January 21, 2011

TO: Jamie S. Gorelick and Michael Traynor, Co-Chairs
ABA Commission on Ethics 20/20

FROM: ABA Section of Real Property, Trust and Estate Law
Alan F. Rothschild Jr., Chair

RE: Discussion Draft Regarding Domestic and International Outsourcing

Following are comments to the Commission's discussion draft on domestic and international outsourcing prepared on behalf of the Section of Real Property, Trust and Estate Law by the Section's ethics committees: Real Property Ethics and Professionalism Committee and Trust and Estates Ethics and Malpractice Committee.

The Section appreciates the opportunity to provide input for this important project. Should you have any questions regarding our comments, please contact the principal drafters: Adam J. Sigman, Chair, Real Property Ethics and Professionalism Committee, Maynard Cooper & Gale PC, 205/254-1225, asigman@maynardcooper.com; Patricia H. Char, K&L Gates LLP, 206/623-7580, pat.char@klgates.com

1. The reviewers of the Draft Report have a serious concern that attempting to deal with the outsourcing issue solely in the Comments (as opposed to changing the "black letter" rule) may not accomplish the purposes intended. If the Rule is unchanged, it might be argued that a later change in the Comments cannot alter or expand the rule or provide the type of "safe harbor" intended by the changes. It was also pointed out that some states do not always adopt the ABA's "Comments" verbatim, and some states do not adopt them at all. It was suggested that these edits need to be part of the "black letter" Rules, not just the Comments.

2. With respect to Paragraph [7] on page 3, it was felt that the "to provide" language in the first sentence may create a serious UPL problem notwithstanding the subsequent cross reference to Rule 5.5. If a non-licensed, out-of-state lawyer is "providing" services directly to the client in the state at issue, then UPL issues may be triggered. Consequently, it was suggested that "provide or" be removed from the first line and "the supervising, licensed lawyer" be added after "assist" (also in the first line).

As revised, the first sentence would read as follows: [7] A lawyer may retain other lawyers outside the lawyer's own firm to assist the supervising, licensed lawyer in the provision of legal services...

3. For some of the edits as well as the headings for some of the comments, we suggest further clarification to provide that the provisions added and edits made deal with outsourced lawyers (as opposed to lawyers working between multi-state offices within a firm). For example, Comment [1] on page 6 does not appear to be limited to outsourcing and could impact intra-office work within a firm.

4. The proposed modifications to the ethical rules are to address "outsourcing," which is described in the Draft Report as taking a specific task or function previously performed inside a law firm and having it performed by an outside service provider. It does not appear, however, that the term "outsourcing" is

used in the actual amendments to the comments or that it is well defined in those amendments. Among other concerns, the amendments reference work outside of a law firm, but do not clarify that they are to refer to tasks or functions previously performed inside a law firm.

The Comments, therefore, may be interpreted in the future more broadly than intended, such that they may apply if an estate planning lawyer retains a non-U.S. lawyer to provide foreign tax advice or to assist with documentation for transfers of foreign assets (transfer of foreign *situs* assets as part of a gift plan), or works with accountants to implement and administer a defective grantor trust arrangement. The Comments were originally intended to apply to a specific type of work, outsourcing of litigation support services and similar tasks. But, they are drafted so that they later could be construed to apply in many situations where estate planning lawyers work with allied professionals or lawyers in different jurisdictions. They also could be construed to apply to either testifying or consulting experts. To the extent that the amendments impose certain requirements on the lawyer or law firm (e.g. obtaining client informed consent to disclosure if foreign jurisdiction provides less protection for client information), they now impose a requirement that previously did not exist when the lawyer works with a professional outside of the firm.

5. In principle, there should be no objection to the proposed amendment to the Comment to Rule 1.1 – that a U.S. lawyer retaining other lawyers outside of his or her own firm should attempt to assure that the other lawyer will provide competent and ethical representation. But, if the practices of a foreign jurisdiction provide less protection for confidential client information than that provided in the U.S., the Comments state that the lawyer "should obtain the client's informed consent." These Comments seem to impose an additional, and possibly unreasonable, burden on a U.S. lawyer who knows that he or she is not authorized to practice in a foreign jurisdiction and who knows that the client, in completing the client's estate plan, should obtain advice if assets are located in that foreign jurisdiction. Does the lawyer now have to become familiar with the ethical practices of that foreign jurisdiction? Or, must the lawyer, in every instance of providing a referral list of foreign lawyers to a client, seek to obtain "informed consent" just in case the ethical rules in the foreign jurisdiction provide less consent?

6. The Draft Report acknowledges that there is controversy over outsourcing practices. The report states that providing of Comments regarding "outsourcing" in the ethical rules was not intended to endorse or reject the practice of outsourcing. Despite this disclaimer, however, by providing ethical guidelines to supposedly guide firms that engage in outsourcing, the ABA is tacitly acknowledging that the practice exists and is accepting outsourcing as a part of current legal practices.

American Bar Association
Commission on Ethics 20/20
Comments on Discussion Draft Regarding Domestic and International Outsourcing

Submitted by:

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Dated: January 31, 2011

Attorneys' Liability Assurance Society, Inc., A Risk Retention Group (ALAS) submits the following comments on the Commission's Discussion Draft Regarding Domestic and International Outsourcing (Discussion Draft).

I. Introduction

Founded in 1987, ALAS is a mutual insurance company that insures 233 major law firms, including over 58,000 lawyers in 49 states, the District of Columbia, and 26 foreign countries, and is the leading provider of professional liability insurance for large law firms in the United States. Lawyers from ALAS were actively involved in the American Law Institute's development of the *Restatement Third, The Law Governing Lawyers* and in the American Bar Association's 2002 revision of the Model Rules of Professional Conduct, and they are involved with other professional and bar associations that have defined the ethical and professional duties of lawyers. Among other services, ALAS provides its insured lawyers with extensive loss prevention advice. ALAS also actively monitors the defense of professional liability claims asserted against its insured firms and lawyers. By virtue of the services it renders, ALAS has a unique understanding of problems confronting law firms today.

In representing their clients, ALAS's insured lawyers, like others in the profession, have outsourced a variety of tasks to service providers located both in the United States and in other countries. *See* Discussion Draft at 10 (noting that "outsourcing of work domestically and internationally, although not new to the legal profession, is becoming increasingly widespread"). ALAS submits the following observations regarding the Discussion Draft's proposed comments to the Model Rules of Professional Conduct (Rules) because those comments raise important issues regarding this growing practice.

II. Issues Raised by the Proposed New Comments to Rules 1.1 and 5.3.

A. Protection of Client Information. Both proposed new comments provide that lawyers may be required to obtain informed client consent when information protected by Rule 1.6 will be disclosed to nonfirm lawyers or nonlawyer service providers. In determining whether consent will be required, the proposed comments refer lawyers to the "rules, laws, or practices" of foreign jurisdictions. That reference raises irrelevant issues and is potentially misleading. The duty under Rule 1.6 to protect client information rests with the U.S. lawyer responsible for the representation. The laws or practices of a foreign jurisdiction, even if such laws and practices could be authoritatively determined by the U.S. lawyer, are not relevant to that lawyer's basic duty. Unless disclosure is impliedly authorized under Rule 1.6(a) or another exception applies, the U.S. lawyer must obtain informed consent to the disclosure of protected information, regardless of the laws or practices of any other jurisdiction.

In addition, the term "substantially less" used in relation to the protection provided by the laws and practices of a foreign jurisdiction seems misplaced. Even if the laws and practices of a foreign jurisdiction were relevant to the duty of a U.S. lawyer, it may be difficult to determine if those laws and practices do, in fact, provide "substantially less" protection to client information than United States law and professional conduct rules. In any event, protection of client information is likely to be a matter of contract between the relevant parties to the outsourcing arrangement. Accordingly, a new or revised comment to the Rules might recommend the consideration of appropriate private agreements for the protection of client information in outsourcing situations.

More broadly, because such agreements can provide clarity and some certainty for clients and lawyers, not to mention the outside service providers, those agreements should be added to the list of circumstances to be considered in assessing the "reasonableness of the conclusion" discussed in the second sentence of proposed Comment [7] to Rule 1.1, and the "extent" of the "reasonable efforts" obligation discussed in the second and third sentences of proposed Comment [3] to Rule 5.3.

B. Client Consent. Neither proposed new comment deals directly with the issue of client consent to outsourcing. As discussed above, both comments mention client consent in the context of potential disclosure of client information, but then say only that informed consent "may" be required. It would be useful for lawyers to have guidance on whether they should seek client consent to outsourcing as a general matter.

III. Issues Raised by the Proposed New Comment [7] to Rule 1.1.

A. Placement of Proposed Comment. Proposed new Comment [7] to Rule 1.1 implicates the scope of the lawyer's representation and the means by which the objectives of the

representation are to be pursued, the particular subjects of paragraphs (c) and (a), respectively, of Rule 1.2. The proposed new comment to Rule 1.1, therefore, would be better placed in Rule 1.2.

The placement of a new comment within the Rules can have important practical consequences. Rule 1.1 focuses on the lawyer's own evaluation of the lawyer's ability to carry out a given representation. There is no suggestion that the lawyer need consult the client about that evaluation. In contrast, Rule 1.2 focuses on the lawyer and client reaching agreement on the scope of the representation as well as the means by which the client's objectives will be pursued.

The language of the current proposed new comment, if placed in Rule 1.1, could be interpreted in that context not to require consultation with the client if the outsourcing lawyer concludes that the work will be "competent." But consultation may be advisable or even required if, for example, the lawyer and the client agree that the lawyer will rely on the outsourced work-product and limit the scope of the lawyer's representation accordingly. *See* Rule 1.2(c). Placing the new comment in Rule 1.2 would promote client-lawyer communications about outsourcing arrangements.

B. Client Directed Outsourcing. Press reports indicate that outsourcing of legal work is frequently requested or demanded by clients. In many cases, the client designates the other lawyers or firms that will be involved, a point made in the proposed Comment [3] to Rule 5.3. Yet the proposed new Comment [7] to Rule 1.1 takes no notice of that common situation, which is a serious omission. The lawyer's duty expressed in the first sentence of proposed Comment [7], that the lawyer must conclude that the nonfirm lawyer's services will contribute to the competent and ethical representation of the client, makes sense if the lawyer chooses or recommends a particular nonfirm lawyer to assist in the client's matter. But a lawyer should not be responsible for judging the competence, or evaluating the work product, of a lawyer or law firm chosen by the client, especially if the client is experienced in legal matters generally, an experienced user of the legal services involved, or independently represented, as by in-house counsel. Any new commentary to the Rules should recognize and deal expressly with client directed outsourcing. In most cases, the allocation of responsibility for choosing nonfirm lawyers and evaluating, using, or relying on the work product of those lawyers will be part of the scope of the representation to be addressed under Rules 1.2 and 1.4.

C. Unauthorized Practice of Law. Proposed Comment [7] states that when retaining nonfirm lawyers, "the requirements of Rule 5.5 must be observed." Presumably, the directive of Rule 5.5 to avoid engaging in or assisting the unauthorized practice of law (UPL) applies to all lawyers at all times, not just lawyers involved in outsourcing. The mandatory "must" in the proposed comment may prove problematic if it is interpreted to place new or additional duties on a lawyer retaining another lawyer in the outsourcing context. It would place an undue burden on clients and lawyers if outsourcing work to lawyers in other U.S. or foreign jurisdictions carried with it the additional obligations to both ascertain and analyze the UPL

authorities of the applicable jurisdiction and then determine how those authorities apply to every lawyer, domestic or foreign, who may work on the proposed representation. In particular, U.S. lawyers should not be made responsible for enforcing the UPL regulations of another country.

IV. Issue Raised by the Proposed New Comment [3] to Rule 5.3.

The term "monitor" does not appear in the Model Rules, but it was used in ABA Formal Opinion 08-451 (Aug. 5, 2008) to describe the oversight appropriate in an outsourcing situation. In this context, "monitor" is more appropriate than the term "supervise" used in some state opinions on outsourcing. As the Discussion Draft recognizes, "supervise" implies a level of control that can only realistically be achieved in an employment relationship. Because outsourcing necessarily involves service providers outside a law firm, the better term "monitor" should be retained in any new or revised comment.

The proposed comment acknowledges that clients often choose service providers, which is helpful, but it gives little additional guidance beyond the suggestion that the lawyer "ordinarily" should consult with the client concerning the responsibility for monitoring the work of service providers outside the lawyer's firm. Another approach would be to establish a "default rule" to determine the responsibility for monitoring in the absence of an agreement. The default rule might provide, for example, that responsibility for monitoring follows the party (client or lawyer) that chooses the service provider, absent a contrary agreement. Of course, the client and lawyer can always agree to a monitoring arrangement that they find fits the circumstances. But the default rule brings a level of certainty and provides a starting point for further discussion between the client and the lawyer. With or without a default rule, proposed Comment [3] to Rule 5.3 should include a cross-reference to Rule 1.2 because the latter rule addresses the scope of the lawyer's representation (including limitations on that scope) and the means by which the objectives of the representation are to be pursued.

V. Issue Raised by Proposed Amendment to Comment [1] to Rule 5.5.

The proposed amendment to Comment [1] to Rule 5.5 appears to merely remind lawyers of their duty under Rule 5.5. If that interpretation is correct, then there should be no need to amend the existing commentary. If it is to be interpreted to add new or additional duties on a lawyer retaining a lawyer in another jurisdiction, however, then the proposed amendment should be modified or withdrawn for the reasons stated in Section III.C regarding the UPL provision in the proposed new comment to Rule 1.1.

VI. Conclusion

ALAS respectfully submits the foregoing for the Commission's consideration.

Natalia Vera, veran@staff.abanet.org

Senior Research Paralegal

American Bar Association, Commission on Ethics 20/20

Dear Natalia,

I am delighted to submit to the ABA Commission on Ethics 20/20 the attached comment dated January 31, 2011 on the Discussion Draft (November 23, 2010) Regarding Domestic and International Outsourcing. The comment is delivered in my personal capacity.

I would like to thank the co-chairs of the US Lawyers Practicing Abroad Committee, Linda Strite Murnane and Christian Jacobson, for providing me with the opportunity to comment on this very important matter.

Please do not hesitate to contact me for any further information or clarification.

Regards,

Anand S. Dayal, Esq.

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COMMENTS ON DISCUSSION DRAFT (NOVEMBER 23, 2010) REGARDING DOMESTIC AND INTERNATIONAL OUTSOURCING

By Anand S. Dayal, dayala@vsnl.com
Member, ABA
Admitted to the bar in NY, DC and India

New Comment [7] to Model Rule 1.1

1. The first sentence (reproduced below) of new Comment [7] permits a lawyer to retain "other lawyers" in certain circumstances.

> [7] A lawyer may retain other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client provided the lawyer reasonably concludes that the other lawyer's services will contribute to the competent and ethical representation of the client. [underlining added]

(a) It will be helpful to clarify the meaning of "other lawyers" as used here, and in particular whether it includes persons ("foreign lawyers") licensed to practice law in a foreign jurisdiction, but not licensed in any US jurisdiction.

Read as a whole, the new Comment [7] and accompanying draft (October 31, 2010) report seem to imply that "other lawyers" includes foreign lawyers. See last sentence in the new Comment [7] (referring to "the rules, laws or practices of a foreign jurisdiction") and the reference to "domestically and internationally" in the parenthetical in the excerpt reproduced below.

> The proposed new paragraph [7] of the Comment to Rule 1.1 specifically addresses outsourcing of legal work through the retention of lawyers outside the lawyer's firm (either domestically or internationally). [underlining added].

(b) As a related matter, permitting the retention of "other lawyers" implies that such persons be duly qualified and admitted as "lawyers" in the relevant jurisdiction, and that such term excludes lay persons and other professionals, such as chartered accountants, company secretaries and para professionals who may have the necessary skills to perform all or part of the outsourced work. It will be helpful to clarify this.

2. One of the conditions required to be satisfied in order for a lawyer to retain other lawyers is that doing so "will contribute to the competent and ethical representation of the client." It will be helpful to clarify whether "contribute" requires that there be an incremental enhancement in the overall quality of representation or merely that the retaining of other lawyers be of some benefit.

Specifically there should be some guidance on (i) whether a reduction in cost (with no improvement in quality) will satisfy this test and (ii) if an enhancement of the representation is necessary, what the baseline is against which such "contribution" is to be measured. For example, is the appropriate base line the competence of the outsourcing lawyer?

Comment [1] to Model Rule 5.5

1. The new sentence (reproduced below) added to Comment [1] should be reexamined and struck if found inappropriate.

> 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.

The reasons for reexamining are:

(a) the comment expands the scope of Model 5.5 from (x) a prohibition on engaging (or helping another engage) in the unauthorized practice of law in another jurisdiction to (y) procuring more generally that the lawyer to whom the work is outsourced complies with the rules governing professional conduct in that jurisdiction.

(b) it places on the outsourcing lawyer the burden of determining what the ethical responsibility of the other lawyer is in that lawyer's jurisdiction and then assessing if the other lawyer is in compliance therewith. This burden would be acceptable if the potential ethical lapses have some bearing on the outsourced work, such as pertaining to confidentiality, conflict of interest and other relevant ethical obligations. Furthermore, if the other lawyer is in a foreign jurisdiction, it would be unduly burdensome to conduct what amounts to an ethics audit of that foreign lawyer.

To: Natalia Vera, veran@staff.abanet.org
Senior Research Paralegal
American Bar Association, Commission on Ethics 20/20

31 January 2011

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January 19, 2011

Jonathan Rusch
Chair
Section on Administrative Law & Regulatory Practice
Amercian Bar Association

Re: ABA Commission on Ethics 20/20 Discussion Draft Regarding Models Rules of Professional Conduct and Domestic and International Outsourcing

Dear Jon:

This letter responds to your request that the Committee on Ethics and Professional Responsibility review the above-referenced Draft and provide comments for the Section before the January 31st due date for comments to the Commission on Ethics 20/20.

The Commission's Draft deals with the current practice by some in the legal profession to out-source work, both legal in nature performed by lawyers and support-type work of performed by non-lawyers, e.g., photocopying and trial exhibits. The Draft covers out-sourcing in the U.S. and overseas.

The primary concerns of the Draft are protection of attorney-client confidentiality and the duty to ensure the competency of the lawyer performing the out-sourced legal work. The means for addressing these concerns are bringing formal ethical opinions and other ethics decisions into the Comments for Rule 1.1 Competence, Rule 5.3 Responsibilities Regarding Nonlawyer Assistants, and Rule 5.5 Unauthorized Practice of Law: Multijurisdictional Practice of Law.

Because of the sensitivity of the confidentiality of the client's information and communications, the Draft has provisions in the proposed Comments to require the client consent prior to various disclosures in advance of the out-sourcing. This concern also applies to situations where a lawyer either associates another law firm with more specialization in the legal area involved or where the case is out-sourced overseas, with the proposed Comments again requiring advance consent by the client.

> **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.

Proposed Comment 7:

Retention of Other Lawyers

[7] A lawyer may retain other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client provided the lawyer reasonably concludes that the other lawyers' services will contribute to the competent and ethical representation of the client. The reasonableness of the conclusion 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 and ethical environment in which the services will be performed. When retaining lawyers and others outside the lawyer's own firm, the requirements of Rule 5.5(a) must be observed. When using the work of nonfirm lawyers in providing legal services to a client, a lawyer must conclude that such work meets the standard of competence under this Rule. If information protected by Rule 1.6 will be disclosed to the nonfirm lawyers, informed client consent to such disclosure may be required. For example, if the rules, laws or practices of a foreign jurisdiction provide substantially less protection for confidential client information than that provided in this jurisdiction, the lawyer should obtain the client's informed consent to such disclosure.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants. 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 lawyers;

(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 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 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 remedial action.

Proposed Comment 3:

[3] The responsibilities stated in this Rule also apply when a lawyer or law firm utilizes nonlawyer service providers outside the lawyer's or law firm's office to assist in rendering legal services to clients. The lawyer or law firm must make reasonable efforts to ensure that the activities of any nonlawyer service providers are compatible with the lawyer's professional obligations. The extent of this obligation will be depend on the circumstances, including: the education, experience and reputation of the nonlawyer service providers; the nature of the services provided; the requirement to protect client information; and the legal and ethical environment in which the services will be performed. Where the client has chosen or suggested a particular nonlawyer service provider, 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. If information protected by Rule 1.6 will be disclosed to nonlawyer service providers outside the lawyer's or law firm's office, informed client consent to such disclosure may be required. For example, if the rules, laws or practices of a foreign jurisdiction provide substantially less protection for confidential client information than that provided in this jurisdiction, the lawyer should obtain the client's informed consent to such disclosure.

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: ***

* * *

Proposed Addition to Comment 1:

[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 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.

The proposed Comments to be added and the Draft itself do not take a position on whether out-sourcing of a client's work should or should not be undertaken. The Draft focuses on the duties a lawyer has when such out-sourcing is planned or undertaken. The Draft is clear that client confidentiality is to be protected and that the competency of the lawyer performing out-sourced work must be determined in advance.

The Draft is consistent with established principles. Convenience and/or expediency are not included as factors to be weighed in this analysis.

I recommend that the Council authorize a response to the Commission on Ethics 20/20 that our Section concurs in the Draft's proposed additional Comments to Rules 1.1, 5.3 and 5.5.

Sincerely,

Myles E. Eastwood

Laura Hill-Eubanks

To the ABA Commission on Ethics 20/20 re Legal Process Outsourcing:

I personally see no problem with domestic outsourcing of legal services for the simple reason that any attorneys licensed in the US are required to study and pass a bar exam that includes US law and ethics requirements.

However, I really cannot see how an attorney outside the US and who has not been licensed in the US can be expected to competently perform outsourced legal work. When all of us here in the US must follow strict laws and rules in order to be allowed to practice, how is it justifiable to then allow attorneys that are not required to follow those same laws and rules to do work that amounts to legal practice?
Those attorneys outside the US would not be subject to sanctions in the US would they? So what would discourage their engaging in unethical practices? And I find it very difficult to believe that a US lawyer can adequately supervise a non-US lawyer that is working outside the US. The outsourcing of legal work in the US should be restricted to US attorneys only.

Frankly, I find it appalling that you have allowed international outsourcing to go on. Especially when there are so many competent attorneys in the US looking for work. Allowing cheap international and non-US-licensed attorneys to practice law in the US under the guise of outsourcing is furthering a race to the bottom for the legal community. You seem to be merely applying technical details of ethics rules in order to justify this practice, without seeing the big picture - it is a ridiculous policy and you should be ashamed of your complicit support of it.

Sincerely,
Laura Hill-Eubanks, Esq.

Rob Gaudet

Dear Natalia:

As a member of the ABA SIL US Lawyers Practicing Abroad Committee, I am pleased to submit comments on the proposed revisions to the ethical rules. I have a private practice, I am licensed in the State of Washington, I live in The Hague, and I frequently work with co counsel in other States and countries.

I have the following comments:

(1) The following proposed new language in Rule 1.1 Comment [7] should be stricken: "If information protected by Rule 1.6 will be disclosed to the nonfirm lawyers, informed client consent to such disclosure may be required. For example, if the rules, laws or practices of a foreign jurisdiction provide substantially less protection for confidential client information than that provided in this jurisdiction, the lawyer should obtain the client's informed consent to such disclosure. " This language is redundant and unnecessary since a lawyer is already responsible for ensuring that she, her staff, and her colleagues (whether in the same firm or not) are aware of the importance of protecting confidential information. I believe this requirement is already built into the existing rules insofar as a lawyer must competently supervise others. The proposed language would add a new bureaucratic step requiring possibly written consent and exchange of information. This would be burdensome without providing any added benefit or security to the client.

(2) The following phrase in Rule 5.5(b)(1) (which I believe is the existing rule) should be deleted: "(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." This rule hinders a lawyer who wishes to practice the law of her own jurisdiction out of an office in another jurisdiction where there may be many clients needing assistance in the jurisdiction where she is licensed. I am licensed in the State of Washington. However, some day, I might wish to live in Virginia because my mother and grandmother are in southern Virginia. I work on many class action cases (including one in New York) that are filed in different States and I work with local co counsel or I get admitted pro hac vice so that I can appear. Put another way, I can live almost anywhere and work on cases around the United States through local counsel and pro hac vice admission. However, this rule (as it exists) hinders my ability to choose where to live while I conduct this work. For instance, the State of Virginia has adopted this rule, unfortunately. The rule in Virginia seems to bar a lawyer from having any other office outside the State of Virginia, if that lawyer is licensed in Virginia, which indicates that a lawyer cannot be licensed (and hold an office) in both Virginia and another state. This obstacle hinders the freedom of movement and it serves no apparent purpose. I think Rule 5.5(b)(1) should be deleted. Further, were Rule 5.5(b)(1) adopted by the Dutch Bar Association as a universally valid norm, then it would prohibit my current work which is performed, often on behalf of

Dutch clients or Italian class members, out of my office in The Hague. I live and work in The Hague but I am not admitted to the Dutch Bar Association. If the logic of Rule 5.5(b)(1) were stretched to Holland, or even to other states, then it would bar my type of practice and make it more difficult for foreign (or out of state) clients to locate and secure legal representation and advice. Hence, the logic of the rule is unsound and runs contrary to the interests of both many clients and the lawyers who wish to serve them. I can easily imagine that I am not the only lawyer whose practice (and clients' interests in having local counsel with expertise in a foreign jurisdiction) would be threatened by the extension of this rule.

(3) For the same reasons noted immediately above, the following language (which seems to already be a part of the current rule) in Comment [4] to Rule 5.5 should be deleted: "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"

(4) For the same reasons noted immediately above, the following language (which seems to already be a part of the current rule) in Comment [5] of Rule 5.5 should be deleted: "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."

(5) For the same reasons noted immediately above, the following language (which seems to already be a part of the current rule) in Comment [15] of Rule 5.5 should be deleted: "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."

(6) Rule 5.5(d)(1) unfairly gives a special advantage to in-house lawyers who practice law while living and working in another jurisdiction on behalf of an "employer." In today's climate, companies more often out source work to other lawyers and they often need the assistance of lawyers who are licensed in another State. The logic of this rule makes it difficult for any lawyer, except an in house lawyer working for an "employer," to practice overseas or in another jurisdiction. I have a client that is a Dutch entity with business around the world. My law firm recently made a proposal to serve as outside general counsel to this client on issues involving American law. My proposal includes association with lawyers in New York and California who could assist with legal matters based on those State laws. However, the logic of Rule 5.5(d)(1) is that only in house lawyers should be permitted to engage in such practice outside their own state. There is no apparent reason why an in house lawyer should have this freedom to practice, live, and work outside the jurisdiction while enterprising lawyers in private practice should not have the same freedom. The distinction should be abolished.

Thank you for the opportunity to comment. I am cc'ing the chair of the US Lawyers Practicing Abroad Committee, Linda, and she is welcome to circulate my comments on her listserv, if she thinks it would be helpful to the other Committee members.

Aside from being a member of the US Lawyers Practicing Abroad Committee, I am also co chair of the ABA SIL International Human Rights Committee but these comments are not presented in my role as co chair of the human rights committee.

Best regards,
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Response to Request for Comments

ABA Commission on Ethics 20/20 Discussion Draft, November 23, 2010

American Bar Association

Commission on Ethics 20/20

Discussion Draft Regarding Domestic And International Outsourcing

A John G. Kelly Report

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Submitted January 25, 2011

Executive Summary

Confidentiality is of great significance in litigation practice and, by extension, insurance defense.[1] A lawyer's right to keep information confidential pertaining to a client whose case they are working on is a particularly attractive attribute of the legal services relationship. It sets the legal services relationship separate and apart and gives it a special status distinct from professions with an otherwise similar stature like accounting.[2] Not surprisingly, it is replete with nuances and complexities in application.[3] The insurance litigation manager represents one of the key parties in the "tripartite" insurance defense mix. The advent of legal bill review approximately 20 years ago in the early1990's as a litigation management mechanism spawned a major conflict between insurance defense lawyers and insurance litigation managers on whether and to what extent disclosure of billing data to insurance litigation managers and outsourced party bill review consultants contravened confidentiality ethical rules.[4] Substantive research conducted during that initial decade demonstrated that the controversy lacked legal substance.[5] In the past decade, developments in "*e-commerce"* generally, the emergence of electronic ("e") information transmission in legal documents and e-bill submissions between law firms and clients are now essential for transacting legal business. Electronic outsourcing is the norm.[6] The American Bar Association (ABA) has acknowledged that legal cost

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[1] Restatement of the Law Third The Law Governing Lawyers, *Ch. 5, Confidential Client Information* Philadelphia, The American Law Institute, (2001),

[2] Geoffery C. Hazard, *An Historical Perspective on Attorney- Client Privilege,* 66 California Law Review 1061, (1978).

[3] Edna Selan Epstein, *The Attorney –Client Privilege and the Work Product Doctrine,* Chicago, American Bar Association, (2001).

[4] Stephen Gillers, *Ethical Issues in Monitoring Insurance Defense Fees: Confidentiality, Privilege and Billing Guidelines,* Wilton Ct., Law Audit Services, (1998).

[5] William G. Ross, *An Ironic and Unnecessary Controversy; Ethical Restrictions on Billing Guidelines and Submission of Insurance Defense Bills to Outside Auditors,* 14 Notre Dame Journal of Law, Ethics & Public Policy, (2000).

[6] American Bar Association, *Formal Opinion 08-451 Lawyer's Obligations When Outsourcing Legal and Non-legal Support Services.* Chicago, American Bar Association, (2008)

management in insurance defense is in the public interest.[7] It is incumbent on the ABA to promulgate an approach to ethical conduct with M*odel Rule 1.6 Confidentiality of Information* in insurance defense that will reconcile the reality of insurance defense cost management; the electronic transmission of legal bills by insurance defense lawyers to litigation managers and their outsourcing to bill review consultants for legal cost management support and guidance.

[7] [7] American Bar Association, *Formal Opinion 01-421 Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions,* Chicago, American Bar Association, (2001)

Preamble

The Commission believes that in the outsourcing context, consideration needs to be given to circumstances and challenges that were not envisioned over two decades ago.

The proposed Comment also acknowledges that **legal support service providers are sometimes chosen or recommended by the client.** (Emphasis added) 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 use of "ordinarily" recognizes that outsourcing often involves routine tasks [copying, mailing, etc.] that typically would not require client consultation. [8]

Background

Contemporary insurance defense litigation management is comprised of three components.

1. *Rules of Engagement/Litigation Management Guidelines*. These are broadly circulated policies and procedures dictating the general parameters of budgeting and billing for a case assigned to an insurance lawyer to which they agree to adhere to at the time of referral.
2. *Litigation budgets.* The cost projections based on an analysis and case plan that are mutually agreed upon by the insurance litigation manager and insurance defense lawyer to determine the cost parameters of the work product comprising the case with provision for modification as and when required through ongoing dialog.
3. *Legal bills for services rendered* submitted by the insurance defense lawyer to the litigation manager after the fact in conformance with the guidelines and budget.

[8] ABA Commission on Ethics 20/20 Discussion Draft, November 23, 2010 at P 15.

Property and casualty (P & C) insurance is a regulated financial service.[9] One of the regulatory requirements imposed on insurance companies by regulators in approving rates is for insurers to manage claims cost effectively.[10] The sheer volume of litigation in insurance claims management has placed considerable stress on insurance litigation managers to take a leadership role in embracing innovative approaches to cost effective claims management. The outsourcing of legal bills to external *" legal bill auditors"* approximately 20 years ago is an example of leadership in innovative legal services management. Insurance defense litigation managers were arguably the vanguard in utilizing outsourcing that is now acknowledged by stakeholders at large in the legal services market as a integral component of the legal services management mix as indicated in the wide ranging discussion taking place in conjunction with this discussion and the call for submissions.

As is the case with many leadership initiatives in legal services management, considerable controversy and debate ensued among the stakeholders in the insurance defense community on the merits, propriety and ethics of the outsourcing of legal bills to dedicated legal bill auditors.[11] In and effort to bring a semblance of order and balance to what had started as outsourced post service legal audit and was quickly evolving into a more sophisticated generation of bill review, the American Bar Association (ABA) issued **Formal Opinion 01-421 Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions** that established ground rules that reflected the tenure of that era.[12] The emergence of electronic bill management systems and "e-bill management" programs have leveraged the outsourcing of legal bill review into a "next" generation and new era of insurance litigation management.

The publication of ABA **Formal Opinion 08-451 Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services,** the ensuing debate it has generated and the establishment

[9] Susan Randall, **insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners.** Vol. 26 Florida State University Law Review at P625,
[10] www.naic.org
[11] Supra 5
[12] Supra 7

of this discussion forum with a call for responses to interim submissions is yet one more indicator of the progression of outsourcing to a new strategic level in legal services management. The combination of the influx of electronic bill transmission[13] and sophisticated legal bill review in insurance defense litigation management [14] makes it incumbent for this commission to reconcile the outsourcing of insurance defense legal bills for bill review with the broader findings of this commission. This submission will trace the evolution of the controversy and debate over outsourced insurance legal bill review and provide the commission with the framework for recommending a resolution that reconciles cost effective case management through outsourced bill review with the realities of electronic legal services management.

Attorney/ Client Privilege- The Starting Point

The "tradition" of assigning the privilege of confidentiality between a client and their lawyer can be traced back to at least Elizabethan times in England. Court cases document judges granting barristers representing clients immunity from disclosure of communication and information obtained therein.[15] The principle became recognized in American law by the early 19th century and has evolved into its modern day application with all the inherent complications:

> The difficulty in applying this limitation in modern law arises from the fact that lawyers today perform such a wide range of services that it is difficult to say when the when the consultant has stopped being a lawyer and has become a financial advisor, marriage counselor, or whatever.[16]

Attorney – client privilege has, at best, a limited association with legal expense management in insurance defense. What these lawyers are invariably referring to is either the Work Product Doctrine and/or the ABA Model Rules on Confidentiality."[17]

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[13] www.**ledes**.org
[14] www.**litigationmanagementreport**.com
[15] Supra 2
[16] Supra 2 at 1076.
[17] Comments, *The Work Product Doctrine in State Courts,* 62 Michigan Law Review 1200 (1964).

The Work Product Doctrine

In 1947 the Supreme Court in a landmark case, *Hickman v. Taylor*[18], expounded on the need for lawyers to be able to incorporate documentation into case strategy secure in the knowledge that opposing counsel would not have an automatic right to access it. The court set forth three propositions to protect its confidentiality:

1) Material collected in the course of preparation for possible litigation is protected from disclosure in discovery.
2) That protection is qualified, in that the adversary may obtain discovery on showing sufficient need for the material.
3) The attorney's thinking – theories, analysis, mental impressions, beliefs, etc. – is at the heart of the adversary system, and privacy is essential for the attorney's thinking; thus, the protection is greatest, if not absolute, for materials that would reveal that part of the work product.[19]

The fundamental distinction between Attorney – Client Privilege and the Work Product Doctrine is that the latter is much more expansive in that it is designed to protect "the adversary trial process itself"[20] Insurance defense is primarily situate in the state court system rather than the federal court system, the origin of the initial rule and the application of the court decision. However, "most states have adopted discovery procedures similar to those in the federal courts, and they tend to provide similar protection for attorney work product."[21]

> A literal interpretation of rule 26 (b) (3) requires that three tests be satisfied before materials can be classified as work product. The materials must be:
>
> *1.* documents and tangible things;
> *2.* Prepared in anticipation of litigation for trial; and
> *3.* by or for another party or by or for that other party's representative[22]

[18] *Hickman V. Taylor,* 329 U.S. 495. (1947).
[19] Supra 3 at 482.
[20] Supra 3
[21] Supra 3 at 487.
[22] Supra 3.

Litigation budgets are documents prepared in anticipation of litigation. Among other items they track litigation strategy. They set the stage for the work product and are reviewed and approved by the insurance litigation manager. Bills for legal services are derived from the work product. They are documents prepared after the fact that report on what the lawyer has accomplished in the course of the litigation action to that point in time. That great majority of billing information is either a record of routine tasks associated with compliance with rules of court or a report on interaction with the other party's lawyer. Confidentiality is not of paramount concern since the information contained therein has already been disclosed or is known to opposing counsel. They are submitted to the insured defendant's litigation manger for review. The outsourcing of bill review to e-bill systems vendors and their bill review managers conforms to the legal services culture articulated in formal opinion 08-451.

Lawyers are not the only parties who work on this type of documentation in preparation for trial. The lawyer relies on a team of experts, paralegals, and related support personnel. Because the Work Product Doctrine pertains to the protecting the confidentiality of the process and not just the practitioner, a "magic circle"[23] of people associated with the lawyer and intrinsic to trial preparation is entitled to access the documentation and input into its preparation without impairing its confidential status. In contemporary insurance litigation the litigation manager is frequently at a disadvantage if they are denied access to the comparable legal budgeting expertise necessary to engage in informed dialog with the outside lawyer. That expertise is usually imbedded outsourced in e-bill management system applications.

[23] United States v. Massachusetts Institute of Technology, 129 F. 3D 681 (1st Cir. 1997).

ABA Model Rule 1.6
Confidentiality of Information

The ABA has long recognized the importance of confidentiality as a primary ethical issue. In the original Canons of Ethics adopted in 1908, Canon 37 dealt with Confidences of a Client.[24] "It is the duty of a lawyer to preserve his client's confidences."[25] This canon's wording and intent was to corroborate and support the common law principle of attorney – client privilege. With the introduction of the Work Product Doctrine and the replacement of canons with the more comprehensive Model Rules of Professional Conduct, Rule 1.6 *Confidentiality of Information* replaced the more limited Canon 37. [26] The annotation is informative in providing background to the rule. It indicates that the origin of the rule "derives from both the law of agency and the law of evidence."[27] Although the reference to evidence has some association with attorney-client privilege, the reference to agency represents the ABA's own position which is arguably more expansive than the Work Product Doctrine. Outsourced bill review managers are agents of insurance litigation managers.

The focus on Rule 1.6 is understandable, given the mission of the ABA on the lawyer as opposed to the client in attorney-client privilege or process in the Work Product Doctrine. The rule starts with the premise that:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to in order to carry out the representation…

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[24] American Bar Foundation, *Opinions on Professional Ethics,* Chicago, American Bar Association, (1967).
[25] Ibid at 167.
[26] American Bar Association, *Annotated Model Rules of Professional Conduct, Rule 1.6 Confidentiality of Information,* Chicago, American Bar Association, (2003).
[27] Ibid at 87.

The annotation contains a specific reference to an interpretation of Rule 1.6 with respect to bill review. To quote:

> The ABA Standing Committee on Ethics and Professional Responsibility in Formal Opinion 01 421 has taken the majority position that the lawyer is impliedly authorized to give detailed billing information to the insurer if it will not adversely affect the interests of the insured, but the lawyer may not submit this information to a third party auditor without the informed consent of the insured.[28]

The reference fails to delineate what "billing information" refers to. Litigation budget information is billing information that is the foundation for the work product. It contains a combination of non-confidential and confidential information. For example, the budget will include projections for filing of statement of defense; a matter of public record. A Litigation bill is billing information that reports on work that has been done and, as has been indicated above, is, for the most part, public and not confidential.

ABA Model Rule 5.1
Responsibilities of Partners, Managers, and Supervisory Lawyers[29]

ABA Model Rule 5.2
Responsibilities of a Subordinate Lawyer[30]
The Restatement

All of the lawyers in a firm, not just the lawyer working on a case, have more or less access to the file depending on a variety of factors ranging from the makeup of the firm to the sensitivity of the case. The model rules have standards and protocols in place to ensure that confidentiality of client information is a paramount consideration with every lawyer in the firm. These standards and protocols enable client

[28] Ibid at 89.
[29] American Bar Association, *Annotated Model Rules of Professional Conduct, Rule 5.1Responsibilities of Partners, and Supervisory Lawyers,* Chicago, American Bar Association, (2003).
[30] American Bar Association, *Annotated Model Rules of Professional Conduct, Rule 5.2 Responsibilities of a Subordinate Lawyer,* Chicago, American Bar Association, (2003).

files to be exchanged among lawyers within the firm without the risk of breaching confidentiality. Many firms augment these standards with comprehensive electronic *"e"* client/matter management systems. Litigation managers also augment their operations with "e" case/matter management systems. These systems are often best provided and managed by outsourced e-bill systems vendors.

ABA Model Rule 5.3
Responsibilities regarding non-lawyer Assistants[31]

Lawyers do not work on cases in isolation. Paralegals, legal secretaries and related support personnel work on case files with them. In fact, the preparation of legal bills and the follow up for payment is oftentimes under the auspices of a billing clerk/manager. They would constitute the magic circle under the Work Product Doctrine. The ABA rule, without mentioning magic circle by name, implies the same. However, the ABA rule is much more specific in addressing the issue of confidentiality and ensuring that the lawyer understands their obligation to uphold it with support staff.

> 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.[32]

The Restatement

The mission, terms of reference and role of the American Law Institute and its publication, Restatement **of The Law Third The Law Governing Lawyers**[33]**,** speaks for itself with the ABA and this commission. To quote from the discussion document: "*Also available in the broader legal context are existing texts such as the*

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[31] American Bar Association, *Annotated Model Rules of Professional Conduct, Rule 5.3, Responsibilities regarding Non lawyer Assistants, Chicago*, American Bar Association, (2003).
[32] Ibid at 453.
[33] Supra 1.

Restatements of Agency and the Law Governing Lawyers"[34] It's important to bring the restatement into the confidentiality issue when bill review is involved. The annotation to ABA Rule 1.6 makes specific reference to the influence of the law of agency section of the restatement on the interpretation of the rule. The restatement addresses the role of agents, a category that includes bill reviewers and insurance litigation managers, on the issue of confidential client Information.

The restatement makes the interesting observation that "courts generally hold that presence of a translator or other person who facilitates a client's communication to a lawyer is consistent with confidentiality."[35] It goes on to opine that an "accountant acting for a client in translating financial data for benefit of client's lawyer (is) privileged equally with (a) translator of foreign language."[36] There is a logical extension of this rationale outsourced bill review professionals providing financial advice to insurance litigation managers, particularly when in a subsequent topic dealing specifically dealing with insurance defense the restatement validates the right of the insurer to control the defense. Given the realities of the tri-partite professional dynamic in insurance defense the restatement states unequivocally that:

> Whether a client-lawyer relationship also exists between the lawyer and client is determined under S.14. Whether or not such relationship exists, communications between the lawyer and "*representatives"* (outsource providers) of the insurer (*i.e. bill review consultants)* concerning such matters as progress reports, case evaluation and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding. [37]

The annotated segments of this excerpt from the restatement are clear and unequivocal in validating the outsourcing of bill review and encompassing it in the parameters of the work product doctrine.

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[34] Supra 8 at P10.
[35] Supra 1, Ch.5, #70, Comment f. at 541.
[36] Ibid
[37] Supra 1 at Ch. 8 at #134 Comment f.

Confidentiality and Data Base Management

Formal Opinion 95-398[38]

Access of Non lawyers to a Lawyer's Data Base

The use of information management systems as the basis for client file management had emerged as a major practice management mechanism by the mid 1990's. Many of the systems were a variation of application service providers (ASP's) installed, maintained and serviced by outsourced vendors. This gave the parties access to confidential material and in theory posed a threat to the privileged nature of the information once disclosed to third party computer service providers. The ABA took the position that this was, in effect, an extension of Rule 5.3 and the Standing Committee made the following policy decision:

> Under Rule 5.3, a lawyer retaining such an outside service provider is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information. Thus when a lawyer considers entering into a relationship with such a service provider he must ensure that the service provider has in place, or will establish reasonable procedures to protect the confidentiality of information to which it gains access, and moreover, that it fully understands its obligations in this regard.[39]

In a footnote to Formal Opinion 01-421[40] on bill review, which will be discussed below, the Standing Committee distinguished this decision from an insurer's referral to a third party bill review

[38] American Bar Association, *Formal Opinion 95-398, Access of non lawyers to a Lawyer's Data Base,* Chicago, American Bar Association, (1995).
[39] Ibid at 2.
[40] Supra 7.

consultant by indicating that "the present inquiry (on the confidential status of third party bill review) is clearly distinguishable (from 95-398) because the lawyer has neither a contract with nor any right to control the conduct of the third party auditor retained by the insurer."[41] This is true as far as the status quo is concerned. However, this state of affairs is easily remediable by insurers requiring the third party bill reviewer consultants to supply insurance defense lawyers with a confidentiality commitment similar to that provided by third party computer companies. A reading of the above quote from Formal Opinion 95-398 indicates that the degree of confidentiality required to protect confidentiality falls well short of the "control" alluded to in the footnote utilized as a reference.

Confidentiality and E-Billing

Formal Opinion 99- 413 [42]

Protecting the Confidentiality of Unencrypted E-Mail

E-mailing is the foundation for e-billing system transmission and bill review. There was initially confusion within the ranks among some law firms who were under a misapprehension and/or misunderstanding about whether and to what degree the sending of billing information by e-mail contravened the ABA Model Rule of Professional Conduct 1.6, "The *Confidentiality Rule*". The question poised was, regardless of whatever right any party might have to access and review client information in the possession of their lawyer, did Rule 1.6 prohibit the transmission of that information electronically?

The Standing Committee accomplished two important objectives in issuing this formal opinion. First and foremost, it recognized the level of rhetoric that had been reached with the histrionic arguments by factions within the legal profession of the inviolate status of Rule 1.6. In the opening paragraph of the actual opinion the committee qualified the status of the rule by

[41] Ibid n, 28.

[42] American Bar Association, *Formal Opinion 99-413, Unencrypted E-Mail,* Chicago, American Bar Association, (2001).

stating that " in order to comply with the duty of confidentiality under Model Rule 1.6, a lawyer's expectation of privacy in a communication medium need not be absolute; it must merely be reasonable"[43]. Rule 1.6 hasn't been drafted to require lawyers to function in a top-secret environment. They are professionals required to exercise the standard of care one associates with professionals dealing with sensitive matters.

The second objective was to put the issue of communication in an electronic age context. The formal opinion is a primer on the evolution of information technology and how the confidentiality of the lawyer/client relationship has continued to prosper when first the telephone and then the fax came into existence up and until the emergence of e-mail. The Standing Committee acknowledges the existence of hackers and recognizes that there is no such thing as an absolute guarantee of the security of the confidentiality of information in e-mail communications.

However, information is at least as secure, if not more so because of encryption, in e-mail transmissions than telephone and fax exchanges. Just as the legal profession has found that it couldn't function without the use of the telephone and fax and designed protocols to minimize the risk of breaches of client confidentiality with them so will be the case with e-mails. The benefit, indeed the necessity of using e-mail for the transmission of client information, far outweighs the potential for any breach of the confidentiality rule. The use of e-mail is compatible with Rule 1.6. "E"-bill transmission through secured networks is compliant with all requirements for confidentiality of communications.

[43] Ibid

Confidentiality and Bill Review
Formal Opinion 01-421
Ethical Obligations of a Lawyer
Working Under Insurance Company
Guidelines and Other Restrictions

All of the state bars have counterparts to Model Rule 1.6. Many are straightforward adaptations of the ABA standard with very minor or virtually no changes to the wording.[44] It is this rule, with its broad interpretation, and not the narrower common law rule of attorney-client privilege or the Work Product Doctrine Rule that state bar ethics committees and courts tend to refer to when dealing with alleged conflicts between bill review programs, especially those involving outsourced bill review consultants, and insurance defense lawyers' confidentiality status.[45] Attorney –client privilege and Work Product Doctrine are used to define the parameters and guidelines associated with confidentiality and the loss thereof.

Insurance litigation management guidelines and outsourced legal auditing were major issues of contention between insurers and the insurance defense bar for the better part of a decade in the 1990's. In an effort to bring an element of reasoned clarity to what was becoming an out of control debate[46] the ABA issued Formal Opinion 01-421[47]. Among other issues it deals with confidentiality under a designated sub-heading, *Lawyer's Submission of Client Billing Records to the Insurer or to the Insurer's Third Party Auditor[48].*

The opinion points out, as a starting point, that "most of the information supplied to insurers through billing records is of a general nature, is publicly known (e.g. a lawyer's court appearances), or

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[45] Claire Hamner Matturo, *Ethical and Legal Snares Waiting for Attorneys Subject to Legal Fee Audits and Billing Guidelines,* 24 J. Legal Prof. 111, (1999).

[47]Supra 7.
[48] Supra 7.

already known as a result of the insured having forwarded it to the insurer to facilitate the defense (e.g. medical records)."[49] The extent to which confidentiality is a concern is at the legal budgeting phase when insurance defense strategy is under discussion. By the time the legal bill is submitted that portion of the work product to which confidentiality may have applied has been disclosed to opposing counsel and may well be a matter of public court record. This doesn't minimize the importance of confidentiality but it certainly puts it in perspective and takes it out of the realm where it is alleged that any type of disclosure of billing information must be measured against the confidentiality factor.

However, the opinion goes on to state that there is no need to engage in this sort of analysis when the issue is whether and to what extent billing information may be disclosed directly to the insurer. To quote:

> Informing the insurer about the litigation through periodic status reports, detailed billing statements and the submission of other information usually is required, explicitly or implicitly, by the contract between the insurer and insured and also is appropriate in those jurisdictions where the insurer is regarded as a client and there is no conflict between the insurer and insured. **The disclosure of such information usually advances the interests of both the insured and the insurer in the representation and such disclosures are, therefore, "impliedly authorized to carry out the representation**."[50]

End of debate! Insurers are entitled to receive and, by implication, analyze, evaluate and comment on insurance defense lawyers' legal budgets and bills so long as there is no conflict between the insurer and insured; a rare occurrence.

The opinion does not accord this same right of access to outsourced bill review consultants. It takes as a starting point that a number of state bar associations have issued opinions stating it is unethical for insurance defense lawyers to disclose billing information to third party

[49] Supra 7.
[50] Supra 7.

bill reviewers without the informed consent of the insured. The seeking of informed consent must include advice that the release of the information to the external bill review consultant involves the risk of loss of privilege and the confidentiality that goes with it.

There is a noticeable lack of certainty and any clear statement of opinion this issue in this portion of the formal opinion, as is the case with all of the state ethics advisories and court opinions. ***It has never been authoritatively ruled by any court that the transfer of billing information in an insurance defense case to an outsourced bill reviewer working in conjunction with the insurer is an actual breach of the confidentiality rule.***[51] The preponderance of state bar opinions referred to are guilty of having played follow the leader. Their main justification is that so and so other states have issued a similar ethics opinion with a corresponding much qualified remark, much like that in the formal opinion, that disclosure to an outsourced bill reviewer "could" without actually categorically saying "would" result in the loss of confidentiality. The impetus for issuing these advisories has been the response to pressure from insurance defense lawyers in their respective jurisdictions, whose opposition to bill review was and is business based rather than genuine concern over an ethical issue.

The one court decision mentioned in the state bar advisories and decisions, as well as the formal opinion, as evidence that submission of billing information to an outsourced party results in the loss of its privileged status and confidentiality is the "Massachusetts Institute of Technology (MIT)" case. However, the facts and issues in that case are a world apart from what is at issue in outsourced bill review with insurance defense. In the MIT case an independent government auditor had initially audited billing records to verify their conformance with government bidding requirements. In a subsequent court challenge by the U.S. government, M.I.T. was denied the right to keep these documents confidential since they had already been previously disclosed to a third party external auditor with an adversarial interest. State courts that have relied on this decision have invariably predicated their reasoning by hypothesizing that outsourced bill review consultants, and indeed insurers, have an

[51] Michael F. Aylward, **Squaring the Triangle,** *The Tripartite Relationship And Its Troubles. (unpublished research paper 2003).* maylward@mail.mmm-m.com

inherent adversarial relationship with the insurance defense lawyer.[52] As the formal opinion clearly states on the basis of substantive jurisprudence, the opposite is the case. The insurer in the overwhelming majority of instances has a common interest with the insured and the insurance defense lawyer in settling the case.

The opinion acknowledges that lawyers do disclose confidential information to other parties without any fear of loss of privilege. Lawyers may share information with the "magic circle" of experts and support persons essential to do their trial preparation work. The opinion differentiates this group from an outsourced bill review consultant by pointing out that they have direct contractual relationship with the lawyer and are, ultimately, subject to the lawyer's supervision, which in the case of in-house personnel is governed by Rule 5.3, *Responsibilities regarding Non lawyer Assistants*[53]

Computer/systems services providers also fall under this classification as was pointed out above. Another category of permissible party that a lawyer may share information is the lawyer-to-lawyer consultation. Under prescribed conditions that respect Rule 1.6 a lawyer may consult with another lawyer outside the firm on case management strategy without risking a loss of confidentiality.[54]

The incongruities of allowing lawyers to share confidential information with their own outsourced data base managers without extending the same provision to insurers and outsourced bill review consultants has been discussed above. However, there's an extra element of hypocrisy in the exemption for the category of lawyer –to- lawyer consultation. The lawyer is permitted to go outside the realm of the lawyer/client relationship, retain a third party expert and seek their advice and input without impugning privilege and confidentiality.

Why is not the same opportunity available to an insurer? It's a given that insurers have both a common interest with the insured in the case and the right to input into the process providing they don't

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[52] *In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2P.3D 806 (Mont. 2000).*

[53] Supra 26.

[54] American Bar Association, *Formal Opinion 98-411 Ethical Issues in Lawyer-to-Lawyer Consultation ,* Chicago, American Bar Association, (1998).

impugn on the lawyer's right to exercise independent professional judgment. Why shouldn't insurers be provided with the same opportunity as the lawyer to retain external experts like outsourced party bill review consultants as long as prescribed conditions were in place to ensure protection of privacy? This is not an outside the envelope question. It follows the line of logic put forward above by the restatement in its suggestion that clients may well be entitled to retain experts to advise them on case matters without breaching confidentiality.

This writer is perhaps not the only one who has made this suggested association. Professor Stephen Gillers of New York University, who work is cited in Formal Opinion 01-421, suggests that:

> Moreover, an insurer's decision to give an independent contractor access to the insured's confidential information to assist it in exercising its contractual right to control the defense should stand on no different footing from a law firm's decision to give an independent contractor access to a much greater volume of confidential information to aid it in representing clients.[55]

Giller's opinion garners additional credibility when one extends that relationship to one of principal and agent. The outsourced bill review consultant is acting as an agent for the insurer with whom it has a common cause in an important component of litigation management; cost effective case management within the framework of litigation management guidelines.[56] The concept of common cause is critical in distinguishing the outsourced bill review consultant in insurance litigation from the third party auditor in the MIT case. In the MIT situation the third party auditor had no common cause with the university. It wasn't retained by it and was performing a watchdog function for the federal government that had an adversarial element to it. Insurers are retaining out sourced bill review consultants as agents with a special expertise to work with them in the common cause of cost effective litigation management. This conforms to all of the ethical considerations associated with the practice of law and the

[55] Supra 4 at 16.

exercise of independent professional judgment by the lawyer in litigating a case.

Lawyer's Obligations When Outsourcing Legal
And
Non-legal Services

Formal Opinion 08-451[57]

The issuance of a formal opinion is invariably the starting point in the evolution of a legal matter into the mainstream of practice management. The outsourcing of legal services is now integral to the design and delivery of legal services. There are specialty legal research companies that undertake first instance legal research for law firms and in-house counsel in corporate legal departments. "*Offshore"* legal document production companies in India[58], a common law country with first - rate law schools, have lawyers on staff to provide document drafting, e-discovery and a broad range of litigation management services for U.S. law firms and corporate legal departments at substantially less cost than in-house domestic associate lawyers.

Most notable and the acknowledged leader has been the outsourcing of information systems and data management to specialists. The range of services covered in the outsourcing opinion is all encompassing. To quote:

> Outsourced tasks range from the use of a local photocopy shop for the reproduction of documents, to the retention of a document management company for the creation and maintenance of a database for complex litigation, to the use of a third - party vendor to provide and maintain a law firm's computer system, to the hiring of a legal research service to prepare a 50-state survey of the law on the issue of importance to a client, or even to the engagement of a group of foreign

[57] Supra 6.
[58] www.**pangea3**.com/

> lawyers to draft patent applications or develop legal strategies and prepare motion papers in U.S. litigation.[59]

The opinion sets the tone for consideration of the panorama of services under review with the following positive statement. "T*he outsourcing trend is a salutary one for our globalized economy*." It then goes on to indicate the extent to which the reality of the 21st century service environment is to be embraced by stating emphatically that "There is nothing unethical about a lawyer outsourcing legal and non-legal services, provided the outsourcing lawyer renders legal services to the client with the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation".

Lawyer to lawyer outsourcing is arguably merely an extension of the accepted referral principle. What distinguishes outsourcing and this formal opinion is the acknowledgement that non-lawyers are to be accorded equivalent status. The following succinct quotes paraphrase the extent to which outsourcing to experts of various designations is permissible and open to litigation managers and the outsourcing of legal bills to bill review consultants.

- There is no unique blueprint for the provision of competent legal services.

- Others may decide to outsource tasks to independent service providers that are not within their direct control. Rule 1.1 does not require that tasks be accomplished in any special way.

Sophisticated e-billing systems have Meta data system capability. The meta data and outsourcing formal opinions provide litigation managers with opportunities to look at creative outsourcing of all manner of tasks and services, including outsourcing of legal bill management to e-bill review systems providers and their outsourced bill review consultants. Moreover, as an increasing number insurance defense lawyers gravitate to using the Uniform Task Based

[59] Supra 6

Management (UTBMS) Litigation Code Set 2007[60], which has been modified to specifically respond to the insurance defense, they will be inclined to outsource their billing functions to e-bill management providers that have the capability to aggregate and massage their bill data into performance management analytics.

The opinion lists three key requirements that a lawyer and, by inference, insurance litigation manager needs to ensure are adequately met in the course of an outsourcing consideration.

- The first is that the outsource provider has a system that conforms to best practices standards. The outsourcing formal opinion recommends that the client, conduct a due diligence. The thrust of the due diligence would be to ensure that the system had robust data management capability with appropriate fire walls in place to ensure adequate privacy protection

- The second is that the outsource provider has legal expertise in-house to complement its systems expertise.

- The third is confidentiality. To quote from the opinion:

> This (outsourcing) requires the lawyer to recognize and minimize the risk that any outside service provider may inadvertently –or perhaps advertently – reveal client confidential information to adverse parties or others not entitled to access. Written confidentiality agreements are, therefore, strongly advisable in outsourcing relationships.

The latter part of this quote is underlined to indicate both its importance in underpinning outsourcing in a way that resolves some of the previous complications that arose in outsourcing legal bills and the opportunity for litigation managers and their outsourced bill review consultants to bring outsourcing of legal bills to the best practices level in conformance with the opinion. Privacy encompasses confidentiality. Industries, particularly financial services, have been

[60] www.**utbms**.com

required to develop comprehensive electronic data privacy protection programs to comply with European Union data privacy regulations. The U.S. Department of Commerce has developed a best practices privacy standard under the umbrella label of "Safe Harbor."[61] An outsourced bill review consultant that developed a Safe Harbor program would by government dictate have the foundation in place for entering into confidentiality agreements that conformed to the conditions of outsourcing as outlined in the opinion.

As is the case with virtually all of the formal opinions cited in this submission, particularly the companion Formal Opinion 10-421, this opinion contains a caveat that states "*no information protected by Rule 1.6 may be revealed without the client's consent.* Thus the need for an articulation of Rule 1.6 that conforms to the reality stated in the opening paragraphs of this opinion that *"The outsourcing trend is a salutary one for our global economy."*[62]

Recommendation

Insurance is a core service industry the well being of which is critical to the functioning of society and the economy. The cost effective provision of insurance services, including insurance defense litigation, is mutually beneficial to the insurer, insured and insurance defense lawyer and is in the public interest. Insurance defense litigation with its tri-partite relationship between the insured, insurer and insurance defense lawyer has a history of requiring its own dedicated sub set of ethical rules of ethical conduct. Legal bill review/bill management by insurance litigation managers has been acknowledged as a key mechanism in the provision of cost effective insurance defense. Outsourced bill review consultants play an important role in supporting the requirement for insurance litigation managers to manage the defense of an insurance defense claim in the best interests of the insured client. E-bill management by outsourced law firm bill management providers is on the horizon. There is no substantive court decision that correctly interprets the mutually supportive relationship between the insured, insurer and insurance

[61] www.export.gov/**safeharbor**
[62] Supra 6.

defense lawyer in the tri-partite relationship in insurance defense that specifically rules that legal bill review by either an insurer or an outsourced bill review consultant is contravenes any law or ethical rule of conduct in general or *Model Rule of Professional Conduct 1.6 – Confidentiality.* The advent of e-commerce and the spawning of outsourcing as the required architecture for legal services management require an addendum to *Rule 1.6* affirming that the outsourcing of legal bills to an external bill review consultant with the appropriate privacy safeguards in place doesn't contravene nor infringe this ethical rule.

Linda Strite Murnane

Dear U.S. Lawyers Practicing Abroad Committee Members

Last evening I forwarded the draft Ethics 20/20 document for your review. I want to repeat that this is a very important document for U.S. Lawyers Practicing Abroad. I would urge all of you to carefully review it.

I have particular concerns regarding Rule 5.5, and draw to your attention this proposal regarding the unauthorized practice of law; multijurisdictional practice of law. Please note in particular sections 5(b) and 5(c).

I know that many of you have offices or systematic and continuous presence in a jurisdiction, and I am not sure that I understand the proposed rule change correctly, but believe that it could mean that you would be in violation of the new proposed 5.5(b) if you are not admitted to practice in a location but have an office or are systematically and continuously present in that jurisdiction. With respect to the "continuous presence in a jurisdiction" language, I have further concerns what that means for people who work in virtual law practices with a "presence" overseas, but who practice in a jurisdiction in which they are admitted.

I would hope that you will respond directly to this proposal with your views, as I fear if you do not, this draft will possibly be adopted more formally.

Thank you.

Kind regards,
Linda Strite Murnane
Co-Chair, U.S. Lawyers Practicing Abroad Committee

G. Fred Ours

Once you outsource something containing a client confidence to a non-lawyer (which may in some states be defined as an individual not licensed to practice law in the U.S or even in a particular state) you may destroy the evidentiary privilege established by a state's legislature, or even violate the confidentiality rule in some states – the multi page informed disclosure document needed to cover all of the permutations could itself be daunting enough to cause a client to say heck no. The core concepts of client confidence, diligence, and avoidance of conflicts of interest (who else is the outsource doing work for – and how do you protect against a foreign national selling your client's confidential information to the other side) would seem to be in direct conflict with outsourcing anything remotely involving a client confidence. This is an extremely complex minefield. Great caution and extraordinary care are required.

G. Fred Ours

Responsive Law
The Consumer's Voice in the Legal System

Testimony of Thomas M. Gordon, Legal and Policy Director
Consumers for a Responsive Legal System

Before the ABA Commission on Ethics 20/20

Submitted January 31, 2011

Consumers for a Responsive Legal System ("Responsive Law") thanks the Commission for the opportunity to present its testimony on its recommendations to date. Responsive Law is a national, nonprofit organization working to make the civil legal system more affordable, accessible and accountable to the people it is meant to serve.

We have comments on several of the proposals and questions raised by the Commission. The fundamental question we asked as we examined each rule was whether it protects those who use lawyers as well as those who do not. The Model Rules often slant toward the former. As lawyers, we are naturally concerned about treating our clients ethically. However, addressing this concern often has a price: A rule that might provide incremental protection to those who already have access to the legal system might also make it harder for outsiders to gain any access to the system at all. It is important that we not be not let an idealized and often outdated set of legal ethics principles stand in the way of innovation that would benefit both current clients and those who wish to become clients.

Outsourcing

Outsourcing can have enormous benefits to clients, as it can result not only in lower prices for legal services, but also in the creation of more flexible staffing arrangements that can provide clients with a wider range of options when choosing a legal service provider. Of course, as in any transaction with a lawyer, clients should be informed about who will be performing the service for which they are paying. We endorse the requirement that the primary lawyer in a case obtain informed consent with respect to lower standards of confidentiality which may apply to an outside lawyer, as we support all efforts to inform clients of their rights with respect to a legal representation.

Proposed Comment 7 reads, in part, "When retaining lawyers and others outside the lawyer's own firm, the requirements of Model Rule 5.5 (a) must be observed." – We recommend that, at a minimum, this comment be amended to refer to Model Rule 5.5 generally, not merely subsection (a). Referring merely to subsection (a), which prohibits practice of law "in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction" leaves ambiguity as to whether out-of-state lawyers may assist an in-state lawyer with a matter. Referring to the whole rule would clarify this issue by, for example, incorporating reference to subsection (c)(1), which permits practice in association with an in-state lawyer.