

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 506**

**June 7, 2023**

## **Responsibilities Regarding Nonlawyer Assistants**

*A lawyer may train and supervise a nonlawyer to assist with prospective client intake tasks including obtaining initial information about the matter, performing an initial conflict check, determining whether the assistance sought is in an area of law germane to the lawyer's practice, assisting with answering general questions about the fee agreement or process of representation, and obtaining the prospective client's signature on the fee agreement provided that the prospective client always is offered an opportunity to communicate with the lawyer including to discuss the fee agreement and scope of representation. Because Model Rule 5.5 prohibits lawyers from assisting in the unauthorized practice of law, whether a nonlawyer may answer a prospective client's specific question depends on the question presented. If the prospective client asks about what legal services the client should obtain from the lawyer, wants to negotiate the fees or expenses, or asks for interpretation of the engagement agreement, the lawyer is required to respond to ensure that the non-lawyer does not engage in the unauthorized practice of law and that accurate information is provided to the prospective client so that the prospective client can make an informed decision about whether to enter into the representation.<sup>1</sup>*

### **I. Introduction**

Nonlawyers<sup>2</sup> provide tremendous client and lawyer support for law firms. This Formal Opinion addresses a lawyer's ethical obligations when the lawyer delegates to a nonlawyer specific prospective client-intake tasks. Lawyers may train and supervise nonlawyers to assist with initial client intake tasks if the lawyers have met their obligations for management and supervision of the nonlawyers pursuant to ABA Model Rule of Professional Conduct 5.3 and prospective clients are given the opportunity to consult with the lawyers to discuss the matter.<sup>3</sup>

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<sup>1</sup> This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2023. The laws, court rules and opinions, regulations, and rules of professional conduct, promulgated in individual jurisdictions are controlling.

<sup>2</sup> The term "nonlawyer" is used in this Opinion, consistent with the term as used in Rule 5.3, to include all law firm employees, agents, contractors, and vendors who are not licensed lawyers (or otherwise authorized to practice law) but work under the supervision of a licensed lawyer including, for instance, paralegals, legal assistants, case managers, firm administrators, intake staff, and clerks. This term does *not* refer to professionals who are licensed by a jurisdiction to provide legal services in that jurisdiction, such as Arizona Legal Paraprofessionals, Utah Regulatory Sandbox participants, Minnesota Legal Paraprofessional Pilot Project, New York Court Navigators, or Washington Limited License Legal Technicians.

<sup>3</sup> Because this Committee does not opine on substantive legal questions, this Formal Opinion assumes that the assistance provided by the nonlawyer does not violate applicable unauthorized practice of law regulations or statutes. Different jurisdictions may have different views on what constitutes the practice of law.

## II. Analysis

### A. Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

ABA Model Rule of Professional Conduct 5.3 addresses a lawyer's responsibilities regarding nonlawyer assistants.<sup>4</sup> Rule 5.3(a) provides that lawyers who are partners or managers in a firm must ensure that the firm has policies that assure a nonlawyer's conduct is "compatible" with the professional obligations of the lawyer. Paragraph (b) of the Rule requires that lawyers who directly supervise nonlawyer assistants must "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Comment [2] notes, "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment ...."<sup>5</sup>

A lawyer's delegation of prospective client intake tasks to a nonlawyer or the lawyer's use of technology to assist with the initial intake of clients provides significant benefits and increased efficiency to lawyers. For example, nonprofit legal services organizations frequently train, supervise, and rely on nonlawyers to perform initial screening of prospective clients to determine whether there are conflicts of interest and whether the prospective clients are requesting services that fall within the organization's practice areas. Similarly, for-profit law firms have offered limited scope online legal services that provide website intake questions, a menu of available limited scope legal document completion services (such as simple powers of attorney, LLC formation, property deed transfers, and name changes), a conflict checking algorithm, and then "click-to-accept-terms" engagement agreements.<sup>6</sup> Delegating initial client intake to nonlawyers also is common in mass tort and class action practices. There, trained intake personnel may check for conflicts of interest, collect basic information from prospective plaintiffs or class members for lawyers to ascertain their eligibility to make a claim, and explain how fees and costs are charged in such cases. If the prospective client meets the eligibility criteria and specifics set forth by the lawyers, then the intake personnel send the prospective clients the standard fee agreement for consideration.

While the benefits of using nonlawyer assistants are many, without proper policies, training, and supervision in place, this delegation could lead to ethical violations and unfortunate consequences for clients and lawyers.<sup>7</sup> The practice must be "carefully and astutely managed."<sup>8</sup>

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<sup>4</sup> MODEL RULES OF PROF'L CONDUCT R. 5.3, cmt. [2] "Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services."

<sup>5</sup> For an extensive analysis of Rule 5.3, see ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

<sup>6</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457 & MODEL RULES OF PROF'L CONDUCT R. 1.18, cmt. [2] for guidance regarding lawyer websites and when an individual becomes a prospective client.

<sup>7</sup> See *In re Phillips*, 226 Ariz. 112, 244 P.3d 549 (2010) (setting forth guidelines for use of nonlawyers in intake process, including applicability of Rule 5.3 and prohibiting nonlawyers from having clients sign engagement agreements without attorney involvement); *In re Pinkins*, 213 B.R. 818 (Bankr. E.D. Mich. 1997) (relying, in part, on State Bar of Mich. Informal Op. RI-128 (1992), superseded by RI-349).

<sup>8</sup> State Bar of Mich. Informal Op. RI-349 (2010).

## B. Establishing the Client-Lawyer Relationship

When a prospective client contacts a lawyer for help in solving a legal matter, the lawyer and the prospective client discuss the scope of representation including the client's objectives for the representation and the actions the lawyer will take to achieve the client's goal.<sup>9</sup> Rule 1.5(b) requires a lawyer to communicate to the client the "scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible ... preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate."<sup>10</sup> Essentially, the client must know what the client bargained for.<sup>11</sup>

Rule 1.4(b) mandates that a lawyer communicate with clients and provide the clients, to the extent reasonably necessary, with explanations that allow the clients to make informed decisions regarding their representation. Some of the communication duties set forth in Rules 1.5(b) and 1.4(b) also apply in the context of explaining fee agreements to prospective clients. We note that Rule 1.4(b) does not expressly apply to prospective clients. Indeed, some of Rule 1.4(a)'s requirements—such as providing updates, consulting about means being employed to address objectives, and responding promptly to requests for information regarding a representation—would not make sense in that context. But it would seem imprudent to wait until after engagement for a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" as required by Rule 1.4(b). ABA Formal Opinion 02-425 (2002) applied Rule 1.4(b) to lawyers who "ask prospective clients to execute retainer agreements that include provisions mandating the use of arbitration to resolve fee disputes and malpractice claims." This interpretation has been extended to explaining "certain implications of the joint representation" by at least one ethics committee.<sup>12</sup> Therefore, we apply Rule 1.4(b) to lawyers when they communicate with both current and prospective clients.

A lawyer may develop policies, train, and supervise a nonlawyer so that the lawyer may delegate to the nonlawyer client intake tasks assuming those tasks do not constitute the practice of law in the applicable jurisdiction. For example, a lawyer may delegate to the nonlawyer obtaining initial information about the matter,<sup>13</sup> performing an initial conflict check,<sup>14</sup> determining whether the assistance sought is in an area of law germane to the lawyer's practice,<sup>15</sup> answering general

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<sup>9</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

<sup>10</sup> Though the Model Rule states this obligation in the passive context, jurisdictions have interpreted the obligation to communicate this information to be a lawyer's obligation. *See, e.g., In re Freeman*, 835 N.E.2d 494, 498 (Ind. 2005). That interpretation logically flows from the conclusion that the Model Rules govern the conduct of lawyers.

<sup>11</sup> GEOFFREY C. HAZARD, W. WILLIAM HODES & PETER R. JARVIS, *THE LAW OF LAWYERING* § 9.02, 9-8 (4th ed. 2002); MODEL RULES OF PROF'L CONDUCT R. 1.5(b) ("requires" discussion of fees).

<sup>12</sup> N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2017-7 (2017).

<sup>13</sup> Nonlawyers can be trained to obtain the names of all relevant parties, the date(s) of the incident(s) involved, and the nature of the legal matter.

<sup>14</sup> Nonlawyers can be trained to run conflict checks with the firm's systems and to filter for not just parties, but witnesses, opposing counsel, vendors, and other individuals who may create a potential conflict of interest for the firm. However, when a relevant or closely related name comes up in the conflict checking process, the lawyer must be the one to review the similarities and make the final determination of whether or not a conflict exists and whether any such conflict or not it is a waivable conflict.

<sup>15</sup> Where the lawyer's services would involve a single transaction, such as helping companies register their corporation filing documents with the state, with the appropriate training, a nonlawyer would likely be able to

questions about the fee agreement or process of representation, and even obtaining the prospective client's signature on the fee agreement as long as the prospective client is offered an opportunity to communicate with the lawyer to discuss the matter.

While many client-intake tasks lawyers perform may be delegable with proper policies in place, training, and supervision, lawyers who delegate do not relinquish their responsibilities under the Model Rules. Once the attorney-client relationship is formed, lawyers still have the responsibility to reasonably consult with the client regarding the client's objectives and how to achieve them.<sup>16</sup> Lawyers also have the responsibility to "promptly comply with reasonable requests for information" and consult with clients who have engaged them regarding limits on the lawyers' conduct given applicable laws and ethical duties.<sup>17</sup> And, Rules 1.2, 1.4, and 1.5(b) require a lawyer to communicate with clients about fees, the scope of representation, and any limitations thereon.

Whether a nonlawyer may answer a prospective client's *specific question* depends on the question presented and what would be considered to be the practice of law in the jurisdiction. That is important because Model Rule 5.5(a) prohibits lawyers from assisting others in practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. As Comment [2] notes, the definition of the practice of law is established by law and varies from one jurisdiction to another. Lawyers should understand how it is defined in their jurisdiction and take care that the supervised nonlawyers understand that definition and how it limits what nonlawyers may do. For example, whether a nonlawyer may answer a question relating to fee or cost calculation or how payments can be made may depend on whether the question requires the application of law to the facts of the case, as opposed to a question that merely asks about a firm procedural matter. When the question presented would require the application of law to facts, a nonlawyer also may convey a client question to the lawyer, have the lawyer determine the answer to the question, and then relay the lawyer's answer to the client, again, depending on the complexity of the question posed. The lawyer will be responsible for determining if the inquiry is best answered by the lawyer communicating directly with the client, so the lawyer can gather more information to make an informed recommendation.

Nonlawyers may provide general information about how the firm charges legal fees, such as explaining that fees are charged hourly, or on a contingency basis, or the matter is billed at a fixed rate. Or, if the question merely relates to how payments can be processed or other administrative matters, then the nonlawyer may provide information to answer the inquiry. However, if the prospective client asks about what legal services the client should obtain from the lawyer to address the client's objectives, wants to negotiate the fees or expenses, or asks for an interpretation of the rights and responsibilities set forth in the engagement agreement, Model Rules 1.4(b), 1.5, and 5.5<sup>18</sup> require the lawyer to respond. Ultimately, the scope of what the nonlawyers may do in this context will depend on whether the services in question constitute the practice of law in the

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explain the type of services provided for a set fee. Allowing a nonlawyer to answer general questions related to the lawyer's services in such a situation would not require them to provide independent legal advice. However, the nonlawyer must be trained to recognize when the client's questions venture from discussing general services.

<sup>16</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(a) & 1.4(a)(2).

<sup>17</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 & 1.4(a)(4), (a)(5).

<sup>18</sup> Once the prospective client becomes a client, then Rules 1.2 and 1.4(a) would also be implicated.

jurisdiction where they are being provided.<sup>19</sup> Because Model Rule 5.5(a) precludes lawyers from assisting others in engaging in the unauthorized practice of law, and Model Rule 5.3(b) requires lawyers to reasonably ensure the supervised nonlawyers conduct themselves compatibly with the lawyer's professional obligations, the lawyers are responsible for making sure this line is not crossed.

As noted above, delegation of prospective client intake must be carefully and astutely managed. What appears to be a simple question about how long the lawyer will spend on the matter, may actually be a question about the representation itself and cannot be accurately answered without the lawyer's personal knowledge and expertise.<sup>20</sup> Therefore, a lawyer must provide nonlawyers who are performing client-intake tasks with policies, training, and supervision regarding which questions the nonlawyer may answer, how to respond to those questions, and which questions should be presented to the lawyer.

## Conclusion

Nonlawyers provide significant client and lawyer support for law firms. A lawyer may train and supervise a nonlawyer to assist during prospective client intake screening by obtaining initial information about the matter, performing an initial conflict check, determining whether the assistance sought is in an area of law germane to the lawyer's practice, assisting with answering general questions about the fee agreement or process of representation, and even by obtaining the prospective client's signature on the fee agreement provided that these tasks do not constitute the practice of law in the applicable jurisdiction and that the prospective client always is offered an opportunity to discuss the fee agreement and scope of representation with the lawyer.

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### AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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<sup>19</sup> Indeed, the question of which jurisdiction's definition of the practice of law should be applied may be subject to a legal analysis. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 504 (2023).

<sup>20</sup> THE LAW OF LAWYERING, *supra* note 11, at §9.04; *see also* ABA MODEL GUIDELINES FOR UTILIZATION OF PARALEGAL SERVICES, Guideline 3(b), at 9, *available at* <https://www.americanbar.org/content/dam/aba/administrative/paralegals/aba-model-guidelines-for-utilization-of-paralegal-services-2021-web.pdf> ("Many state guidelines prohibit paralegals from "setting fees" or "accepting cases. . . . NALA Ethics Canon 3 states that a paralegal must not establish attorney-client relationships or set fees.").