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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.
