

**American Bar Association**

**Commission on Ethics 20/20**

**Discussion Draft Regarding Domestic and International Outsourcing**

**Comments Requested by January 31, 2011. Please send comments to Senior  
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## ABA Commission on Ethics 20/20 Discussion Draft, November 23, 2010

**RESOLVED:** That the American Bar Association amends the ABA Model Rules of Professional Conduct by adopting new Comment [7] to Model Rule 1.1 as follows (insertions underlined, deletions ~~struck through~~):

### *Client-Lawyer Relationship* **Rule 1.1 Competence**

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

#### **Comment**

#### **Legal Knowledge and Skill**

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

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

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

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

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### Thoroughness and Preparation

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

### Maintaining Competence

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

### 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 also reasonably 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.

**FURTHER RESOLVED: That the American Bar Association amends the ABA Model Rules of Professional Conduct by adopting new Comment [3] to Model Rule 5.3 as follows (insertions underlined, deletions ~~struck through~~):**

#### *Law Firms And Associations* **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 lawyer;

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

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

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

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

### Comment

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

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

[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 depend upon the circumstances, including: the education, experience and reputation of the nonlawyer service providers; the nature of the services involved; 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

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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.

**FURTHER RESOLVED: That the American Bar Association amends Comment [1] to Rule 5.5 (a) of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):**

### *Law Firms And Associations*

#### **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
  - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
  - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
  - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
- (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

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

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

### Comment

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

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

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

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

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

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

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

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

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

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

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

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a

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pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

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

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide *pro bono* legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].

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

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

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unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

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

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

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

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

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

**DRAFT REPORT  
(October 31, 2010)**

**Introduction**

The outsourcing of work domestically and internationally, although not new to the legal profession<sup>1</sup>, is becoming increasingly widespread. The ABA Standing Committee on Ethics and Professional Responsibility and other state and local bar associations have recognized the reality of outsourcing and issued many opinions or reports giving guidance on how to outsource ethically.<sup>2</sup> ABA Formal Opinion 08-451, entitled “Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services,” identified key ethical considerations lawyers should take into account under the Model Rules of Professional Conduct when outsourcing domestically or internationally. To date, however, the Model Rules and their accompanying Comments do not specifically address outsourcing.

Shortly after the issuance of Formal Opinion 08-451, the ABA Section of International Law (“the Section”) created a Task Force on the International Outsourcing of Legal Services. Subsequently, in November 2009, the ABA Commission on Ethics 20/20 identified outsourcing by lawyers and law firms as a subject squarely within its mission, which was to examine the ethical and regulatory implications of advancing technology and globalization of the practice of law. The Commission therefore created an Outsourcing Working Group that included, but was not limited to, members of the Section’s Task Force as well as a representative from the ABA Standing Committee on Ethics and Professional Responsibility. The global perspective, insights and substantive work of the Section’s Task Force members have been of critical value to the development of these Resolutions and this Report, as have the knowledge and expertise of the ABA Standing Committee on Ethics and Professional Responsibility.

In considering whether the ABA Model Rules of Professional Conduct adequately address outsourcing, the ABA Commission on Ethics 20/20 remained cognizant of two important considerations. First, the black-letter Model Rules are rules of reason, in most instances general in nature. As noted in the “Scope” provision of the Model Rules, they “presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.” Also available to lawyers in the broader legal context are existing texts such as the Restatements of Agency and of the Law Governing Lawyers, and case law regarding ethical

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<sup>1</sup> For example, in 1995, the Dallas, Texas-based law firm Bickel and Brewer opened a legal support office in Hyderabad, India to support its litigation practice.

<sup>2</sup> See e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451 (2008); State Bar of Cal., Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 2004-165 (2004); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l Responsibility, *Report on the Outsourcing of Legal Services Overseas* (2009); Colo. Bar Ass’n, Formal Op. 121 (2009); Prof’l Ethics of the Fla. Bar, Op. 07-02 (2008); N. Carolina State Bar, 2007 Formal Op. 12 (2008); N.Y. City Bar, Ass’n of the Bar of the City of N.Y. Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-3 (2006); N.Y. State Bar Ass’n., Comm. on Prof’l Ethics, Formal Op. 762 (2003); Ohio S.Ct. Bd. of Comm’rs on Grievances & Discipline, Advisory Op. 2009-06 (2009) ; San Diego Bar Ass’n, Op. 2001-1 (2001); Council of Bars and Law Societies of Europe, *CCBE Guidelines on Legal Outsourcing* (2010), [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/EN\\_Guidelines\\_on\\_leg1\\_1277906265.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Guidelines_on_leg1_1277906265.pdf).

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and tort liability. Thus, the Commission recognized the importance of examining as well the extent to which other substantive and procedural law complements the Model Rules to provide appropriate instruction and regulation for those who outsource legal services.

Second, the Commission reviewed the Model Rules' Comments, understanding that they are intended to provide guidance for practicing in compliance with the Rules. The Scope note also observes that "comments are sometimes used to alert lawyers to their responsibilities under...other law." The Commission therefore considered the Comments accompanying each of the Model Rules that apply to a lawyer's engaging in outsourcing, to determine whether specific language on this subject might be added usefully to any of them.

In developing this Resolution, the Commission analyzed a significant of materials (see [www.abanet.org/ethics2020](http://www.abanet.org/ethics2020) for a sample bibliography), including, but not limited to, all available legal ethics opinions (the vast majority of whose conclusions are consistent with those in Formal Opinion 08-451); news reports, scholarly articles, studies and surveys; testimony offered at the Commission's public hearings; and comments received in response to questions that were specifically tailored to the experiences and concerns of clients, lawyers, law firms, and providers of outsourced services.

Finally, the Commission remained especially cognizant of the concerns not only of those who oppose outsourcing work internationally, but those who find the practice of outsourcing itself to be objectionable. The Commission was particularly sensitive to the current employment market for lawyers and the economic hardships faced by those lawyers currently seeking jobs, particularly young lawyers. The changes to the Comments to Rules 1.1, 5.3, and 5.5 of the Model Rules of Professional Conduct recommended herein constitute neither endorsement nor rejection of the practice of outsourcing by lawyers and law firms. Rather, they are an important and direct response to the existence and growth of outsourcing practices, intended to help lawyers engaging in the practice to do so ethically and responsibly.

In addition to recommending adoption of this Report's proposed amendments, the Commission enthusiastically endorses the commitment of the ABA Center for Professional Responsibility to create and manage a comprehensive, user-friendly website tracking all significant news and developments relating to the ethical issues arising in the context of outsourcing. This website will provide up-to-date access to both evolving outsourcing practices and the technological changes that make them possible. During the period in which the continued and rapid evolution in outsourcing practices renders the creation of a static, established set of practice standards both unwieldy and premature, this web-based resource will serve as an easily-updated "living document," useful both to those who engage in outsourcing and those who study it. Lawyers engaged in specialized practices can also use this resource to develop more tailored supplemental guidance related to their practice areas.

### **Overview: Outsourcing by Lawyers and Law Firms**

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Outsourcing in general refers to the practice of taking a specific task or function previously performed inside a law firm and, for reasons including cost, capability and efficiency, having it performed by an outside service provider. A service provider to whom work is outsourced may be located within the United States or in another country. When outsourced work is sent outside the U.S., the activity is often referred to as “offshoring.” Globalization and an increasingly technology-driven economy have led to the increase in outsourcing by lawyers and law firms, both domestically and internationally.

Among the factors that have contributed to the significant growth of outsourcing are the technology-driven enhanced ability to provide cost-effective “24/7” service to clients and faster turnaround for labor-intensive projects; the enormous growth of electronic discovery; the dominance of the English language in law and commerce; and the steady escalation of legal fees.

For several reasons, outsourcing may appeal to the clients of U.S. lawyers and law firms as well as to the lawyers and law firms themselves. The work may be better done outside the firm because of efficiencies developed and utilized by providers of outsourced services. There are potential and possibly substantial cost-savings, whether the work is outsourced to providers in the U.S. or elsewhere. This cost differential may be of particular benefit to solo practitioners and small and medium-sized U.S. law firms, allowing them to compete more aggressively for large matters without fear that if they secure employment by the client they may lack adequate resources to perform the legal work.

Outsourcing may be done by individual lawyers, law firms, or clients. The providers of outsourced services, whether located in the U.S. or elsewhere, may be engaged as independent contractors, on a temporary or ongoing basis, to perform a variety of nonlaw-related or law-related work. Work that is now frequently outsourced – either inside or outside the U.S. – includes, for example, hiring outside companies to handle human resources functions; engaging software as a service provider including those providing off-site servers commonly referred to as a “cloud computing” provider; sending client documents out for copying, scanning or archiving; or hiring providers, including other lawyers and law firms, to conduct legal research, perform document review, conduct patent searches, perform due diligence or draft contracts. Document review, in the context of electronic discovery, presently constitutes the bulk of outsourced law-related work along with patent-related work. Information reviewed by the Commission indicates that outsourcing domestically remains more common than doing so internationally.

In considering whether the Model Rules of Professional Conduct effectively address outsourcing, the Commission explored the nature and complexities of this evolving industry, both domestic and international. The Commission focused its attention on the ethical considerations identified in ABA Formal Opinion 08-451: appropriateness of fees, competence, scope of practice, confidentiality, conflicts of interest, safeguarding client property, adequate supervision of lawyers and nonlawyers, unauthorized practice of law, and independence of professional judgment. It also considered numerous ethics opinions of international, state and local bar associations on the subject, the vast majority of whose conclusions were also set forth in the ABA Opinion.

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Exploring the range of additional guidance currently available to lawyers, the Commission reviewed materials from domestic and international outsourcing providers themselves, finding substantial evidence that the providers are also focused on the ethical considerations and obligations identified in the organized bars' ethics opinions, and that they are motivated to do so. Protocols developed by the providers of outsourced legal and non-legal services evidence their use of ever more sophisticated technology to ensure quality control of the outsourced work, to provide adequate security over personnel and information, and to increase the opportunities for and convenience of oversight by the lawyers and law firms that are outsourcing the work.

Information the Commission reviewed shows that, for example, a wide variety of effective procedures are in place to protect the confidentiality of client information. Lawyer and nonlawyer employees of many outsourcing providers are required to sign confidentiality agreements, with some firms requiring employees to sign new and separate confidentiality agreements for each new assignment. Although the details of security measures implemented by outsourcing companies are often proprietary, certain generalizations are possible. The most effective of these measures include the use of the most up-to-date information security technology (*e.g.*, for encryption, anti-virus, transmission, storage, and permanent deletion of information); use of biometric and other security measures for access to premises or data (including separate premises or areas for each project); maintenance of continuous video monitoring, monitoring of employee computers, disabling of employee computers' portals for portable data storage devices, and repeated identity checks on admission to buildings, elevators, and other areas where work is being performed; extensive background checks on employees; and periodic internal and external audits of all of the foregoing measures.

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

Industry awareness and responsiveness to the ethical concerns and obligations of U.S. lawyers and law firms are resulting in outsourcing firms seeking input from and collaboration with the organized bar, and with lawyers and law firms, in the development of ethics policies and training regimes for the lawyer and nonlawyer employees of service providers. The Commission's research has determined that a number of companies that provide outsourced services have established sophisticated training programs for nonlawyer and lawyer employees on a variety of topics, including U.S. substantive and procedural law, legal research and writing, and the rules of professional ethics. There may also be specific training to address the particularized needs of a client or project.

### **Proposed Amendments to the Comments to Rules 1.1, 5.3, and 5.5 of the ABA Model Rules of Professional Conduct**

The Commission's review of the Model Rules of Professional Conduct and their accompanying Comments revealed that, in all but three instances, they are either easily recognizable as having

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application to outsourcing, or they bear no relation to it at all. The extensive commentary accompanying the series of Model Rules dealing with conflicts of interest, for example (Rules 1.7 through 1.13), when considered in conjunction with the wealth of ethics opinions, court cases, and scholarly discussion generally available on that subject, reveals that no special language needs to be added to them to remind lawyers subject to these Rules that they are applicable to outsourcing practices. The same can be said of Model Rule 1.5 (“Fees”) and the wealth of ethics opinions available treating myriad specific questions relating to the reasonableness of fees for both legal and non-legal services; and of Model Rule 1.15, “Safekeeping Property.” Model Rule 1.6, “Confidentiality of Information”, is clearly applicable to the lawyer who engages in outsourcing.

The Commission ultimately determined, however, that Rules 1.1, “Competence,” 5.3, “Responsibilities Regarding Nonlawyer Assistants,” and 5.5. “Unauthorized Practice of Law; Multijurisdictional Practice of Law” present opportunities for guidance in their Comments, of their applicability to the outsourcing of legal or non-legal services.

### *Competence – Model Rule 1.1*

U.S. lawyers must perform legal services competently under Model Rule 1.1. The lawyer’s duty is not diminished when he or she outsources work domestically or internationally. As noted in Opinion 08-451, this requires the lawyer to be able to independently evaluate and understand the capabilities and basic competencies of any service provider retained.

Among other topics, the Comment to Model Rule 1.1 discusses situations in which a lawyer obtains the assistance of another lawyer in an area in which the lawyer himself does not profess competence. The Commission believes that in light of the frequency with which today’s lawyers may outsource work to another lawyer or law firm, -- a phenomenon certainly not contemplated by the drafters of the Rules -- the Comments to Rule 1.1 should be expanded to refer specifically to the practice.

Whether one finds that the basis of an outsourcing lawyer’s responsibility to ensure the competence of outsourced services lies in agency law, in the mandates imposed upon a lawyer in Model Rule 5.1 (Responsibility of a Supervisory Lawyer), or elsewhere, the basic rule on lawyer competence is the most appropriate location for practice guidance to lawyers on this subject.

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). The first sentence restates the general position on outsourcing expressed in ABA Formal Opinion 08-451 and the various other state and local ethics opinions. That is that Rule 1.1 operates to require that the lawyer be able to conclude reasonably that the outsourced services will be performed competently, thus contributing to the overall competent and ethical representation of the client. The proposed Comment proceeds to list some of the factors distinctly applicable when the lawyer is considering the choice of lawyer to whom to outsource work. The third sentence provides guidance regarding the situation in which a lawyer incorporates outsourced work into the lawyer’s own work in providing legal services. The fourth sentence alerts lawyers that, when disclosing to nonfirm lawyers information protected by

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confidentiality requirements of Model Rule 1.6, the client's informed consent to such disclosure may be required.

### *Responsibilities Regarding Nonlawyer Assistants – Model Rule 5.3*

Model Rule 5.3, has to date most often been applied, interpreted, and written about in the context of “employing [nonlawyer] assistants” in a law firm. Although the Comment to the Rule acknowledges that such persons might be employed as independent contractors, it clearly was not written in contemplation of the wide range of service providers to whom a lawyer might turn today to outsource services.

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 most significant of these relates to the concern that the providers of the services, including where they operate outside the U.S., understand and comport their conduct to, the outsourcing lawyer's ethical obligations.

Proposed Comment [3] confirms that Rule 5.3 extends to outsourcing of legal support services, where the nonlawyers in question are not “in the firm” as actual employees of the lawyer or law firm, regardless of location. The Comment refers to both lawyers and law firms because contracts for support services are typically made by law firms rather than individual lawyers within a firm. The individual lawyers, however, remain responsible for compliance with the Rules.

Proposed new Comment [3] includes a series of factors that must be taken into account in determining whether the nonlawyers' activities may be reasonably expected to be compatible with the lawyer's professional obligations. They essentially parallel the factors recited in the proposed new Comment to Rule 1.1.

The proposed Comment also acknowledges that legal support service providers are sometimes chosen or recommended by the client. 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. It uses “monitor” rather than “supervise” because supervision implies actual control of the kind that an employer exercises over an employee. When the service provider is chosen by the lawyer or law firm, the lawyer will usually be responsible for monitoring and therefore, there would likely be no reason to discuss with the client the responsibility for monitoring.

### *Unauthorized Practice of Law; Multijurisdictional Practice of Law - Model Rule 5.5*

ABA Formal Opinion 08-451 cautions lawyers subject to the Model Rules to remain cognizant of their obligation to avoid assisting others in the unauthorized practice of law. Given the increased prominence of the phenomenon of outsourcing, including in the international context, the Commission believes that it is appropriate to elevate to the Comment to Model Rule 5.5 (a) Formal Opinion 08-451's specific alert to U.S. lawyers and law firms in this regard.

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