NOTE: GUIDING THE MODERN LAWYER THROUGH A GLOBAL ECONOMY: AN ANALYSIS ON OUTSOURCING AND THE ABA's 2012 PROPOSED CHANGES TO THE MODEL RULES

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Over the last few decades, the dramatic changes that have occurred in the global economy have similarly altered the landscape for outsourced work both domestically and internationally. One study estimates that as many as 3.3 million white-collar jobs could be shipped abroad by 2015.¹ This growing trend has also substantially affected the unique nature of the legal field. For the past year and a half, the American Bar Association (ABA) Ethics 20/20 Commission has been considering changes to the Model Rules of Professional Conduct as they relate to domestic and international outsourcing.² The revision process has included soliciting input from stakeholders, including lawyers, law firms, clients and providers of outsourced services.³ Last year, the ABA proposed changes to the Model Rules that pertain specifically to outsourcing.⁴ The Commission

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¹ J.D. Candidate, University of Miami School of Law, 2013; B.A., Finance, University of Tennessee 2010.
³ Id.
⁴ ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing, May 2, 2011.
will formally file its outsourcing proposal to the ABA’s House of Delegates for their consideration in August 2012.\(^5\)

The term “outsourcing” is no new phenomenon to American companies. A business outsources by segmenting off an aspect of its activities and retaining a third party to perform the activities.\(^6\) Offshoring, on the other hand, occurs when a business relocates its activities to allow the business to capture some economic benefit efficiently, often through lower labor costs.\(^7\)

The “first wave” of outsourcing work to foreign countries hit the American economy in the late 1980s.\(^8\) “Because of the relatively large wage-benefit differential between American and foreign labor, it [has become] more cost effective to ship overseas many American blue-collar manufacturing jobs.”\(^9\) With the same mentality and continually developing communication technology, the phenomenon of outsourcing has expanded to the white-collar sector as well.\(^10\) In recent years, companies have outsourced a wide variety of services to foreign employers, including software engineering, technical support, tax preparation, and even medical imaging diagnostics.\(^11\) As a result, some

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\(^7\) Daley, supra note 6, at 403.
studies estimate that revenue utilized for outsourcing from the United States now falls between $100 to $200 billion.\textsuperscript{12}

In the latest wave of outsourcing, a new trend has emerged: U.S. companies and law firms have begun outsourcing domestic legal work to foreign attorneys.\textsuperscript{13} Administrative legal work, such as proofreading, typing, legal coding, and document review are areas in which outsourcing has successfully adapted to the needs of the legal market.\textsuperscript{14} The outsourced work might be accomplished in either a lower-cost area of the United States or in another country, both of which could provide lower labor and overhead costs.\textsuperscript{15} Today, many law firms outsource significant portions of their back-office support services.\textsuperscript{16}

Recently, attention has shifted from outsourcing just administrative and support functions of law firms to outsourcing the actual legal and law-related services.\textsuperscript{17} This shift to more specialized legal services is what distinguishes legal outsourcing from typical business outsourcing. “Outsourcing legal services raises special concerns that implicate the professional obligations of lawyers and our self-regulatory regime.”\textsuperscript{18}

Overall, outsourcing legal work has the potential to reduce the cost of domestic legal

\begin{itemize}
\item \textsuperscript{12} Douglas R. Richmond, \textit{Outsourcing Legal Work...Do Professional Liability and Responsibility Go Along?}, Counsel, Feb. 2005, at 5.
\item \textsuperscript{13} Woffinden, \textit{supra} note 11, at 483.
\item \textsuperscript{15} Daley, \textit{supra} note 6, at 403; \textit{See also}, \textit{Inside vs. Outside: When Does it Make Sense for Law Firms to Outsource, Roundtable Discussion, LAW PRACTICE TODAY}, Apr. 2006, available at http://www.abanet.org/lpm/lpt/articles/mgt04063.shtm.
\item \textsuperscript{16} See Julie Creswell, \textit{Law Firms Are Starting to Adopt Outsourcing}, \textit{N.Y. TIMES}, Oct. 27, 2006, at C3 (Describing Clifford Chance, one of the largest law firms in the world announcement to “consolidate and move big chunks of its administrative functions like accounting and technological support to an operation in Delhi, India”).
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Daley, \textit{supra} note 6, at 405.
\end{itemize}
services and increase access to the legal system, while maintaining a high quality legal product.\textsuperscript{19}

Until recently, the legal community had remained relatively quiet regarding the ethical implications of U.S. attorneys utilizing foreign labor to accomplish their domestic legal work at a discounted price.\textsuperscript{20} The first outsourcing proposal came in 2008 when the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion that provided guidance to lawyers about how to outsource ethically and in a manner that was consistent with the profession’s core values.\textsuperscript{21} State and local bar associations have also offered guidance in this area. Yet it wasn’t until May 2, 2011, that the American Bar Association Ethics 20/20 Commission drafted a proposal to the Model Rules, which specifically addressed outsourcing.\textsuperscript{22} The ABA Commission added changes to the comments to the Model Rules for clarity. In particular, there were three changes: First, the Commission proposed that a new comment to Model Rule 1.1 (Competence) that identifies the factors that lawyers need to consider when retaining outside counsel to assist on a client’s matter.\textsuperscript{23} Second, the Commission proposed new comments to Model Rule 5.3 (Responsibility Regarding Non-Lawyer Assistance) in order to identify the factors that lawyers need to consider when using nonlawyers outside the firm.\textsuperscript{24} Lastly, the Commission proposed a new sentence to Comment [1] to Model Rule 5.5 (Unauthorized Practice of Law) in order to clarify that lawyers cannot engage in

\textsuperscript{19} Woffinden, \textit{supra} note 13, at 485.
\textsuperscript{21} See e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451 (2008).
\textsuperscript{22} ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing May 2, 2011.
\textsuperscript{23} ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing May 2, 2011.
\textsuperscript{24} \textit{Id.}
outsourcing when doing so would facilitate the unauthorized practice of law.\footnote{Id.} The Commission aimed to clarify how existing rules and principles apply to the particular context of outsourcing.\footnote{Id.} Following the ABA Commission’s Initial Draft Proposal on Outsourcing published in May, the ABA has since released its Revised Initial Proposal in September of 2011\footnote{ABA Commission on Ethics 20/20 Third Draft Report on Outsourcing Sept. 15, 2011.}, followed by the Revised Draft Resolution for Comment in February 2012.\footnote{ABA Commission on Ethics 20/20 Revised Draft Resolution for Comment-Outsourcing Feb. 21, 2012.}

This Comment surveys the current and proposed ethical guidelines for outsourcing legal work, and puts forward a new strategy for the Commission to consider for providing ethical leadership. Part I of this Comment provides the history and evolution of legal outsourcing. Part II discusses the ethical issues implicated when domestic attorneys use foreign labor to assist in legal work. Part III analyzes ethical guidance that has been provided by various bar associations. Part IV examines the ABA Proposed Changes to the Model Rules, and Part V suggests a new approach that the ABA should take in order to provide lawyers with adequate guidance in the growing trend of legal outsourcing.

I. WHY ARE WE OUTSOURCING (WORKING TITLE)

With headlines such as “Watching the Jobs Go By As Companies Get Their Work Elsewhere”\footnote{Nicholas Kristof, Watching the Jobs Go By As Companies get Their Work Elsewhere, THE OBSERVER REPORT, Feb. 15 2004.} and “White Collar Jobs Moving Abroad,”\footnote{Stacy A. Teicher, White-Collar Jobs Moving Abroad, THE CHRISTIAN SCIENCE MONITOR, July 29, 2003.} it is no secret that U.S. companies are sending more jobs overseas. As additional work is being shipped abroad, the U.S. has seen a massive amount of criticism from American workers who are faced
with less job opportunities.\textsuperscript{31} Despite a strong backlash from the American public, companies continue to outsource internationally at a growing rate.

As previously mentioned, “outsourcing” is sending work traditionally handled inside a company or firm to an outside contractor for performance.\textsuperscript{32} Among the factors that have contributed to the significant growth of outsourcing are: (1) globalization; (2) the technology-driven efficiencies developed and utilized by many providers of outsourced services; and (3) the demand by clients for cost-effective services.\textsuperscript{33} Now it seems, “Lawyers have found that the same [technological] efficiencies that have led to an increase in outsourcing throughout the global economy are also making outsourcing an attractive option within the legal profession.”\textsuperscript{34}

Lawyers are outsourcing a variety of legal work. Initially, legal outsourcing primarily involved “legal support” services—such as proofreading, typing, legal coding, and document review.\textsuperscript{35} However, recently, the legal outsourcing market has begun to include skill-intensive work such as legal research, document review, patent searches, due diligence, and contract drafting.\textsuperscript{36} Many of these services have typically been performed by paralegals and new law school graduates. Now, a law firm or corporation can outsource their document review, legal research and writing, or drafting of pleadings and briefs to somewhere in India (or elsewhere) for a fraction of the cost.

The outsourcing phenomenon has led to the advent of intermediary outsourcing firms. “Smelling opportunity, a handful of companies have sprung up in recent years,

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\textsuperscript{31} \textit{Sending Jobs Overseas: The Cost to America’s Economy and Working Families}, WORKING AMERICA AND THE AFL-CIO
\textsuperscript{33} ABA Comm. on Ethics 20/20, Initial Draft Proposal – Outsourcing (May 2, 2011).
\textsuperscript{34} Id.
\textsuperscript{35} Pollak, \textit{supra} note 14, at 102.
\textsuperscript{36} ABA Comm. on Ethics 20/20, Initial Draft Proposal – Outsourcing (May 2, 2011).
\end{flushleft}
both in the U.S. and abroad, that sell outsourced legal services. “These firms can also be called Legal Process Outsource, or LPO firms. U.S. lawyers with elite credentials founded several LPO firms such as Mindcrest and Atlas Legal Research. “These [LPO firms] identify foreign lawyers to work on outsourced projects, communicate assignments to them, set and collect fees, and might even provide U.S.-lawyer review of outsourced work.”

Historically, U.S. companies and law firms have outsourced administrative work to domestic lawyers, however, in-house counsel and law firms began outsourcing high cost legal labor to foreign attorneys in the mid 1990s. Today, legal outsourcing has grown dramatically, and includes small, midsize and large firms, as well as Fortune 500 companies. However, research indicates that lawyers still tend to outsource legal and law-related work domestically more often than internationally. “In fact, data reviewed by the [ABA] Commission indicates that, more recently, the outsourcing industry is responding to client demand for greater availability of on-shore operations.”

Despite the growing trend of domestic legal outsourcing, without a doubt, India is the most popular destination for internationally outsourced legal jobs. According to The LPO Program, the global legal outsourcing market is expected to grow 34% ($217m) in

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39 (Ganesh Natarajan and George Hefferan, both formerly with McGuire Woods’s Chicago office)
40 (Abhay “rocky” Dhir, former law clerk to U.S. District Judge Jerry Buchmeyer).
41 Id.
43 Woffinden, *supra* note 11, at 486.
44 Id.
46 Id.
2011, from a base of $640m in 2010, to $857m. The Forrester report estimates the global market for legal services to be $250 billion with the U.S. accounting for more than two-thirds of the market, the vast majority of which comes from U.S. companies and law firms ($170 billion). According to NASSCOM-CRISIL study, legal outsourcing in India was worth $356.5 million in 2010 and is expected to record robust growth to a $1.3 billion market by 2015.

Five main reasons standout on why India is the most popular destination for American firms to outsource legal work. First, due to the time difference between the two countries, Indian lawyers are able to perform legal work into the midnight hours. Second, there are over 1 million lawyers in India, and 75,000 new lawyers graduate from Indian law schools every year. Additionally, American law firms can save a tremendous amount of money. In India, lawyers who graduate from one of the country’s most prestigious law schools may earn annually between $3,000 to $10,000 U.S. dollars, whereas, graduates from U.S.’s top law schools may earn more than $100,000 in their first year of work. The Indian legal system is also largely based on the British common law, just like the U.S.’s legal system. Lastly, Indian lawyers speak and are educated in

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49 *Id.*
50 *Id.*
54 *Id.*
English. Therefore, it is easy to see the practical and economical benefits that international legal outsourcing provides to law firms.

In addition to law firms outsourcing legal work, some of the most active users of the outsourcing market have been corporate legal departments. Corporate general counsel may be more likely to try offshore outsourcing than law firms, because they are influenced by the successful experiences of other corporate departments that have outsourced work overseas. Companies with in-house legal departments in India include DuPont, Cisco Systems, Morgan Stanley, and Microsoft. One of the first companies to lead the charge to international legal outsourcing was General Electric. “General Electric sends about $3 million a year in routine legal work to its Indian affiliate.” Many Fortune 500 companies have outsourced legal research relating to patent applications and IP prosecution, reviewing documents for discovery, and preparing “first drafts of responses to interrogatories or doing privileged [document] reviews...” West publishing even uses Indian lawyers to prepare case summaries, which form the basis for legal research by U.S. practitioners.

Though corporate counsels have historically used outside law firms on a regular basis, outsourcing legal work internationally brings new challenges.

57 Daley, supra note 6, at 414.
59 Legal Process Outsourcing: Interview with Mark Ross, Vice President of Legal Services, Integreon, SHARED SERVICES & OUTSOURCING NETWORK, May 2010.
60 Id.
“[Commonly], general counsels purchase expertise in their use of outside counsel, supplementing their own substantive knowledge and familiarity with their company’s operations with the expertise of lawyers working in firms, whose experience in representing multiple clients gives them insight into a larger and different context of legal issues than that available to an in-house lawyer.”63

However, by outsourcing their legal work to international sources, corporate counsels are simultaneously “buying services for which they must serve as a reviewer and expert supervisor.”64 This new element of supervision forces corporate counsels to juggle the cost benefit with the increased practical and ethical responsibilities.

The shift from administrative and support work to more client oriented work has raised many legal and ethical concerns. It is these concerns that separate business outsourcing from legal outsourcing. “When legal services are outsourced, the same rules of professional conduct regulating lawyers’ activities generally apply, triggering concerns about unauthorized practice and other ethical issues.”65 If firms are trying to avoid ethical obligations by differentiating between support work and law practicing work, they may be in trouble. Some authors have analyzed that the distinction between administrative support work and work performed by licensed attorneys is itself the root of many ethical issues.66 Though there are several ABA Model Rules that try to identify the difference between law related services, the answer to that distinction has been very broad and described as a circuitous definition.

Outsourcing first became a growing craze in the U.S. business sector, with the legal industry soon following suit.67 Law firms and in-house counsels found that

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63 Daley, supra note 6, at 416.
64 Id.
65 Daley, supra note 6, at 408.
66 Id.
67 Woffinden, supra note 11, at 483.
outsourcing could provide cost saving benefits as well as good quality legal work. Legal outsourcing can be done both domestically and internationally. Increasingly, however, we have seen more work be sent to India because the country offers highly educated attorneys, who study and speak English, and charge a fraction of the cost than American law firms. A growing concern pertaining to outsourcing is how large will it grow? Specifically, what effect will the 200,000 annual law graduates from India have on the American legal system? With the expanding numbers of outsourced legal work, there still remains the duty of maintaining ethical and professional responsibility to the clients.

II. CURRENT ETHICAL ISSUES RELATED TO LEGAL OUTSOURCING

Due to the increasing practice of legal outsourcing by in-house counsel of corporations as well as small, mid-sized, and large law firms, the ABA has proposed changes to Model Rules which pertain specifically to outsourcing. This comment analyzes the proposed Model Rules (drafted by the American Bar Association Commission on Ethics on May 2, 2011, and revised on September 19, 2011 and February 21, 2012) and analyzes whether the ABA’s current strategy will effectively guide lawyers through the practice of outsourcing.

Prior to the new proposed Model Rules, there was much-needed direction for firms and corporations looking to outsource legal work. Before the May 2, 2011 proposed changes to the Model Rules, the guiding opinions had come from the ABA and

69 Id.
70 Brian Miller, The Ethical Implications of Legal Outsourcing, 32 J. LEGAL PROF. 259 (2008).
71 Eric Bellman & Nathan Koppel, More U.S. Legal Work Moves To India’s Low-Cost Lawyers, WALL ST. J., Sept. 28, 2005, at B1 (“More than 200,000 Indians graduate from law school there every year – five times as many as in the U.S. – creating an enormous pool of talent to tap.”)
72 Woffinden, supra note 11, at 494.
73 Douglas R. Richmond, Outsourcing Legal Work...Do Professional Liability and Responsibility go Along?, COUNSEL, Feb. 2005, at 5 (“there is ... considerable need for guidance in this area”).
other state and local bar associations. Before reviewing the proposed changes to the Model Rules, it is necessary to understand the relevant ethical issues that legal outsourcing involves. Some of the ethical issues corporations or law firms need to consider include: the unauthorized practice of law, adequate supervision, client confidentiality and consent, conflicts of interest, competence, and appropriate billing.

As mentioned previously, a lawyer’s ethical obligations differ depending on whether outsourcing is for “substantive legal support services,” such as legal research, drafting, contracts, document review, writing legal memoranda, drafting patent applications; or whether it is for “administrative support,” including IT, transcription, document coding, accounting and clerical support. The scope of this Comment covers primarily the obligations associated with outsourcing substantive legal support services.

A. AVOIDING AIDING AND ABETTING THE UNAUTHORIZED PRACTICE OF LAW

By outsourcing legal work both domestically and overseas, an attorney must be careful not to aid in the unauthorized practice of law. The current Model Rules of Professional Conduct 5.5 state “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.” The Model Rule applies to unauthorized practice of law by a lawyer, whether

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through the lawyer’s direct action or by the lawyer assisting another person. The purpose of the rule is to protect the public against the performance of legal services by unqualified persons. Remember, however, that the definition of the practice of law is established by state law and varies from one jurisdiction to another.

Failure to comply with an individual state’s rule against the unauthorized practice of law can result in serious sanctions. For instance, in the State of Florida, the unauthorized practice of law may result in either (1) civil injunction against the practice in a particular case or (2) indirect criminal contempt—which is contemptuous conduct that occurs outside of the judge’s presence.

Therefore, a firm looking to outsource legal work must strategically assign work that will not contribute to the unauthorized practice of law. Although the unauthorized practice of law stemming from Model Rule 5.5 is clearly relevant to outsourcing legal work, the current model rules do not specifically address legal outsourcing.

B. SUPERVISION

The duty of supervision is governed by ABA Model Rule 5.3, which requires that reasonable efforts be made to ensure that the non-lawyer’s conduct is compatible with the professional obligations of the lawyer outsourcing the work. On the other hand, the

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78 Id.
79 Model Rules of Prof’l Conduct R. 5.5, cmt. 2 (2011); see also, Connecticut Proposed Bill HB 5083 (One state representative from Connecticut has proposed a bill that would ban legal outsourcing from companies and firms within the state); Why Connecticut Shouldn’t Ban Legal Process Outsourcing, LEGAL RESEARCH & WRITING PRO, January, 19 2011 (One state representative from Connecticut has proposed a bill that would ban legal outsourcing from companies and firms within the state.) (“The proposed bill explains that its purpose is intended ‘[t]o provide that outsourcing of legal document review to non-attorneys constitutes the unauthorized practice of law.’”).
80 Florida Bar, Unauthorized Practice of Law, the Florida Bar Public Information and Bar Services Department, available at, http://www.floridabar.org/DIVCOM/PI/BIPS2001.nsf/1119bd38ae090a748525676f0053b606/dc4a88c3a91eea378525669e004e16f9!OpenDocument.
81 Model Rule of Prof’l Conduct R. 5.3(a) (2011).
obligation to supervise lawyers, to whom work is outsourced overseas, depending on the arrangement, may be governed by Model Rule 5.1. Model Rule 5.1 requires lawyers who possess managerial authority in a law firm make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

Ensuring adequate supervision over an outsourced firm can present unique challenges. The differences in training and expertise, primary language spoken, resources, and time-zone differences are just some of the examples of why supervising work overseas can be demanding. Further, the current Model Rules make no mention of special supervision requirements for legal work sent outside of the firm, or outside of the country for that matter.

C. DUTY OF CONFIDENTIALITY AND CLIENT CONSENT

Protecting the confidentiality of client information is a major ethical concern, which arises when outsourcing legal services domestically or internationally. ABA Model Rule 1.6 states in part “[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent...” A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information relating to the representation.

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82 Tuft, supra note 42, at 827.
83 Model Rule of Prof’l Conduct R. 5.1(a) (2011).
84 Brandon James Fischer, Note & Comment: Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising From the Practice of Outsourcing Legal Services Abroad, 16 Sw. J. INT’L L. 451, 2010.
85 Id.
86 Model Rule of Prof’l Conduct R. 1.6(a) (2011).
87 Model Rule of Prof’l Conduct R. 1.6, cmt. 2 (2011). Comment [6] of MR 1.6 recognizes limited exception to the model rule:

“Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients,
lawyer encourages the client to communicate fully and frankly with the lawyer in order to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. 88 Many of the Comments to Rule 1.6 focus on issues of client counseling and the scope of the lawyer’s obligation to disclose or counsel regarding a client’s criminal activity. 89

Confidentiality issues clearly arise when a firm is looking to outsource legal work. For instance, a firm may be responsible in ensuring that its offshore agents understand the scope of a U.S. lawyer’s duty to preserve information relating to the representation of a client. Some U.S. firms have expressed reservations about outsourcing because of the lack of secure information technology networks, which carry confidential information overseas. 90 One of the leading questions with regard to outsourcing, is whether or not the firm must obtain client consent? Just as the Model Rule requires, information relating to representation must not be revealed without client consent. 91 Does a law firm’s use of outsourced resources qualify as the revealing of confidential information? The current Model Rules do not specifically address these questions of confidentiality as it relates to outsourcing. With the current state of the Model Rules, it is easy to see how outsourcing lawyers could struggle to interpret and apply the traditional ethical rules to today’s global legal market.

D. DUTY TO AVOID CONFLICTS OF INTEREST

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88 Model Rule of Prof’l Conduct R. 1.6, cmt 2 (2011).
90 Pollack, supra note 89, at 124.
91 Model Rule of Prof’l Conduct R. 1.6(a) (2011).
Though conflicts of interest has traditionally been analyzed when an attorney goes to work for another firm or when a new client has a claim that may be adverse to a current or former client, increasingly, conflicts of interest have been a concern in the context of legal outsourcing.\textsuperscript{92} ABA Model Rule 1.7 provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.\textsuperscript{93} Rule 1.7 defines a “concurrent conflict of interest” as a situation where:

“(1) the representation of one client will be directly adverse to another client or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”\textsuperscript{94}

Representation of a client is permissible if the lawyer “reasonably believes that he or she will be able to provide competent and diligent representation”\textsuperscript{95} and “each affected client gives informed consent, confirmed in writing.”\textsuperscript{96} Comment [2] to the rule places the firm responsible to determine whether a conflict of interest exists.\textsuperscript{97} Further it states that “a lawyer should adopt reasonable procedures, appropriate for the size and type of the firm and practice, to determine in both litigation and non-litigation matters the personas and issues involved.”\textsuperscript{98}

A firm that chooses to outsource legal work may face several situations that have conflict of interest questions. First, if the outsourced lawyer is working for an LPO firm that does work for a certain client, is the LPO precluded form providing outsourcing

\textsuperscript{92} See Brandon James Fischer, \textit{Note & Comment: Outsourcing Legal Services In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising From the Practice of Outsourcing Legal Services Abroad}, 16 SW. J. INT’L L. 451, 2010.
\textsuperscript{93} Model Rule of Prof’l Conduct R. 1.7 (2011).
\textsuperscript{94} Id.
\textsuperscript{95} Model Rule of Prof’l Conduct R. 1.7(b)(1) (2011).
\textsuperscript{96} Model Rule of Prof’l Conduct R. 1.7(b)(4) (2011).
\textsuperscript{97} Model Rule of Prof’l Conduct R. 1.7, cmt. 2 (2011).
\textsuperscript{98} Id.
services to a U.S. firm representing a different client with interests adverse to that of the first?\textsuperscript{99} Second, is there a conflict of interest if the LPO or outsourcing lawyer’s business objectives or policies impede the outsourced lawyer from providing clients with an objective, independent and “best efforts” assessment of the law?\textsuperscript{100} Third, is there an issue if either firm is working with a former, rather than current client.\textsuperscript{101} Lastly, despite traditional lawyering where the opposing side is often responsible for raising concerns about potential conflicts of interest,\textsuperscript{102} would a U.S. firm even have to disclose that it has engaged an outsourced lawyer to an opposing side? All of these situations specifically relating to outsourcing are currently not detailed in the Model Rules, regardless of its obvious detriment.

\subsection*{E. Duty of Competent Representation}

Another ethical issue that arises out of outsourcing legal work is the duty of competence. Model Rule 1.1 requires an attorney to provide competent representation to his or her client.\textsuperscript{103} The Model Rule further states, “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”\textsuperscript{104} In determining whether a lawyer employs the requisite skill in a particular matter, relevant factors include the relative complexity and specialized nature of the question, the preparation and study the lawyer is able to give the matter, and

\begin{itemize}
  \item[99] Pollak, supra note 14, at 126.
  \item[100] Id. at 128.
  \item[101] Id.
  \item[102] Pollak, supra note 14, at 129.
  \item[103] Model Rule of Prof'l Conduct R. 1.1 (2011).
  \item[104] Id.
whether it is feasible to refer the matter to, or consult with, a lawyer of established competence in the field in question. 105

The issue of competency clashes with legal outsourcing when firms take on cases that they themselves may not have the competency to do; but they outsource the legal work to another firm. Attorneys using legal outsourcing have a duty to oversee that the work is performed competently. But how can the attorney adequately monitor the outsourced work if they are unable to determine for himself or herself whether the work under review is competently done? Though the Model Rules provide satisfactory doctrine on this issue, there is a lack of detailed direction from the Model Rules to assist with this issue pertaining specifically to outsourcing.

F. D U T Y T O B I L L A P P R O P R I A T E L Y

If a lawyer bills outsourced legal work as an expense or a disbursement, the lawyer has an ethical obligation to pass cost savings on to the client. 106 At its most basic form, the Model Rule 1.5 requires that “[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” 107 The Rule goes on to cite certain factors to be considered in determining the reasonableness of a fee. 108 The ABA has stated, “[a] lawyer may not charge a client more than her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses.” 109 Lastly, and most applicable to outsourcing legal work, the Model Rule ends by stating “a division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each

106 Woffinden, supra note 11, at 483.
107 Model Rule of Prof’l Conduct R. 1.5(a) (2011).
108 Id.
lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement—including the share each lawyer will receive—and the agreement is confirmed in writing, and (3) the total fee is reasonable.”

Clearly, outsourcing legal work has an effect on the billing of a client. Despite the ABA and State Bar Opinions for outsourcing legal work, there are no specific previsions of this issue of billing in the current Model Rules.

III. CURRENT ETHICS OPINIONS ON OUTSOURCING LEGAL AND NON-LEGAL SERVICES

Before analyzing the new proposed Model Rules, it will be helpful to review the current ethics advisory opinions, which set forth guidelines for legal outsourcing. In 2008, the ABA Standing Committee on Ethics and Professional Responsibility provided a Formal Opinion that gives guidance as to ethical considerations that arise when outsourcing legal work. Before the ABA opinion, the New York Bar Association and the Los Angeles Bar Associations had both issued advisory opinions. Several other states followed their lead.

A. NEW YORK BAR OPINION

In 2006, the New York Bar Association was the first to address the ethical implications of legal outsourcing to foreign lawyers. The bar association provided much needed answers to law firms within the state, who were either outsourcing legal work or interested in doing so. Overall, the opinion concluded that a New York lawyer

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110 Model Rule of Prof’l Conduct R. 1.5(e) (2011).
may ethically outsource legal work overseas to “a non-lawyer,” if the New York lawyer rigorously supervises the non-lawyer to avoid aiding the unauthorized practice of law, and if he or she ensures that the non-lawyer’s work contributes to the lawyer’s competent representation of the client.\textsuperscript{113}

The New York opinion acknowledged the benefits of delegating work to non-lawyer personnel. However, the opinion specifically established the limits of that delegation.\textsuperscript{114} The New York opinion advised that without proper supervision by a New York lawyer, the outsourced firm would be engaging in the unauthorized practice of law.\textsuperscript{115} The opinion also noted that non-lawyers may research questions of law and draft documents of all kinds, including process, affidavits, pleadings, briefs and other legal papers as long as the work is performed \textit{under the supervision} of an admitted lawyer.

The N.Y. Bar Association also specifically addressed one of the premier ethical issues of legal outsourcing: confidentiality.\textsuperscript{116} The opinion concluded that if the outsourcing assignment requires the lawyer to disclose client confidences or secrets to the overseas non-lawyer, then the lawyer should secure the client’s informed consent in advance.\textsuperscript{117} Additionally, the opinion provided measures that lawyers may take to help preserve client confidences and secrets when outsourcing overseas, such as: (1) restricting access to confidences and secrets; (2) providing contractual provisions

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
addressing confidentiality and remedies in the event of breach; and (3) implement periodic reminders regarding confidentiality.\textsuperscript{118}

Moreover, the opinion discussed the duty of an attorney to obtain a client’s consent before outsourcing legal work to another agency or contract lawyer.\textsuperscript{119} The opinion explained that participation by a contract lawyer whose work is limited to legal research or tangential matters would not need to be disclosed, but if a contract lawyer makes strategic decisions or performs other work that the client would expect of the senior lawyers working on the client’s matters, the firm should disclose the nature of the work performed by the contract lawyer and obtain client consent.\textsuperscript{120}

The opinion specifically instructed lawyers on how to approach the issue of conflicting interest.\textsuperscript{121} The opinion stated that as a threshold matter, the outsourcing lawyer should ask the intermediary or LPO firms, which employs the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients.\textsuperscript{122} The outsourcing New York lawyer should also ordinarily ask both the intermediary and the non-lawyer performing the legal support service whether either is performing, or has performed services for any parties adverse to the lawyer’s client.\textsuperscript{123}

The New York Opinion has been criticized for giving questionable ethical guidance to attorneys outsourcing legal work to foreign countries.\textsuperscript{124} For example, some have criticized that the opinion fails to answer the simple question of whether foreign

\begin{footnotes}
\textsuperscript{118} Id.
\textsuperscript{119} Id. ("In the case of contract or temporary lawyers, this Committee has previously opined that 'the law firm has an ethical obligation in all cases (i) to make full disclosure in advance to the client of the temporary lawyer’s participation in the law firm’s rendering of services to the client, and (ii) to obtain the client’s consent to that participation.’")
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
\textsuperscript{124} Tuft, supra note 42, at 842 (citing Woffinden, supra note 11, at 483).
\end{footnotes}
lawyers are participating in the unauthorized practice of law. Further, some say the Opinion failed to recognize the difficulties of supervising a foreign attorney and therefore didn’t enumerate additional requirements.\(^{125}\) Furthermore, some critics have debated that by failing to adequately explain the dangers associated with outsourcing legal work, the New York Opinion left an impression of endorsing outsourcing, when they arguably should have been protecting the public.\(^{126}\)

B. LOS ANGELES COUNTY BAR ASSOCIATION OPINION

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee authored an opinion in November 2006, which pertained to *domestic* legal outsourcing.\(^{127}\) Overall, the Bar Association found that a lawyer in a civil case may hire an outsourced legal research and brief writing company to conduct the legal research and/or draft legal briefs for the attorney’s use in connection with the attorney’s representation of the client.\(^{128}\) Much like the New York Bar Opinion, the Los Angeles opinion provided that primary responsibility belongs to the outsourcing lawyer to ensure compliance with ethical obligations.

Specifically, the opinion concluded that an attorney may ethically enter into the arrangement with a company, provided that the attorney at all times retains and exercises independent professional judgment in connection with the performance of the attorney’s legal services for the client.\(^{129}\) Further, the attorney must sign the brief, and in so doing, adopts the work and becomes ultimately responsible for the accuracy of the brief to both

\(^{125}\) Woffinden, *supra* note 11, at 483.

\(^{126}\) *Id.*


\(^{128}\) *Id.*

\(^{129}\) *Id.*
the court and the client. The opinion went on to say that, depending on the facts and circumstances, the attorney might have a duty to disclose to the client the nature and specifics of the contract with the outsourcing company. The committee found that the attorney is responsible for determining and for ensuring that there is no violation of client confidences or secrets, and that there remains no conflict of interest created for the client by the attorneys contracting with the company. Finally, the opinion stated, any refund of costs paid by the company to the attorney should be refunded to the client if the client is charged for the cost of the services.

The Los Angeles Bar Association opinion has been criticized for not discussing the duty of supervision except to note that the lawyer has a duty to act competently and to exercise professional judgment in the provision of legal services to or on behalf of the lawyer’s client.

C. SAN DIEGO BAR ASSOCIATION OPINION

Following the opinions of the City Bar of New York and the Los Angeles County Bar Association, the San Diego Bar Association Legal Ethics Committee provided its own advice on the issue of legal outsourcing to foreign countries. The Opinion referenced a useful hypothetical scenario whereby a small law firm takes on a complex intellectual property dispute. The two-lawyer California litigation firm had limited experience in intellectual property and contracted with a fictional India-based LPO

130 Id.
131 Id.
132 Id.
133 Id.
134 Tuft, supra note 42.
company to undertake legal research, develop case strategy, prepare deposition outlines and draft correspondences, pleadings and motions in the case.\textsuperscript{136}

The San Diego Committee concluded that although the nature of the work performed in India would constitute the unauthorized practice of law if foreign lawyers had done the work directly for the client, the California attorneys did not aid in the unauthorized practice of law because the California lawyer in this case retained full control over the representation of the client and exercised independent judgment in reviewing the draft work performed by the outsourced attorneys.\textsuperscript{137}

The San Diego Bar Opinion focused specifically on Model Rule 1.1, involving duty of competence, and Model Rule 5.1(b), involving the duties of lawyers having direct supervisory authority over other lawyers. On the issue of competence, the Bar Opinion explained that using a firm experienced in a particular field does not relieve the outsourcing attorney from the duty to act competently.\textsuperscript{138} The attorney retains the duty to supervise the work performed competently.\textsuperscript{139} To satisfy this duty, an attorney must be able to determine for himself or herself whether the work under review is competently done.\textsuperscript{140} To make such a determination, the attorney must know enough about the subject in question to judge the quality of the work.\textsuperscript{141}

The Opinion concluded that the degree of supervision warranted for outsourced work is magnified by the work being performed in India rather than a United States jurisdiction.\textsuperscript{142} Further, they cautioned that California lawyers needed to understand the

\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
educational backgrounds of those persons performing the work abroad, because the necessary training to become a lawyer differs around the world.\textsuperscript{143}

Further, the Opinion warned that ethical standards of the jurisdiction vary on issues such as confidentiality, privilege, and conflicts.\textsuperscript{144} Lastly, it illustrated factors that may be considered in determining the adequacy of supervision for non-California lawyers: (1) whether the non-lawyer can be disciplined or terminated by the outsourcing lawyer; (2) whether the non-lawyer’s compensation can be adjusted for poor performance; (3) whether the non-lawyer has been educated or trained by a lawyer; (4) whether the outsourcing lawyer has the ability to review the non-lawyer’s work ethics and practices; (5) whether the lawyer regularly provides input to the non-lawyer on his or her performance; and (6) whether the lawyer has the ability or discretion to restrict or confine the non-lawyer’s areas of work or scope of responsibility.\textsuperscript{145}

D. ABA FORMAL OPINION 08-451 (2008)

A formal opinion by the ABA was long overdue as the changing parameters of legal services had been in a state of fluctuation for several years. Finally, in 2008, the ABA issued an opinion, which concluded that there is nothing unethical about a lawyer outsourcing legal and non-legal services, provided that the outsourcing lawyer renders legal services to the client with the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation, as required by Rule 1.1.”\textsuperscript{146}

\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} ABA Comm. on ethics and Prof’l Responsibility, Formal Op. 08-451(2008).
The opinion warned that there are additional obligations on lawyers, through Rules 5.1\textsuperscript{147} and 5.3,\textsuperscript{148} who have “direct supervisory authority” over other lawyers and nonlawyers.\textsuperscript{149} These provisions apply regardless of whether the other lawyer or nonlawyer is directly affiliated with the supervising lawyer’s firm.\textsuperscript{150}

However, the ABA Committee did provide some guidelines for appropriate supervision.\textsuperscript{151} The opinion suggested that a lawyer outsourcing services should consider (1) conducting reference checks and investigating the background of the lawyer providing services, (2) consider interviewing the principal lawyers, and (3) consider paying visits to the facilities.\textsuperscript{152} In foreign countries, the opinion suggested assessing whether the legal education is comparable to the United States, and considering the legal landscape and judicial system of the foreign nation.\textsuperscript{153}

A substantial amount of the Opinion is dedicated to considerations that must be taken into account pertaining the individual client. First, the Opinion noted that it may be necessary for the lawyer to provide information concerning the outsourcing relationship to the client, and perhaps obtain the client’s informed consent to the engagement of the lawyers or nonlawyers who are directly associated with the lawyer or law firm which the client retained.\textsuperscript{154} Due to most outsourcing situations involving an intermediary, there is a risk of inadequate supervision and control. Thus, the Opinion stated, where the

\textsuperscript{147} Model Code of Prof’l Conduct R. 5.1(b) (2011) (stating “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct).\

\textsuperscript{148} Model Code of Prof’l Conduct R. 5.3(b) (2011) (requiring lawyers who employ, retain, or associate with nonlawyers to “make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer”).\n
\textsuperscript{149} Id.\n
\textsuperscript{150} Id.\n
\textsuperscript{151} ABA Comm. on ethics and Prof’l Responsibility, Formal Op. 08-451(2008).\n
\textsuperscript{152} Id.\n
\textsuperscript{153} Id.\n
\textsuperscript{154} Id.
relationship between the firm and individuals performing the services is attenuated, no client confidential information protected by Rule 1.6\textsuperscript{155} may be revealed without the client’s informed consent.\textsuperscript{156} In order to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure, the opinion suggested written confidentiality agreements for parties involved.\textsuperscript{157}

Lastly, the Opinion stated that fees charged from outsourcing lawyers must comply with the requirements of Rule 1.5.\textsuperscript{158} Specifically, the ABA Committee suggested that in the absence of an agreement with the client authorizing a greater charge, the lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies for the individual under contract.\textsuperscript{159} The Opinion concluded with a warning that if the activities of a lawyer, nonlawyer, or intermediary employed in an outsourcing capacity are held to be the unauthorized practice of law, and the outsourcing lawyer facilitated that violation of law by action or inaction, the outsourcing lawyer will have violated Rule 5.5(a).\textsuperscript{160}

Critics have recognized that the Opinion did not go into detail about what the responsibilities are in the context of outsourcing or under what circumstances each rule applies.\textsuperscript{161} Additionally, the opinion did not address circumstances in which partners and lawyers with comparable managerial authority in a law firm have general management

\textsuperscript{155} Model Code of Prof’l Conduct R. 1.6 (2011).
\textsuperscript{156} ABA Comm. on ethics and Prof’l Responsibility, Formal Op. 08-451(2008).
\textsuperscript{157} Id.
\textsuperscript{158} Model Code of Prof’l Conduct R. 1.5 (2011).
\textsuperscript{159} ABA Comm. on ethics and Prof’l Responsibility, Formal Op. 08-451(2008).
\textsuperscript{160} Id.
\textsuperscript{161} Tuft, supra note 42.
responsibilities for outsourced legal and non-legal support services.\textsuperscript{162} Despite the critiques by some, the ABA Opinion was a successful step in the right direction to acknowledge the growing trend of outsourcing and its need for detailed ethical direction. However, the Formal Opinion was just a start, and more concrete guidelines were clearly needed in the form of changes to the Model Rules.

\textbf{IV. PROPOSED CHANGES TO THE MODEL RULES: THE ABA’S ATTEMPT TO PROVIDE MORE CONCRETE GUIDENCE}

Some critics have said that the ABA has largely taken a “wait-and-see approach” to addressing the ethical issues surrounding legal outsourcing.\textsuperscript{163} In response, in May of 2011, the ABA Commission proposed changes to several Comments of the Model Rules for clarity. The Proposal was revised in September of 2011, and again in February of 2012, when the Commission released the Revised Draft Resolution for comment. In particular, there are three proposed changes to the Model Rules: First, the Commission proposes that a new Comment be added to Model Rule 1.1 (Competence) that identifies the factors lawyers need to consider when retaining lawyers outside the firm to assist on a client’s matter.\textsuperscript{164} Second, the Commission proposes new comments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) in order to identify the factors that lawyers need to consider when using nonlawyers outside the firm.\textsuperscript{165} Lastly, the Commission proposes a new sentence be added to Comment [1] of Model Rule 5.5

\textsuperscript{162} Id.
\textsuperscript{163} Brandon James Fischer, Note & Comment: Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising From the Practice of Outsourcing Legal Services Abroad, 16 SW. J. INT’L L. 451 (2010).
\textsuperscript{164} ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing May 2, 2011.
\textsuperscript{165} Id.
(Unauthorized Practice Of Law) in order to clarify that lawyers cannot engage in outsourcing when doing so would facilitate the unauthorized practice of law.\textsuperscript{166}

I. NEW COMMENT [6] TO MR 1.1 (COMPETENCE)

The proposed comments to Model Rule 1.1, entitled "Retaining or Contracting with other Lawyers,“ are a step in the right direction and do provide specific guidance in regards to the ethical issue of competency that was analyzed above. The Proposed Comment states that a lawyer seeking outsourcing should “ordinarily obtain informed consent from the client and should reasonably conclude that the other lawyer’s services will contribute to the competent and ethical representation of the client.”\textsuperscript{167} The Comment goes on to include many of the same factors in determining the reasonableness of the outside counsel that were illustrated in the ABA formal Opinion 08-451 and in various state and local ethics opinions:

“The reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm will depend upon the circumstances, including the education, experience and reputation of the non-firm lawyers’ the nature of the services assigned to the non firm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdiction sin which the services will be performed, particularly relating to confidential information.”\textsuperscript{168}

The corresponding report to the proposed model rules explains some of the background information to the decision by the Commission. The Report first noted that the Proposed Model Rules use the traditional term “non-firm lawyer” instead of “outsourcing”.\textsuperscript{169} The Commission felt the relatively new term of “outsourcing” may

\begin{footnotes}
\item[166] Id.
\item[167] ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing May 2, 2011.
\item[168] Id.
\item[169] Id.
\end{footnotes}
become dated or fall out of use, and that the traditional term is more familiar to lawyers who are used to the concept of retaining or “contracting with” a nonfarm lawyer.\textsuperscript{170}

The most appealing aspect to the Proposed Comment is the list of circumstances that a lawyer should consider before outsourcing legal work.\textsuperscript{171} The Commission’s Report noted that the list is not intended to be exhaustive, but is intended to give lawyers some guidance regarding some of the most important considerations to take into account when retaining nonfarm lawyers.\textsuperscript{172} The use of this detailed list of examples and circumstances is exactly the kind of guidance that the Model Rules have been missing on the issue of outsourcing. Unfortunately, the Commission failed to add any Comments to many other Model Rules, which relate specifically to outsourcing.

In addition to the list of factors that the Commission provided, another interesting part of the Commissions Comment is the use of the word ‘should’ in the first sentence of the Comment. The Comment states “the lawyer should ordinarily obtain informed consent from the client.”\textsuperscript{173} The corresponding Report describes the Commission’s reluctance to conclude that consent is always required, and therefore used the word ‘should’ instead. The report concludes that ‘should’ was appropriate “because the consent may not be necessary when a non-firm lawyer is hired to perform a discrete and limited task, especially if the task does not require the disclosure of confidential information.”\textsuperscript{174} This analysis by the Commission is repeated later on in its Report when defending potential criticisms for not containing a more detailed requirement for client consent.

\textsuperscript{170} Id.
\textsuperscript{171} As noted, the model rules refer to “outsourcing legal work” as “retaining nonfarm lawyers”.
\textsuperscript{172} ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing May 2, 2011.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
The Commission’s clarification is precisely what the San Diego Bar Opinion was recommending when it addressed the issue of attorneys outsourcing work, which they lacked competency to do themselves. In addition to the San Diego Opinion’s hypothetical, the Commission may have added their explanation to assess the work of non-firm lawyers in response to *J-M Manufacturing v. McDermott Will & Emery.*175 In this case, the plaintiff alleged that the defendant law firm’s failure to thoroughly review the work of contract attorneys at e-discovery vendor Stratify Inc. resulted in the production of 3,900 privileged documents.176 Whatever the Commission’s inspiration, the proposed comments to MR 1.1 offer an improvement to providing guidance for lawyers currently or potentially interested in legal outsourcing.

II. PROPOSED CHANGES AND NEW COMMENTS TO MR 5.3

The most technical changes put forward by the Commission appear in the Proposed Model Rule 5.3 and corresponding Comments. As described above, MR 5.3 is titled ‘Responsibilities Regarding Nonlawyer Assistants’. At first glance, the title of MR 5.3 seems directly geared towards outsourced legal work, however, it has historically dealt mainly with the supervision over nonlawyers within the office.

To begin, the Commission proposed a change in the title of MR 5.3 to say Responsibilities Regarding Nonlawyer Assistance (instead of the original ‘Assistants’). This small detail, the Commission describes, is an acknowledgment that nonlawyer services are provided not only by individuals, such as investigators, but also by entities,

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175 *J-M Mfg Co., v. McDermott Will & Emory LLP*, No. BC462832 (Cal. Sup. Ct., County of Los Angeles).
such as electronic discovery vendors and “cloud computing” providers.\textsuperscript{177} Though the prior Model Rules could have been interpreted to include entities as well as individuals in that category, the proposed changes properly expand the definition to clarify new categories of outsourcing.

For the first time, the proposed Model Rules provide a Comment that describes the distinct concerns which arise when the services are performed outside the firm.\textsuperscript{178} Comment [3] provides many of the same examples of different services used to outsource that were described in detail in the historical background of this note. The Proposed Comment [3] states that, when a lawyer uses nonlawyer services outside the firm, the lawyer has an obligation to ensure that the nonlawyer services are performed in a manner that is compatible with the lawyer’s professional obligations.\textsuperscript{179} The proposed comment then identifies the factors that determine the extent of the lawyer’s obligations relative to nonlawyer service providers, which mimic the same factors used in the proposed Comment [6] of MR 1.1.\textsuperscript{180}

Also for the first time, the Proposed Model Rules address a practical issue that comes up when a client has chosen or suggested a particular nonlawyer service provider outside the firm. For a brief background, the Commissions’ Report said,

“In the complex world of outsourcing, sometimes clients instruct lawyers to use particular nonlawyer service providers. Comment [4] acknowledges that and instructs that the lawyer ordinarily, in that situation, should consult with the client to determine how the outsourcing arrangements

\textsuperscript{177} ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing May 2, 2011 (Report p. 6).
\textsuperscript{178} ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing May 2, 2011; Model Rule of Prof’l Conduct R. 5.3, cmt.3 (2011).
\textsuperscript{179} \textit{Id}.
\textsuperscript{180} ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing May 2, 2011; Model Rule of Prof’l Conduct R. 5.3, cmt.3 (2011); Model Rule of Prof’l Conduct R. 1.1, cmt.6 (2011).
should be structured and who will be responsible for monitoring the performance of the nonlawyer services.”{181}

The key word in this proposed comment is the word ‘monitor’. “The Commission made it clear that the choice of the word “monitoring” was intentional.”{182} This simple sentence, however, may create a more complicated affect than at first glance. The Commission Report explained they used of the word “monitoring” to reflect the idea that, under these circumstances, a lawyer may have a duty to remain aware of how the nonlawyer service provider is performing its services, even if the lawyer has not chosen the provider and may not have any direct supervisory obligations.{183} The Commission further explained that when the lawyer or law firm chooses the nonlawyer service provider, there would likely be no reason to discuss the responsibility of monitoring, because the lawyer or law firm would retain that responsibility.{184}

Just like the Proposed Comment [6] to MR 1.1, Proposed Comment [3] to MR 5.3 provides supportive examples of legal services nonlawyers may assist on, specific circumstances that determine the extent of the lawyers’ ethical obligation, and advice on communicating between lawyer and nonlawyer. However, Proposed Comment [4] to MR 5.3 does very little to give guidance to outsourcing lawyers. Despite the inclusion in the Model Rules of the practical issue faced by outsourcing lawyers, the Proposed Comment fails to go far enough in assigning adequate responsibility.

The Commission’s use of the word ‘monitor’ to describe the lawyer’s responsibility regarding outsourced work chosen by a client seems excessively relaxed.

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{183} *Id.*
Likewise, the choice of the word ‘monitor’ does not instill any type of permanent responsibility on the lawyer. As the Proposed Comment expresses in Comment [3], “When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations.” The same responsibility should be required for any outsourced work regardless of who chooses the nonlawyer service provider. The language used in Comment [4] creates a burden shifting of responsibility, from lawyer to client. If this was the intention of the Commission, then there remains a need for more clarity on when the burden to provide direct supervision actually shifts from lawyer to client. The Commission should seriously consider a change to this particular part of the Comment due to its lack of clarity.

III. NEW SENTENCE TO COMMENT [1] OF MR 5.5

The final Proposed change to the Model Rules was an added sentence to Comment [1] of Model Rule 5.5: Unauthorized Practice of Law—Multijurisdictional Practice of law. As mentioned above, outsourcing legal work causes a major concern for unauthorized practice of law because lawyers and law firms need to be conscious of their own violations in the rules but also in aiding the outsourced firm in the unauthorized practice of law. The unauthorized practice of law is one of the biggest concerns for lawyers who outsource legal work both domestically and internationally. Despite being one of the distinct ethical issues concerning legal outsourcing this note has analyzed, the

185 ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing May 2, 2011; Model Rule of Prof’l Conduct R. 5.3, cmt.3 (2011).
Commission’s additional sentence to Comment [1] does not go far enough in expanding unauthorized practice of law to outsourcing.

In one simple sentence, the Commission added, “...a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person’s jurisdiction.” To give a further explanation for this proposed change, the Commission’s Report simple states,

“When lawyers outsource work to lawyers and nonlawyers, it is important to ensure that those lawyers and lawyers are not engaging in the unauthorized practice of law. The commission concluded that it is important to make this point explicitly in Comment [1] to Model Rule 5.5.”

Though the Commission’s Report described every intention to ensure that outsourced work was not engaged in unauthorized practice of law, the added sentence does not mention outsourced work or even ‘non-firm lawyers’, which was the term used in the prior proposed changes. Instead, the proposed changes simple reiterate what is already stated in MR 5.5(a). This lack of specific detail on outsourcing or use of ‘non-firm lawyers’ does very little to clarify the Model Rules to the increasingly popular use of outsourcing.

As mentioned earlier, the San Diego Bar Opinion 2007-1 was a practical opinion regarding unauthorized practice of law and outsourcing; however, the Commission’s proposed Comment Model Rules did not take their recommendations. Specifically, the San Diego Committee addressed the issue of legal work performed in India, which would constitute the unauthorized practice of law if foreign lawyers had done the work directly

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for the client.\footnote{San Diego County Bar Ass’n Legal Ethics Comm., Formal Op. 2007-1(2007).} However, the opinion concluded, because the California lawyer in this case retained full control over the representation of the client and exercised independent judgment in reviewing the draft work performed by the outsourced attorneys, the California attorneys did not aid in the unauthorized practice of law.\footnote{\textit{Id.}} With Bar Opinions such as these, the Commission could have come up with a more specific recommendation in the Comment section of MR 5.5. However, they instead chose a broad sentence that simply repeated the first part of the rule. Thus, the Proposed Comment to MR 5.5 fails to provide outsourcing lawyers with any additional guidance.

\section*{V. A NEW APPROACH TO ETHICAL LEADERSHIP}

International and domestic outsourcing is an option for law firms looking to use the practical and financial benefits of today’s global economy. In light of the ethical obligations that lawyers already follow, the beneficial use of outsourcing should not provide firms with any sort of outlet or shelter from these ethical obligations. Yet, until recently, a lawyer or law firm has not had much guidance on how to take advantage of the benefits of legal outsourcing while abiding by the ethical standards of the legal profession.

The ABA Ethics 20/20 Commission’s Proposed Changes to the Model Rules fall short of providing enough adequate guidance to the ethical issues of legal outsourcing. The Proposed changes only provide direction on three individual ethical issues, (Competency, Responsibilities Regarding Nonlawyer Assistants, and Unauthorized Practice of Law) despite the obvious fact that outsourcing affects many more issues. Further, the Commission’s Report consistently states that changes to certain Model
Rules, which relate to outsourcing, are unnecessary because of the “wealth of ethical opinions already available.”\textsuperscript{190} However, what exactly is the purpose of the ABA Model Rules and corresponding Comments if not to be the leading provider of guidance to ethical issues? For this answer, we can look at the Preamble and Scope of the ABA Model Rules:

“[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.”\textsuperscript{191}

“[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule...The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.”\textsuperscript{192}

If the purpose of the Model Rules and accompanying Comments is to incorporate the court and state bar opinions, then why did the Commission leave so many ethical issues unanswered? Instead of incorporating all outsourcing issues, the Commission implies that there are already opinions available, so lawyers and law firms should simply review those opinions for further guidance. This reasoning does not comply with the purpose of the Model Rules and their attached Comments based on the ABA’s own written Scope and Preamble. Undoubtedly, the ABA should go back to the drawing board and create more adequate changes to the Model Rules for legal outsourcing. One possible approach is for the ABA to include the guidance and opinions that were discussed earlier in this note into each Model Rule pertaining to outsourcing. However, with so many issues and Model

\textsuperscript{190} ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing May 2, 2011 (Report).
\textsuperscript{191} Model Rules of Prof’l Conduct, Scope (2011).
\textsuperscript{192} Id.
Rules affected by outsourcing, this solution would place an overwhelming burden on the legal field to search through dozens of Rules just to find outsourcing information.

Instead, I propose that the ABA create an entire new section to the Model Rules, specifically for legal outsourcing. There are three reasons why an entirely new section would provide the most clarity to the legal field: (1) outsourcing is a evolving field, and there are many more ethical issues to come as the trend progresses, therefore the ABA should provide adequate space for future issues to be addressed; (2) the ABA has repeatedly endorsed outsourcing and further expressed the magnitude outsourcing has on the legal field, so corresponding action should be taken; (3) the ABA has historically been reactive to new ethical issues, such as Multijurisdictional Practice of Law and Corporate Governance, and should for the first time be proactive in making changes to the Model Rules on the outsourcing issue. Outsourcing is here to stay, and guidance on the ethical issues surrounding it can only be adequately provided if the ABA creates an entire section on Legal Outsourcing in the Model Rules.

1. POTENTIAL ETHICAL ISSUES FOR LEGAL OUTSOURCING IN THE FUTURE

Outsourcing is deserving of its own section of the Model Rules not only to incorporate the issues it already faces, but more importantly to incorporate the many ethical issues to come in the future. “As new innovative models for delivering legal services continue to emerge, the legal profession is facing a period of evolutionary change.”

Peter Brudenallm a Technology and Outsourcing Partner at Lawrence Graham LLP predicts that several trends will emerge in response to outsourcing and market

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changes. For instance, he predicts that cloud computing (which is an “on-demand network access to a shared pool of configurable computing resources”\textsuperscript{194}) concerns will increase and “the struggle of complying with data protection laws, and a lack of contractual safeguards, will continue to slow the take-up by larger organizations.”\textsuperscript{195} Additionally, he predicts that data protection will become an increasing ethical concern by lawyers who are sharing their work.\textsuperscript{196} In addition to these two potential ethical implications, Brudenallm also suggests the following future developments in legal outsourcing: mergers between outsourcing technology providers will increase; less established countries will increase their profile to be legal outsourcing service providers; and, the use of LPO firms are likely to increase dramatically.

Brudenallm isn’t the only person warning of future ethical issues associated with legal outsourcing. Mark Ross, Vice President for Legal Solutions at Integreon and also one of the most profound names in the outsourcing industry, not only predicts several ethical issues outsourcing will encounter, but also cautions about the potential responsibilities for outsourcing lawyers.

First, Ross poses the question, “Given the argument not to charge an unreasonable fee, are U.S. law firms under a duty to inform their clients of the cheaper ‘offshore’ LPO option for certain routine legal tasks?”\textsuperscript{197} One potential issue that the ABA does not address in the proposed changes to the Model Rules is whether or not a lawyer, who


\textsuperscript{196} Id. (“Data processors (ie: service providers) will also have regulatory responsibilities for the first time, forcing the industry to potentially adopt higher standards of security.”).

\textsuperscript{197} Id.
doesn’t inform a client of the more efficient offshore option, is in violation of the MR 1.5 for not sharing or making an agreement for an “unreasonable fee.”

Secondly, Ross predicts a potential ethical issue regarding lateral movement across the LPO industry due to conflicts of interest and confidentiality agreements.\textsuperscript{198} “[I]t is commonplace for employees to sign comprehensive non-disclosure and confidentiality agreements with their LPO employers . . . Subject to their confidentiality agreement with previous employers, candidates may be unwilling to disclose pertinent information pertaining to previous client engagements.”\textsuperscript{199}

Lastly, Ross specifically addresses the possible duty that law firms may face regarding insurance coverage. “The U.S. lawyer seeking to engage in LPO providers as part of his or her own due diligence should determine whether the LPO company itself holds sufficient professional global errors and omissions (E&O) insurance coverage.”\textsuperscript{200} This detailed obligation may become a specific duty on the part of the outsourcing lawyer in the near future.

The ABA Commission has admitted that outsourcing practices “continue to evolve and new issues continue to arise.”\textsuperscript{201} Additionally, the ABA suggests the adoption of a user-friendly website, which would tract significant news and developments relating to the ethics of outsourcing.\textsuperscript{202} This Comment agrees with the ABA that a comprehensive website of updated changes would provide additional guidance to practicing lawyers. Given the admission by the ABA that the evolving field of outsourcing will have new ethical issues in the future, one question still remains: Is the ABA implementing the right

\textsuperscript{198} Id.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} ABA Commission on Ethics 20/20 Initial Draft Proposal-Outsourcing May 2, 2011 (Report p. 8).
\textsuperscript{202} Id.
strategy by simply proposing only a few changes to the Model Rules regarding outsourcing? With all of these potential issues to come, in addition to the laundry list of ethical issues already discussed in this note, outsourcing requires its own section of the Model Rules to incorporate all of these issues.

2. THE ABA’S FULL ENDORSEMENT TO LEGAL OUTSOURCING

In the post financial crisis of 2008, which gave way to an economic market where thousands of U.S. lawyers lost there jobs,\(^\text{203}\) the ABA is subject to intense criticism by simply proposing any changes to the ABA Model Rules regarding outsourcing. For some, the idea of allowing foreign eyes to see and work on confidential information completely erodes the attorney-client relationship that has long been at the heart of the profession.\(^\text{204}\) Others argue that legal outsourcing will ruin the American legal profession.\(^\text{205}\) Scott Bullock, a contract lawyer who has blogged about the woeful economics of non-big-firm practice, told the New York Law Journal, “It’s just preposterous that we have to go to an American law school and pass a bar exam and then see our jobs shipped overseas. Why even require people to go to law school?”\(^\text{206}\)

Despite the critics, this note believes the ABA has given its full endorsement to legal outsourcing. The accompanying Report to the Proposed Model Rules discusses the cost advantages that outsourcing can provide for small and medium sized law firms.\(^\text{207}\)


\(^{204}\) Suzanne Barlyn, Call my Lawyer...in India, TIME MAGAZINE, (Apr. 3, 2008) (“I’m deeply troubled that outsourcing companies do not understand the scope of a lawyer’s duty to confidentiality, nor are they familiar with conflict-of-interest rules.”).


\(^{206}\) Anthony Lin, ABA gives thumbs up to legal outsourcing, THE NATIONAL LAW JOURNAL (ONLINE), (August 27, 2008).

Further, the Commission acknowledges the magnitude of outsourcing and the future ethical issues that could arise in this evolving practice.208

Many other observers also believe the ABA has shown its support for legal outsourcing.209 One author has said that the Commission blatantly endorses outsourcing by recognizing how outsourcing can benefit both clients and lawyers:

“The [Commission’s] report recognizes that the ability of solo practitioners and small- and mid-sized firms to retain outside high-quality outside providers, who can complete work at greater speed and lower cost than firm employees allows those firms to better compete for large matters without fear that they will lack adequate resources to perform the legal work involved.”210

Despite facing criticism from a portion of the legal community, the ABA has rightfully addressed the increasing trend of legal outsourcing, acknowledged its ethical effects, and has subsequently given legal outsourcing its full endorsement. Yet, despite its approval, the ABA’s current strategy to provide guidance to the legal field has simply been to add one Comment at a time to the individually affected Model Rules. This is the greatest example of the ABA avoiding actions that must be taken. The ABA needs to stop expressing the dramatic impact of outsourcing while only implementing minor changes to the Model Rules. If the ABA is going to endorse the practice of outsourcing and acknowledge the extent that it will play on the legal field, then they should also provide the issue of outsourcing with the amount of guiding rules it deserves—a separate section of the Model Rules dedicated to legal outsourcing.

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209 See Anthony Lin, ABA gives thumbs up to legal outsourcing, THE NATIONAL LAW JOURNAL (ONLINE), (August 27, 2008).
210 Ethics 20/20 Commission’s Draft Proposal Supports Outsourcing, Clarifies Hiring Attorneys’ Obligations, LEGAL RESEARCH & WRITING PRO, May, 2 2011. See also, ABA’s Ethics 20/20 Commission Issues revised outsourcing Proposal, LEGAL RESEARCH & WRITING PRO, September 20, 2011. See also, David Perla, ABA Blesses Legal Oustourcing in August Ethics Opinion, PANGEA3, (“The ABA, as the single most important national bar association, representing millions of US lawyers, believes that outsourcing legal services is a benefit to the ehalth of the profession itself.”).
3. THE ABA’S TRADITIONAL APPROACH TO ETHICAL LEADERSHIP

Looking at the most recent changes to the Model Rules, it is easy to see that the ABA has historically taken the ‘reactive approach’ to addressing serious ethical issues in the legal field. The two most recent changes to the Model Rules, which related to Multijurisdictional Practice of Law (hereinafter MJP) and Corporate Responsibility, provide a perfect example of the ABA’s prior strategy. By reviewing the ABA’s role in these two issues, maybe the ABA can learn from past results and apply a new approach to their ethical leadership.

Just like the onset of legal outsourcing, the issue of “MJP and the unauthorized practice of law was once considered to be purely theoretical.” However, in 1998, shortly after the ABA had created the Ethics 2000 Commission, the issue of MJP came to the forefront of the legal community due to a highly publicized case concerning the unauthorized practice of law by out-of-state practitioners. In the pivotal California Supreme Court decision, a New York law firm was denied compensation for assisting one of their clients in a San Francisco-based arbitration without a license to practice in California.

The ABA responded to the increasing concerns regarding the serious issues facing lawyers in MJP by creating a separate group designed solely to evaluate the unique issues surrounding MJP. The group, called the “Commission on Multijurisdictional Practice of Law,” took aim at studying the mass amount of information being submitted from the

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211 Lucian T. Pera, Assessing the Future of the Legal Profession, 30 OKLA. CITY U.L REV. 637 (Fall, 2005).
212 Gene Hammoud, Note: Multijurisdictional Practice: An Analysis of the ABA’s Proposed Changes to Rule 5.5 of the Rules of Professional Conduct, 26 Seton Hall Legis. J. 533, 533 (2002).
213 Id.
various bar associations throughout the United States. In 2002 the ABA House of Delegates, based upon the work of that Commission, adopted amendments to Model Rules 5.5 and 8.5 relating to MJP.

Most recently, in 2002, as a result of several corporate scandals the ABA created the Task Force on Corporate Responsibility. Specifically, the Task Force responded to the corporate scandal of Enron Corporation with particular attention paid to Enron's lawyers. “In significant respects, the SEC and ABA reforms were reactions to the perceived inadequacies in the performance of these lawyers.” (emphasis added) The Task Force focused the assertion that “[Enron]’s lawyers suffered from a dual failure of vision--losing sight of who their client was—the corporation itself, as opposed to any particular corporate agent with whom they were dealing--and seeing their role in unacceptably narrow terms--as mere implementers or transaction engineers, rather than as broadly-gauged corporate counselors or advisors.” As a result of the work of that Task Force the ABA House of Delegates, in 2003, adopted changes to Rules 1.6 and 1.13.

The ABA’s changes to the Model Rules incorporating both MJP and Corporate Governance have one thing in common: the ABA took a reactive approach to changing the Model Rules and providing ethical guidance to the legal field. One could argue that the lawyer’s in the corporate scandals such as Enron may have followed different action

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216 Id.
218 Id.
219 Gene Hammoud, Note: Multijurisdictional Practice: An Analysis of the ABA’s Proposed Changes to Rule 5.5 of the Rules of Professional Conduct, 26 SETON HALL LEGIS. J. 533, 533 (2002).
221 Id.
if the Corporate Governance’s rules were in place on a preventative manner. Just as they did with Multijurisdictional Practice of Law and Corporate Governance, the ABA is currently taking a “wait-and-see,” reactive approach to legal outsourcing. One author perfectly stated the ABA’s current leadership role by saying,

“[If] the ABA rule writers were more self-conscious in their work, more consciously aware of the role they inevitably play in the adoption of ethics rules across this country, and more consciously aware that uniformity may sometimes have more value for practicing lawyers, clients, and courts than getting the rule exactly right, the ABA might be even more successful in leading the way on legal ethics, and the nation might have more effective, more uniform, better understood rules of ethics.”

The ABA has an opportunity here to take action before the ethical issues of outsourcing grow to a disastrous level. For the first time, the ABA should be proactive instead of reactive when making changes to the Model Rules. The time is now for the ABA to take a different route in its role as the legal ethics leader, and provide the legal field with the ethical guidance on all the issues that outsourcing entails.

4. A MATTER THIS COMPLEX DESERVES ITS OWN SECTION

In light of the arguments addressed above, I propose that the ABA create an entirely new section to the Model Rules, specifically designed for legal outsourcing. As shown throughout this note, outsourcing legal work can create a complex web of ethical issues such as: the unauthorized practice of law, adequate supervision, client confidentiality and consent, conflicts of interest, competence, and appropriate billing. Further, outsourcing is at risk of new ethical issues such as lateral movement among LPOs, cloud computing and other technological issues, data protection, and global

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223 Lucian T. Pera, Assessing the Future of the Legal Profession, 30 OKLA. CITY U.L REV. 637 (Fall, 2005).
224 Mark Ross, Ethics of Legal Outsourcing, INTEGREON
225 Brudenhall, supra note 201.
226 Id.
Errors and Omission’s insurance coverage.\textsuperscript{227} With the current proposed changes, plus the advise of other state bar opinions relating to all the ethical issues affected by legal outsourcing, the ABA has too much necessary advisory information to attach to each individual Model Rules, which outsourcing affects. Further, a section of the Model Rules dedicated to outsourcing would provide a clearer and more organized place to access information.

The proposed changes to the Rules and Comments made in the May, September and February drafts may provide some guidance to the legal field on the issues of competency, supervision, and the unauthorized practice of law. However, as this note has shown, the ABA Commission is just barely scratching the services of an enormous global practice, which is here to stay. For once in the history of the ABA, the ABA should try to provide guidance to the legal community in anticipation of potential issues, instead of merely waiting until those issues are so eminently before them.

Just as they did in 2000 when the ABA created the Commission on Multijurisdictional Practice and again in 2002 with the creation of the Task Force on Corporate Responsibility, the ABA should create a separate Commission on Outsourcing in order to provide more detailed research for the issues at hand. Historically, the ABA has given significant deference to the individual Commissions due to their specific ABA mandate, tighter focus on the issues, and the fact that their appointed constituents include representatives of many portions of the legal profession with specific, relevant interests and needs.\textsuperscript{228} Therefore, the ABA will be best served with the creation of a Commission

\textsuperscript{227} Mark Ross, \textit{Ethics of Legal Outsourcing}, INTEGREON
\textsuperscript{228} Lucian T. Pera, Assessing the Future of the Legal Profession, 30 OKLA. CITY U.L REV. 637 (Fall, 2005) (“By the time the MJP Commission was created, Ethics 2000 had, in fact, begun work on these issues, even beginning work on the use of Model Rule 5.5 as a vehicle for a possible solution, but the Ethics 2000
on Outsourcing in order to provide comprehensive coverage of all the ethical issues involved in the practice.

The ABA Commission on Ethics 20/20 has put one step forward in trying to provide the legal field with ethical guidance on legal outsourcing. However, it is evident that the ABA is following its normal ‘wait-and-see approach’ to making actual changes. The ABA has already given its full support and endorsement to the practice of outsourcing, both for its practical and economical advantages. So, why doesn’t the ABA just fulfill their responsibility and provide the ethical leadership now, instead of waiting until the legal community has suffered from a severe lack of guidance. Hopefully, the ABA learns from its past approaches to new ethical issues and does not wait until some landmark case or considerable ethical scandal occurs before implementing necessary changes. The time is now for the ABA to act and provide the Model Rules with an entire section dedicated to legal outsourcing.

V. CONCLUSION

Over the past three decades, the drastic economic evolution to a more global economy has transformed the nature and administration of legal work. The outsourcing of legal work by a law firm or legal department to a legal outsourcing company or an entity located offshore raises specific issues pertaining to the outsourcing lawyer’s ethical obligation to his or her client. Until last year, the only specific guidance that a lawyer

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had on the ethical issues associated from outsourcing came from state and local bar opinions. This lack of a viable, consistent guidance to an increasing trend of outsourcing put the legal field in a total state of flux. The 2011 proposed changes to the Model Rules are specifically geared towards advising lawyers on their ethical duties when participating in legal outsourcing; however, they fall short of providing adequate detailed guidance by not incorporating the important issues of confidentiality, conflict of interest, fees, and client consent. With many more ethical issues to come, the ABA should be proactive in their approach to this dense legal practice and provide the Model Rules with a section strictly for legal outsourcing.