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# Ethical Considerations Relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States

James I. Ham, Esq.\*

## I. INTRODUCTION<sup>1</sup>

The same cost considerations that have impelled so many industries in the United States to send administrative support work overseas have reached the legal industry. Unlike many industries that outsource, lawyers in the United States are subject to unique professional responsibility regulations. In sending legal work overseas, United States law firms are handing over work to individuals who are not subject to the disciplinary authority of state or local bar associations, may have limited legal training, and do not necessarily have any legal responsibility to abide by United States laws and ethical rules applicable to lawyers. Without properly structuring an outsourcing or off-shoring arrangement to address such issues, an improper outsourcing arrangement could lead to serious legal ethics violations and a new variety of disciplinary action against attorneys.

Legal outsourcing is in relative infancy in the United States, and the legal ethics community has barely begun to grapple with the host of ethical ramifications involved with the use of outsourced or offshore legal support. The few ethics opinions that have been drafted by major

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\* The author is a partner with Pansky Markle Ham LLP. The author wishes to acknowledge and thank Paige Gold, Esq., for her research and drafting assistance in the preparation of this article.

1. This article was written before the American Bar Association issued its formal opinion on outsourcing. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008), available at <http://www.abanet.org/cpr/08-451.pdf>; see also ABA, News Release, [http://www.abanet.org/abanet/media/release/news\\_release.cfm?releaseid=435](http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=435) (last visited Nov. 18, 2008). The ABA opinion is consistent with the earlier ethics opinions approving outsourcing and has not changed the views expressed in the article.

bar associations base their analyses on rules that were originally written for locally-provided legal services. These rules may be lacking when applied to offshore entities providing sophisticated legal services to a law firm and its clients.

The infancy of legal ethics analysis in the United States relating to the topic of off-shoring of legal services is evident from the generality of the ethics opinions—adopted, proposed and withdrawn—that have addressed the issue to date. For example, the San Diego County Bar Association’s (“SDCBA”) Legal Ethics Opinion 2007-1 states, “A number of obstacles can arise when work is assigned to foreign companies. An attorney acting with competence will foresee and understand such obstacles and will weigh them against the client’s interests.”<sup>2</sup> While this is undoubtedly true, an attorney who lacks experience dealing with an offshore provider of legal services located in a foreign country will find little guidance in that broad and general statement.

Perhaps not surprisingly, the most practical advice offered to date concerning the ethics of outsourcing has been offered by overseas legal providers themselves, who have an interest in encouraging the use of such services.

American industry uses the term “outsourcing” to refer to hiring an outside firm, which may be located overseas. The term “off-shoring” refers to opening one’s own office overseas, staffed by foreign nationals. While a number of large U.S.-based corporations (as well as some large law firms) have opened their own legal departments in foreign countries, this paper focuses largely on ethics issues associated with law firms that outsource by hiring a foreign-based company to carry out legal support tasks.

At present, most of America’s legal outsourcing business is being sent to India, drawn by the common language, common-law basis of both legal systems, and the large number of literate, Indian-educated and licensed attorneys who can do the same work as American legal assistants at a fraction of the price. Some industry observers have predicted that as many as 50,000 to 80,000 or more legal jobs may move overseas within the next decade.<sup>3</sup>

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2. San Diego County Bar Ass’n Comm. on Legal Ethics, Formal Op. 2007-1 (2007), available at <http://www.sdcba.org/ethics/ethicsopinion07-1.htm>. The text of the San Diego County Bar Association’s opinion is attached hereto as Appendix A.

3. See, e.g., Cynthia Cotts & Liane Kufchock, *U.S. Firms Outsource Legal Services to India*, INT’L HERALD TRIB., Aug. 21, 2007, available at <http://www.iht.com/articles/2007/08/21/business/law.php>; Emily Kopp, *A Smaller Legal World: More and More Companies are Outsourcing Legal Work Overseas—Where the Price is Right*, FULTON

As outsourcing of legal services expands in the coming years, many additional legal ethics issues are certain to arise. To avoid ethical problems, law firms that outsource with overseas companies need to make sure that the company with which they contract has a solid reputation and is equally familiar with American professional responsibility issues as with other legal subjects. The best way to protect a law firm from unintended ethical breaches is to contract with an overseas company that has a United States office and employs U.S.-licensed attorneys or managers.

## II. AN OVERVIEW OF UNITED STATES ETHICS OPINIONS ON OUTSOURCING

The legal ethics opinions that have so far been proposed, adopted, or in some cases withdrawn pending further study, all suggest that foreign outsourcing should be subject to the same ethical requirements as the domestic use of nonlawyer services. Basing their views on prior opinions concerning use of contract attorneys or legal-services companies in the United States, these opinions give general advice that should apply equally to conditions across town or overseas. There are, however, some unique issues applicable to overseas outsourcing. These more unique issues have not been adequately addressed, so far, by legal ethics literature.

Existing ethics opinions discuss the benefits of outsourcing: cost and time savings, greater efficiencies and improved client service. The first of these opinions was issued by the Los Angeles County Bar Association's ("LACBA") Professional Responsibility and Ethics Committee in 2006.<sup>4</sup> This opinion was followed shortly by opinions from the San Diego Bar Association and the Bar Association of the City of New York. The American Bar Association's Ethics Committee is also preparing, and expected to issue, an ethics opinion on outsourcing in 2008 that will, to a large extent, mirror the views of existing ethics opinions on the subject.<sup>5</sup>

These ethics opinions generally assume that the work to be outsourced would otherwise be carried out by paralegals and legal assistants in the United States. For example, Opinion 2006-3 of the

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COUNTY DAILY REP., Dec. 13, 2005 (discussing a 2005 study by Forrester Research predicting the movement of 79,000 legal positions by 2015).

4. See Los Angeles County Bar Ass'n Prof'l Responsibility and Ethics Committee, Formal Op. 518 (2006), available at <http://www.lacba.org/showpage.cfm?pageid=427>. The text of the Los Angeles County Bar Association's opinion is attached hereto as Appendix B.

5. See *supra* note 1.

Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York equates outsourcing with delegating support work to clerks, secretaries, and other lay persons, declaring that outsourcing is acceptable as long as lawyers provide vigorous supervision to ensure competent representation and to avoid aiding in the unauthorized practice of law; preserve client confidences and secrets; inquire into possible conflicts of interest; bill clients appropriately; and obtain any necessary client advance consent.<sup>6</sup>

SDCBA Opinion 2007-1 opines that an attorney who uses an overseas legal support company “does not aid in the unauthorized practice of law where he retains supervisory control over and responsibility for those tasks constituting the practice of law.”<sup>7</sup> The opinion continued, “Outsourcing does not dilute the attorney’s professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged.”<sup>8</sup>

Opinion No. 518 of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association states that an attorney may contract with an out-of-state company to draft a brief

provided the attorney is competent to review the work, remains ultimately responsible for the final work product, does not charge an unconscionable fee, protects client confidences and secrets, and there is no conflict of interest between the client and the contracting entity. The attorney may be required to inform the client of the nature and scope of the contract between the attorney and out of state company if the brief provided is a significant development in the representation or if the work is a cost which must be disclosed to the client under California law.<sup>9</sup>

Florida’s Proposed Advisory Opinion 07-2 also exemplifies the current limits of the legal ethics discussion relating to outsourcing to overseas vendors, which assumes that the same issues exist when outsourcing across the street or across the world.<sup>10</sup> Thus, the proposed advisory opinion states, “It is the committee’s opinion that there is no

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6. Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-3 (2006). The text of the City of New York’s opinion is attached hereto as Appendix C.

7. See San Diego County Bar Ass’n Comm. on Legal Ethics, *supra* note 2.

8. *Id.*

9. Los Angeles County Bar Ass’n Prof’l Responsibility and Ethics Committee, *supra* note 4.

10. Prof’l Ethics of the Florida Bar, Formal Op. 07-2 (2008), available at <http://www.floridabar.org/tfb/TFBETOpin.nsf/EthicsIndex?OpenForm> (enter “07-2” in search box, select “Ethics, Opinion 07-2”). The text of the Florida Bar’s opinion is attached hereto as Appendix D.

ethical distinction when hiring an overseas provider of such services versus a local provider.”<sup>11</sup> At the same time, however, Florida’s rules require direct attorney supervision of employees, and require that an attorney make reasonable efforts to make sure that an employee’s conduct complies with applicable ethics rules.<sup>12</sup> The proposed opinion does not provide any practical guidance regarding how to implement these rules with overseas vendors.<sup>13</sup> How does an attorney directly supervise staff members who are ten time zones away? What constitutes a “reasonable” effort to make sure these staffers comply with ethics rules?

### III. THE TYPES OF LEGAL TASKS BEING OUTSOURCED OVERSEAS

A wide variety of tasks are currently being outsourced, many largely administrative. The most basic tasks include transcription, clerical tasks, and document review, with documents being scanned and sent to the overseas company electronically.

Ascending in complexity, the next level of legal work commonly outsourced is legal research. Using an offshore company to analyze case and statutory law on a particular subject is very popular with large firms, the theory being that a literate, India-licensed attorney can do a comparable (if not better) job, more cheaply, than an American paralegal or law clerk would do.<sup>14</sup>

The North Carolina State Bar, which drafted a proposed opinion on outsourcing legal services to a foreign country and then withdrew the opinion in favor of further study, had proposed that a lawyer may use foreign assistants for

administrative support services such as document assembly, accounting, and clerical support. A lawyer may also use foreign assistants for limited legal support services such as reviewing documents; conducting due diligence; drafting contracts, pleadings, and memoranda of law; and conducting legal research. Foreign assistants may not exercise independent legal judgment in making decisions on behalf of a client.<sup>15</sup>

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11. *Id.*

12. *Id.*

13. *See id.*

14. *Contra* Posting of David Hoffman to Concurring Opinions Blog, [http://www.concurringopinions.com/archives/2007/07/outsourcing\\_law\\_1.html](http://www.concurringopinions.com/archives/2007/07/outsourcing_law_1.html) (July 8, 2007, 7:55 p.m.) (disagreeing that outsourcing legal research is appropriate).

15. North Carolina State Bar Ass’n, Formal Op. 2007-12 (2008), *available at* <http://www.ncbar.com/ethics/ethics.asp>. The text of the North Carolina Bar Association’s opinion is attached hereto as Appendix E.

More complicated assignments commonly outsourced overseas include patent applications, contract drafting, and preparing briefs and drafts of other complex legal documents. One Indian-based firm claims to have prepared a brief on a matter that was submitted to the U.S. Supreme Court.<sup>16</sup>

## VI. KEY ETHICAL CONSIDERATIONS IN OVERSEAS OUTSOURCING

Below is a list of key issues which any law firm should address if it wishes to outsource its legal tasks in an ethical manner.

### A. *Supervision*

The law firm has a duty to rigorously supervise the foreign company, and make sure that none of the assignments could be construed as the unauthorized practice of law (“UPL”).

All United States jurisdictions forbid attorneys to assist unlicensed individuals in practicing law. Under ABA Model Rule 8.4, “it is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”<sup>17</sup> California RPC Rule 1-300 states, “A member shall not aid any person in the unauthorized practice of law.”<sup>18</sup> New York also prohibits the unauthorized practice of law<sup>19</sup> and its Code of Professional Responsibility, under Ethical Considerations, notes that authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere.<sup>20</sup>

While an attorney may be licensed to practice law in one state or jurisdiction, the view in the United States is that an attorney is only licensed to practice law within the state or jurisdiction where they are licensed. Thus, a New York lawyer can be prosecuted for unauthorized practice of law under California Business & Professions Code § 6125, when that lawyer renders California legal advice to a California client

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16. See Daniel Brook, *Made in India: Are Your Lawyers in New York or New Delhi?*, LEGAL AFF., May-June 2005, at 11, available at [http://www.legalaffairs.org/issues/May-June-2005/scene\\_brook\\_mayjun05.msp](http://www.legalaffairs.org/issues/May-June-2005/scene_brook_mayjun05.msp).

17. MODEL RULES OF PROF'L CONDUCT R. 8.4 (2002).

18. CAL. RULES OF PROF'L CONDUCT R. 1-300 (2007).

19. N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 3-101(A) (2007).

20. See *id.* at EC 3-9 (2007).

while present in California.<sup>21</sup> The unauthorized practice statutes can also reach across state lines under certain circumstances.<sup>22</sup>

A law firm hiring an outside company needs to be sure that none of the assigned tasks could be considered the unauthorized practice of law. The proper level of supervision by the retaining attorney, measured by the complexity and sensitivity of the tasks assigned, should alleviate most unauthorized practice issues.<sup>23</sup>

As long as the California lawyer retains full control over the representation of the client and exercises independent judgment in reviewing the draft work, the unauthorized practice of law issue is avoided because the outsource company is assisting the lawyer in carrying out his duties, not performing the duties itself. This is the basic rationale of the Los Angeles County Bar Association's outsourcing opinion, Ethics Opinion No. 518.

A form of sliding scale of required supervision, based on the complexity of the tasks being outsourced, appears to have been recognized as well by the New York City Bar Association in its opinion on outsourcing. The New York opinion suggests that the ambit of tasks that an attorney may delegate to non-lawyers should be commensurate with the degree of supervision that the attorney provides over the work of the non-lawyers.<sup>24</sup> The opinion states that supervision may be accomplished through reference checks, interviews, and continuous communication.

Similarly, the Proposed 2007 Formal Opinion 12 of the North Carolina Bar, which was withdrawn in favor of further study, had tentatively concluded that to properly supervise the work delegated to foreign assistants, a lawyer must possess sufficient knowledge of the specific area of the law, and ensure that the assignment is within the

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21. See CAL. BUS & PROF. CODE § 6125 (2008).

22. See e.g., San Diego County Bar Ass'n Comm. on Legal Ethics, *supra* note 2 (citing *Birbrower v. Superior Court*, 949 P.2d 1, 5-6 (1998) ("One may practice law in the state in violation of [Business & Professions Code] § 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by phone, fax, computer, or other modern technological means.")).

23. See, e.g., Los Angeles County Bar Ass'n Prof'l Responsibility and Ethics Comm., *supra* note 4, at 5, 8-9 (discussing unauthorized practice of law and the duty to supervise); Orange County Bar, Formal Op. No. 94-002 (1994) (stating that a paralegal who does work of a preparatory nature, such as drafting initial estate planning documents, is not engaged in UPL where the attorney supervising the paralegal maintains a "direct relationship" with the client).

24. See Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, *supra* note 6.



foreign assistant's area of competency.<sup>25</sup> The proposed opinion went on to suggest that if physical separation, language barriers, differences in time zones, or inadequate communication channels do not allow a reasonable and adequate level of supervision to be maintained over the foreign assistant's work, the lawyer should not retain the foreign assistant to provide services.

What remains to be decided is the degree to which direct or face to face interaction between the lawyers and the outsource suppliers is necessary in order to satisfy the requirement of proper supervision. Is it sufficient "due diligence" to conduct telephone reference checks and interviews without physically meeting and observing the outsource provider's operations, and examining its protocols and work behaviors? Is a teleconference, or even a videoconference, enough? There is no consensus at this time on such questions.

### *B. Independent Judgment*

There are increasing news reports of client pressure being placed on large, corporate law firms to reduce legal costs by employing offshore personnel. According to one recent article, firms like Jones Day and Kirkland & Ellis have been asked to send basic legal tasks to India, where lawyers tag documents and investigate takeover targets for as little as \$20 an hour.<sup>26</sup> While basic administrative jobs may be outsourced without harm to the quality of services rendered, when a lawyer's decision-making becomes driven by "the client's business needs instead of legal needs, independent professional judgment can be compromised."<sup>27</sup>

There may come a point where the drive for cost savings may conflict with the attorney's duty of independent judgment. Certainly in the context of rapidly developing electronic discovery obligations and standards, the pressure to reduce costs by outsourcing can potentially be at odds with a lawyer's responsibilities under the Federal Rules of Civil Procedure or state Codes of Civil Procedure, at least where the attorneys are too far removed from the document identification and selection process.

In-house legal counsel can also be impacted by the cost control demands and the concomitant pressure to off-shore substantial legal work. For such counsel, the ultimate issue may be whether outsourcing

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25. See North Carolina State Bar Ass'n, *supra* note 15.

26. Cotts & Kufchock, *supra* note 3.

27. Marcia L. Proctor, *Transactional Law: Considerations in Outsourcing Legal Work*, MICH. B.J., Sept. 2005, at 20, 24 (2005).

will be controlled by a purchasing department or another part of the organization, instead of the company's general counsel. Quite clearly, substantial questions about the exercise of independent judgment are raised when legal counsel is no longer the gatekeeper for legal services.

Likewise, on the other side of the globe, bottom-line concerns may cause the contracted firm to limit the amount of time its staff spends on the work, in order to meet the U.S. law firm's bottom-line expectations. ABA Formal Opinion 88-356 suggests that a law firm must make certain that the compensation received by the temporary lawyer, whether paid directly to the lawyer or by a placement agency, is adequate to satisfy the firm that it may expect the work to be performed competently for the firm's clients.<sup>28</sup>

### C. *Competence*

The quality of outsourced work will naturally have a tendency to reflect on the attorney's own legal competence. Because an attorney in the United States has a duty to perform competently, a law firm outsourcing legal tasks should evaluate and understand the capabilities and basic competencies of the overseas company it retains. The firm should to gather enough information about the company to be able independently to evaluate its general quality, reputation and reliability.

A lawyer should obtain reliable information about various aspects of the company's operations, including: (a) the identities of the principal owners and their qualifications; (b) staff expertise and qualifications; (c) length of time in business; (d) policies and procedures, including policies on the handling of client confidential information; (e) information technology and security systems; (f) lawsuits and claims pending or previously asserted against the company; (g) credit history; (h) sample work product; and (i) stateside and local references.

So far, ethics opinions in the United States have addressed only generally the relationship between the lawyer's duty of competence and the off-shoring or outsourcing of legal work. Thus, the San Diego County Bar's ethics opinion states that for work to be done competently, the lawyer retaining the overseas firm must have an understanding of the legal training and business practices in the jurisdiction where the work will be performed, including the educational background and credentials of those actually doing the work.<sup>29</sup> The Bar Association of New York's ethics opinion directs an outsourcing attorney to do the following: obtain background information about any intermediary employing or engaging

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28. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988).

29. See San Diego County Bar Ass'n Comm. on Legal Ethics, *supra* note 2.

the non-lawyer; obtain the professional resume of the non-lawyer; conduct reference checks; interview the non-lawyer by phone or voice-over-internet protocol (VOIP) or web cast to ascertain his or her suitability for the particular assignment; and communicate during the assignment to ensure that the non-lawyer understands the assignment and is discharging the assignment according to the lawyer's expectations.<sup>30</sup>

Once the overseas company is retained, the New York opinion advises an attorney to first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality.<sup>31</sup> The LACBA Professional Responsibility and Ethics Committee advises that the attorney must review the brief or other work and independently verify that it is accurate, relevant and complete, and revise it, if necessary, before submitting it to the court.<sup>32</sup>

All the opinions agree that if the United States attorney is not knowledgeable about the area of law involved, procuring work from a company that is experienced in that area does not fulfill the duty to act competently.<sup>33</sup> A lawyer cannot delegate any authority over legal strategy, questions of judgment, or the final content of any work product delivered to the client or filed with the court.<sup>34</sup>

The San Diego Bar Association's outsourcing ethics opinion states that an attorney should not outsource work, even to a purportedly expert company, if the attorney is not knowledgeable enough about the subject to be able to critically and independently evaluate the work product he receives.<sup>35</sup> With this in mind, a company's assurance that it provides documents "ready to file with the court" may serve as a red herring and lure unsuspecting attorneys into the mistake of delegating the legal decision making to the outsource supplier.

#### *D. Conflict Checks*

Subject to certain exceptions allowing a client or former client to consent, ABA Model Rules of Professional Conduct 1.7 and 1.9 prohibit a lawyer from representing a client if the representation will be directly

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30. See Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, *supra* note 6.

31. See *id.*

32. See Los Angeles County Bar Ass'n Prof'l Responsibility & Ethics Comm., *supra* note 4, at 8-9.

33. See, e.g., *id.* at 6 ("The Committee is of the opinion that attorneys who contract for services which assist the attorneys in representation of their clients to not assist in a violation of Bus. and Prof. Code § 6125, so long as the attorney remains ultimately responsible for the final work product provided to or on behalf of the client.").

34. See *id.*

35. See San Diego County Bar Ass'n Comm. on Legal Ethics, *supra* note 2.

adverse to another current or former client, or, if the representation may be materially limited by the lawyer's responsibility to another client.<sup>36</sup> Model Rule 1.10 imputes disqualification to an entire firm.<sup>37</sup> As a practical matter, law firms have a responsibility to determine whether new attorneys (and, in some cases, support staff) have performed services for parties adverse to the law firm's clients in matters substantially related to the law firm's work for its clients. With overseas outsourcing, the subject of conflicts comes into play when a law firm contracts with a company that may be performing similar tasks for opposing counsel.

A contract company working (through the law firm) on behalf of one party in a dispute should not simultaneously perform work on behalf of the opposing party or that party's counsel. While a law firm that takes on representation of a client in a given dispute would immediately be aware that it could not accept employment from the client's adversary, a more continuous monitoring of overseas legal-support firms may be required. Such firms may acquire a conflicting client engagement after their retention by the first law firm. Changes to the identity of parties, resulting from amended complaints, intervention by new parties, or a merger or acquisition, require the law firm to conduct the same conflict checks it would perform domestically with its offshore providers.

Before retaining an overseas company, a law firm should inquire into, and be reasonably comfortable with, the company's conflict of interest and record-keeping procedures concerning all matters worked on, and the personnel assigned to them. The law firm should also ask specific questions about whether the company is performing or has performed services for any parties adverse to the lawyer's client. The sufficiency of the answers may give some indication as to whether this issue is taken seriously by the company.

ABA Formal Opinion 88-356 discusses conflicts as they pertain to temporary contract attorneys who may have worked for opposing counsel.<sup>38</sup> The opinion states that if a temporary lawyer does not have access to, or acquire, confidential information of the opposing counsel's client, and did not directly work on the matter, the rules requiring the disqualification of legal counsel are inapplicable to the contract attorney.<sup>39</sup> The opinion cautions that firms should screen temporary lawyers from all information relating to clients for whom the temporary lawyer does not work, and that confidential materials should only be seen

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36. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (2008); *id.* at R. 1.9.

37. See *id.* R. 1.10.

38. See ABA Comm. on Ethics and Prof'l Responsibility, *supra* note 28.

39. See *id.*

on a need-to-know basis.<sup>40</sup> In the context of outsourcing services, it may be possible for an overseas company to work for opposing counsel on separate, unrelated matters, without compromising ethical considerations, so long as ethical screens are established between the projects and the attorneys or personnel assigned to each project.

Both the law firm and the offshore company should maintain records and documentation of which personnel were assigned to each project for purposes of both confidentiality and conflict-checking. Should an actual conflict arise, the law firm should obtain client consent for the firm to do the work (where permissible and appropriate), or else not use that outsource provider.

### *E. Confidentiality—Preserving Client Confidences and Secrets*

Every United States jurisdiction has adopted a requirement that a client's confidential information be protected from disclosure.<sup>41</sup> Thus, for example, ABA Model Rule 1.6, Confidentiality of Information, states that a lawyer shall not reveal "information relating to the representation of a client" unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation.<sup>42</sup>

Confidentiality issues associated with outsourcing are of at least two distinct types. The first type is legal in nature: Can confidential information be transmitted and used overseas consistent with existing laws and regulations? The second type is practical in nature: Are there sufficient practical safeguards in place to insure that a client's confidential information is adequately protected?

With respect to whether confidential information can be transmitted and used overseas consistent with existing laws and regulations, a lawyer must consider the nature of the information being transmitted and existing government laws and regulations regarding privacy and the export of sensitive information. Local, state, or federal laws, for example, may limit and place conditions upon who may have access to a client's confidential information. The Health Insurance Portability and Accountability Act of 1996, commonly known as "HIPAA,"<sup>43</sup> and its regulations<sup>44</sup> is one example of a potential source of restrictions and limitations. United States export control regulations may also limit the

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40. *See id.*

41. *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (Selected State variations 2008).

42. *See id.* at R. 1.6.

43. *See* Health Insurance Portability & Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996).

44. *See* 45 C.F.R. §§ 160.500-164.534 (2007).

types of confidential information that can be transmitted overseas. For example, the Export Administration Regulations issued by the United States Department of Commerce Bureau of Industry and Security, under laws relating to the control of certain exports, re-exports, and activities, may need to be consulted.<sup>45</sup>

In addition, recently a law firm sued the President of the United States and outsource service providers in the United States District Court for the District of Columbia for declaratory judgment and injunctive relief, alleging that the electronic transmission of data from the United States to a foreign country may result in a waiver of Fourth Amendment protections otherwise applicable to such communications.<sup>46</sup> The lawsuit alleged, among other things, the government's alleged "pervasive surveillance of electronically transmitted data wherein one party to the transmission is a foreign national residing overseas" and raises the issue of whether a party waives Fourth Amendment protections when information is transmitted to foreigners living overseas.<sup>47</sup> While the outcome of that lawsuit would have been less than certain had it not been withdrawn, the claims raise questions as to whether the confidentiality of information transmitted overseas can be legally protected. Ultimately, practicalities will likely prevail over technical legal objections and roadblocks, but how and when that will occur remains at this time an open question.

The second category of confidentiality issues is practical in nature. For example, a law firm considering whether to outsource legal services must consider differences in cultural and legal expectations regarding client confidentiality and personal privacy. For example, to execute a particular work assignment, it may be sometimes necessary for the overseas firm to have access to the data resident on the law firm's computers. The identical dangers that exist with misappropriation of electronic data in other industries are present here. Present also, perhaps to a greater or lesser extent depending upon the region, are the risks of industrial espionage or sabotage, bribery and commercial theft.

Mismanagement of sensitive information has led to issues in other industries that serve as a caution to law firms who outsource legal work. For example, recently, an offshore subcontractor handling patient-record management for the University of California at San Francisco ("UCSF")

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45. See 15 C.F.R. §§ 730.1-774.1 (2007).

46. See Amended Complaint for Declaratory Judgment & Injunctive Relief at 2-3, *Newman McIntosh & Hennessey, LLP v. Bush*, No. 1:08-cv-00787-CKK (D.D.C. May 12, 2008), available at [www.klgates.com/files/upload/eDAT\\_NMH\\_v\\_Bush\\_Amended\\_Complaint.pdf](http://www.klgates.com/files/upload/eDAT_NMH_v_Bush_Amended_Complaint.pdf).

47. See *id.* at 2.

Medical Center threatened to post confidential patient records on the internet unless the Medical Center straightened out a problem with the third-party vendor handling UCSF's accounts payable department.<sup>48</sup> In another case, a Bangalore, India-based data manager held an American company's data hostage and refused to return it unless the American company dropped its legal claims against it.<sup>49</sup>

The risk of potential misuse of confidential or private data raises the issue of whether a law firm must consider, in the selection of an outsource supplier, the laws of the foreign jurisdiction in which the outsource supplier resides. Do those laws protect privacy? Do laws of the local jurisdiction require the outsource supplier to keep confidential information private? Do the laws provide an adequate remedy to the law firm and its client should the outsource supplier breach its obligations of confidentiality? Are contractual obligations of confidentiality recognized and sufficiently enforced in the outsourcing country? Are adequate and real remedies available in the event of a breach?

Ultimately, a law firm using overseas support staff must reconcile the duty of confidentiality with the need to provide the outsource firm with sufficient information to enable it to complete its task. Absent strict controls, an outsourcing law firm may have no way of empirically verifying that confidential information is in fact being kept confidential. Current ethics opinions provide no guidance to law firms in this area. For example, the Bar of the City of New York's opinion states only that a law firm should exercise reasonable care to prevent the company from disclosing or using confidences or secrets of a client.<sup>50</sup>

It appears, at minimum, that a law firm should confirm, through its retention agreement and by actual verification that foreign workers understand the applicable concepts and rules of confidentiality practiced in the United States, and that the outsource supplier has enforceable and enforced rules and procedures pertaining to the safeguarding of confidential information. The San Diego County Bar's outsourcing opinion thus specifies that a United States lawyer hiring an overseas company must know what legal and ethical standards are applicable to foreign lawyers, particularly with respect to confidentiality, attorney-client privilege, and conflicts.<sup>51</sup> The Bar of the City of New York

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48. See Jennifer Skarda-McCann, *Overseas Outsourcing of Private Information & Individual Remedies for Breach of Privacy*, 32 RUTGERS COMPUTER & TECH. L.J. 325, 325 n.2 (2006).

49. See *id.* at 325.

50. See Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, *supra* note 6.

51. See San Diego County Bar Ass'n Comm. on Legal Ethics, *supra* note 2.

opinion suggests that, wherever possible, an attorney should obtain written assurances of compliance from foreign workers and the agencies that hire them.<sup>52</sup>

Current ethics opinions on outsourcing do not directly address issues related to enforcement of agreements between the offshore service provider and the law firm regarding protection of confidential information, or for that matter, any other aspect of the arrangement. How and where such disputes are to be settled could be very important. Failure to consider questions of venue and dispute resolution procedures may have unintended consequences or unexpected results. For example, where the forum for any dispute is not specified by the contracting parties, choice of law and venue rules may result in disputes being settled in a foreign jurisdiction whose laws may not provide the degree of protection expected by the client and the law firm.

One practical way to assure enforcement of confidentiality safeguards may be to make sure the outsourcing firm managers are bound by an ethical responsibility to ensure compliance with ethical standards, by being licensed in a United States jurisdiction. Some law firms have placed United States trained and licensed lawyers into supervisory roles in the offices where services are being outsourced. This enhances the ability to manage the complex ethical issues which are associated with the outsourcing of legal work.

Additional practical means of ensuring confidentiality for sensitive client information include walling off files from foreign offices and limiting access to only the information necessary to complete the work for the particular client. If the firm has assigned more than one matter to the offshore company, information-sharing should be limited to those workers assigned to the particular task.

For document review services, a law firm should consider hosting documents on third-party servers that are secure and provide limited access to the personnel working on the matter. Such systems can prevent copying and downloading of the material and contain other useful security features. If actual materials are provided to the outsource vendor, the law firm's retention agreement should include explicit and specific instructions regarding the proper method of destruction (or return) of such materials upon project completion.

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52. See Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, *supra* note 6.



### F. *Client Consent*

There remains a wide range of opinion regarding what circumstances require client consent for the outsourcing legal services. In the case of domestic outsourcing, the ABA and most state bars impose a duty to obtain client consent before outsourcing to temporary attorneys where the outside attorney will play a significant role in the matter, where client confidences and secrets will be disclosed, where the client would expect only employees to handle the matter, and where the charges will be directly billed to the client.<sup>53</sup> Often, rules regulating the splitting of attorneys' fees accomplish the objective of client notification and consent.<sup>54</sup>

Thus, ABA Formal Opinion 88-356 states that where a temporary lawyer is providing work for a client without the close supervision of a lawyer who is part of the law firm, the client must consent.<sup>55</sup> The Bar Association of the City of New York's outsourcing opinion suggests that a lawyer should secure the client's informed consent in advance of disclosing any confidences to outside support staff.<sup>56</sup> However, the New York opinion frowns upon "reflexive" disclosure for all outsourced work:

Non-lawyers often play more limited roles in matters than contract or temporary lawyers do. Thus, there is little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to outsource legal support services overseas to a non-lawyer. But the presence of one or more additional considerations may alter the analysis: for example, if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-lawyer, in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed.<sup>57</sup>

Regardless of local professional responsibility rules, full discussion of the issue with a client makes sense and is in keeping with ABA Model Rules 1.2(a) and 1.4, and state counterparts to those rules, which require

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53. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, *supra* note 28.

54. See *id.*

55. See *id.*

56. See Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, *supra* note 6.

57. *Id.*

that a lawyer consult with the client and communicate the means by which the client's objectives are to be pursued.<sup>58</sup>

Clients may have strong feelings about outsourcing. Clients whose cases involve private or sensitive information may not be comfortable with it. In contrast, a large corporate client may favor outsourcing, in some cases to the point where it may threaten to interfere with the duty of the lawyer to properly supervise the work. The Los Angeles County Bar Association's ethics opinion on outsourcing frames the issue in terms of whether the overseas company's work would be a "significant development" reportable to the client.<sup>59</sup> Outsourcing may be a "significant development" within the meaning of both rule California Rule of Professional Conduct 3-500 and California Business & Professions Code § 6068(m).<sup>60</sup>

According to the Los Angeles County Bar's opinion, if the outsource company is doing only legal research, administrative support services such as transcription, litigation support graphics, or data entries, then disclosure is probably not necessary.<sup>61</sup> But if strategic decisions are being made (drafting a brief would most likely fall under this category), or the work is something the client would expect of the senior lawyers assigned to the case to take responsibility for doing, then disclosure may be necessary.<sup>62</sup>

Likewise, the San Diego County Bar Association concluded that if a client has a reasonable expectation that the work would be done by the firm retained, the attorney has a duty to inform the client if the work is being outsourced.<sup>63</sup> In its Advisory Opinion 07-2, the Florida Bar suggests that, in determining whether client consent is required, an attorney should bear in mind factors such as whether the client would reasonably expect the lawyer to personally handle the matter and whether non-lawyers will have more than a limited role in the provision of services.<sup>64</sup> The opinion suggests that work delegated should be so much under the lawyer's supervision and ultimately merged into the lawyer's own product that the work will be, in effect, that of the lawyer himself.<sup>65</sup>

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58. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2008); *id.* at R. 1.4.

59. See Los Angeles County Bar Ass'n Prof'l Responsibility and Ethics Comm., *supra* note 4, at 6.

60. See *id.* at 7.

61. See *id.* at 6-7.

62. See *id.*

63. See San Diego County Bar Ass'n Comm. on Legal Ethics, *supra* note 2.

64. See Prof'l Ethics of the Florida Bar, *supra* note 10.

65. See *id.*

### G. *Billing Practices*

Depending on the rules of the law firm's jurisdiction, a law firm may cover the cost of the outsourcing itself, incorporate the cost into its overhead; pass the cost directly to the client; mark up the cost and pass it on to the client; or charge a flat fee.

ABA Formal Opinion 00-420 states that as long as the total fee is reasonable, a law firm is not required to disclose a surcharge on the contracting lawyer's work, if billed as legal services.<sup>66</sup> The premium is to be added based on the theory that the lawyer is using the offshore company's work product to assist in giving legal advice to the client; the lawyer is reviewing the work, then using it to formulate legal advice.

Some states, such as New York, have concluded that because a non-lawyer cannot perform legal services, it may be inappropriate to include the cost of outsourcing as a legal fee. New York states that a law firm should charge the client "no more than the direct costs associated with the outsourcing, plus a reasonable allocation of overhead expenses."<sup>67</sup> "Reasonable overhead" can be the time spent in delegating, supervising and reviewing the work done by the offshore company. The terms on which the charge is based must be communicated to the client, because absent disclosure, it is improper to assess a surcharge on disbursements over and above the actual payment of funds to third parties made by the lawyer on the client's behalf.

ABA Formal Opinion 93-379 states that "if a lawyer receives a discounted rate from a third-party provider, it would be improper if she did not pass along the benefit of the discount to her client rather than charge the client the full rate and reserve the profit to herself."<sup>68</sup> This opinion rests upon the proposition that it is improper to create an additional source of revenue for the law firm beyond that involved in the provision of professional services, without client consent.

Regardless of how the billing is arranged, the law firm must disclose to client the basis on which the client is expected to pay for any legal work outsourced. ABA Formal Opinion 93-379 states that "absent a contrary understanding, any invoice for professional services should fairly reflect the basis on which the client's charges have been determined."<sup>69</sup>

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66. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420 (2000).

67. Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, *supra* note 6.

68. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993).

69. *Id.*

The Florida State Bar's proposed outsourcing opinion is the only one to address the subject of charging for outsourcing work in contingency fee cases. The proposed opinion states that in such cases, "it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to that attorney, even if that cost is paid to a third-party provider."<sup>70</sup>

## V. OTHER ETHICAL CONSIDERATIONS INVOLVED IN FOREIGN OUTSOURCING

While potentially not solely ethical considerations, a law firm should consider other potentially sensitive issues associated with outsourcing legal services overseas. Some of these considerations are identified below.

### A. *Political/Public Relations Issues*

According to Lexadigm, one of several early outsourcing companies,

[a]ttorneys in India, on an average, are paid one-third of their U.S. counterparts' compensation. Furthermore, Indian attorneys who are employed in the private sector are not likely to expect health insurance coverage, any retirement plans, disability benefits, or life insurance as a part of their benefits package. . . . [T]he resulting cost savings . . . could be anywhere between 50 percent and 70 percent of the cost of maintaining comparable staff to perform such work in the U.S.<sup>71</sup>

Depending on the client, the same information that would be viewed in a positive light by those wishing to improve the firm's bottom line could be a political and public relations nightmare for another. A ready example of such risk can be found in the litigation and negative publicity that has plagued some United States clothing and garment manufacturers who have been accused of improperly profiting from low-priced overseas labor to manufacture their clothes.

In the contemporary United States political environment, more consumers are looking at American companies' treatment of foreign workers. Reports concerning maltreatment of foreign subcontractors

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70. Prof'l Ethics of the Florida Bar, *supra* note 10.

71. Puneet Mohey, Esq., *Practical and Ethical Considerations of Legal Outsourcing*, Feb. 20, 2007, at 9, available at [http://www.lexadigm.com/docs/Practical%20and%20Ethical%20Considerations%20of%20Legal%20Outsourcing\\_Lexadigm.pdf](http://www.lexadigm.com/docs/Practical%20and%20Ethical%20Considerations%20of%20Legal%20Outsourcing_Lexadigm.pdf).

increasingly draw media attention. Therefore, depending on the industry, there could be negative repercussions for some clients if it became widespread knowledge that the client's law firm was outsourcing legal assistance.

### *B. Malpractice Insurance*

Law firms should check with the malpractice insurance providers to make sure the policy does not contain any restrictions against outsourcing.

### *C. Export Control Issues*

A law firm could encounter legal and ethical problems if the documents being scanned for overseas staff support contain restricted, sensitive ideas not in the public domain, including defense- and homeland security-related matters. International transmission of such sensitive material is regulated by two United States agencies, the Directorate of Defense Trade Controls and the Bureau of Industry and Security.

## VI. PRACTICAL SUGGESTIONS FOR ENSURING ETHICAL OUTSOURCING

Given the above constraints, whether outsourcing is appropriate in any given situation should involve a risk-benefit analysis in which the cost savings are balanced against what is at stake in the underlying legal matter. The client should be involved in the analysis. ABA Rule 1.2, Scope of Representation and Allocation of Authority between Client and Lawyer, says that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."<sup>72</sup> ABA Rule 1.4(a)(2) on Communication states, "[a] lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished."<sup>73</sup>

### *A. Quality Control and Testing*

Before hiring an overseas legal support company, a law firm should consider whether the outsourcing company has a strong United States presence and can be held accountable in the United States, or in its home jurisdiction, in the event issues arise with respect to the quality and

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72. MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983).

73. *Id.* at R. 1.4.

content of the outsourced work product and the improper release of confidential or privileged information. The retainer agreement should explicitly address the venue and jurisdiction issues for any claims and contain clear choice of law provisions.

A law firm should start slowly in developing a relationship with the outsource legal-service provider and test the provider's capabilities by initially giving it small, controlled projects.

Finally, the law firm should make sure that all work is done under close supervision of managers who are attorneys licensed to practice law in the United States, and who are readily accessible to the law firm for consultations.

#### *B. Rules of Thumb: What Not to Outsource*

Highly fact-intensive matters that would require the overseas staff to become familiar with every minute detail of a matter may not be suitable for outsourcing. Examples might include merger and acquisition documentation, employment agreements for executives, and joint venture agreements; fact-intensive pleadings where the United States lawyer has interviewed the client and is most familiar with the underlying facts; and matters requiring active negotiation.

Do not outsource a project that would shift the responsibility for legal decision making to overseas staff. It is best to limit the overseas staff role to providing the resources necessary, such as research and intelligence, for the requesting attorney to render an informed opinion.

Do not outsource work when sophisticated technical knowledge and experience are necessary, unless the outsource vendor has demonstrated and established qualifications in the area.

#### *C. Rules of Thumb: What to Outsource*

Projects involving multi-jurisdictional legal research; contract drafting; memoranda of points and authorities; due diligence reports; litigation support; IP services such as patent, trademark or copyright searches; review, drafting, and portfolio management; and document review, where documents are not sensitive and do not contain confidential trade secrets or other sensitive data.

## APPENDICES

As mentioned *supra*, this article was written before the American Bar Association issued its formal opinion on outsourcing.\* The ABA opinion is consistent with the earlier ethics opinions approving outsourcing discussed above and reproduced with permission in the following appendices.

### APPENDIX A

#### SAN DIEGO COUNTY BAR ASSOCIATION\*\*

##### Ethics Opinion 2007-1

#### I. FACTUAL BACKGROUND

A partner in a two-lawyer California litigation firm was contacted by a business acquaintance to defend a complex intellectual property dispute in San Diego Superior Court. The attorney and his partner had limited experience in intellectual property litigation.

The attorney nonetheless took the case and assured the client of his firm's ability to develop a solid understanding of the areas of law involved. Without telling his client, the attorney contracted on an hourly basis with Legalworks, a firm in India whose business is to do legal research, develop case strategy, prepare deposition outlines, and draft correspondence, pleadings, and motions in American intellectual property cases at a rate far lower than American lawyers could charge clients if they did the work themselves. None of the foreign-licensed attorneys at Legalworks held law licenses in any American jurisdiction.

The California attorney reviewed the work he got from Legalworks and signed all court submissions and communications with opposing counsel himself. The work of Legalworks was billed to the client at cost, but was classified on the bills in broad categories such as "legal research" or "preparation of pleadings."

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\* See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 (2008), available at <http://www.abanet.org/cpr/08-451.pdf>.

\*\* Ethics Opinion 2007-1 was written by the San Diego County Bar Association's Legal Ethics Committee and is reprinted with the permission of the San Diego County Bar Association. Ed. Note: this appendix preserves the numbering and form of the citations as they appear in the original opinion.

Ultimately, the attorney and his partner obtained dismissal of the case on a summary judgment motion. When the client asked how the attorneys developed the theory on which summary judgment was granted, and had done the work so inexpensively, the attorney told him that virtually all of the work was done by India-based Legalworks.

## II. QUESTIONS

A. Did the attorneys violate RPC 1-300 by aiding Legalworks in the unauthorized practice of law?

B. Did the attorneys have a duty to inform the client of the firm's arrangement with Legalworks before or at the time of entering the contract with Legalworks?

C. Did the attorneys violate RPC 3-110 by the extent to which that firm relied on Legalworks to provide substantive expertise that the attorneys lacked to defend the suit? Specifically, may a California lawyer with limited experience in the subject matter of the service to be undertaken outsource important responsibilities in performing the service to a "lawyer" reasonably believed to be competent who is not licensed or otherwise authorized to practice in California? Does the answer differ if the other lawyer is licensed to practice law in another U.S. state rather than in another country?

## III. AUTHORITIES CITED

### Cases

Baron v. City of Los Angeles (1970) 2 Cal.3d 535

Birbower, Montalbano, Condon & Frank, PC v.

Superior Court (1998) 17 Cal.4th 119

Bluestein v. State Bar (1974) 13 Cal.3d 162

Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd. (2002)  
99 Cal.App.4th 1094

Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal.App.3d 1142

Crane v. State Bar (1981) 30 Cal.3d 117

Gafcon, Inc. v. Ponsor & Associates (2002) 98 Cal.App.4th 1388

Matter of Phillips (Rev.Dept. 2001) 4 Cal.State Bar Ct. Rpt. 315

People ex rel. Lawyers' Institute of San Diego v.

Merchants Protective Corp. (1922) 189 Cal. 531

Upjohn Co. v. United States (1981) 449 U.S. 383

Vaughn v. State Bar (1972) 6 Cal.3d 847



## Statutes

California Business and Professions Code §6067  
California Business and Professions Code §6068  
California Business and Professions Code §6125  
California Business and Professions Code §6126  
California Evidence Code §912

## Rules

ABA Model Rule 1.1  
ABA Model Rule 5.1  
ABA Model Rule 5.3  
Rule of Court 227  
Rule of Court 965  
Rule of Court 983  
Rule of Professional Conduct 1-100  
Rule of Professional Conduct 1-300  
Rule of Professional Conduct 3-110  
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## Ethics Opinions

ABA Ethical Consideration 3-6  
ABCNY Formal Op. 2006-3  
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COPRAC Formal Opinion 1994-138  
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Los Angeles County Bar Association Professional Responsibility and  
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New York Committee on Professional and Judicial Ethics, Formal  
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State Bar Opinion 1987-91

## Other

David Lazarus, Looking Offshore: Outsourced UCSF notes highlight  
privacy risk.

How one offshore worker sent tremor through medical system, S.F. Chron., March 28, 2004

Marcia Proctor, Considerations in Outsourcing Legal Work, Mich. Bar Journal, September 2005

Eileen Rosen, Corporate America Sending More Legal Work to Bombay, NY Times, March 14, 2004

Indian Evidence Act of 1972

#### IV. DISCUSSION

As an initial matter, the Committee emphasizes that a California attorney has a duty under the applicable law and rules to act loyally and carefully at all times. Outsourcing does not alter the attorney's obligations to the client, even though outsourcing may help the attorney discharge those obligations at lower cost.

##### A. Did the Attorneys Aid the Unauthorized Practice of Law?

California Business and Professions Code section 6125, part of the State Bar Act, states: "No person shall practice law in California unless the person is an active member of the State Bar." RPC 1-300(A) states: "A member shall not aid any person or entity in the unauthorized practice of law." Leading or assisting the layman in his or her unauthorized practice of law is considered aiding and abetting in California. (*Bluestein v. State Bar* (1974) 13 Cal.3d 162 ; Cal. Bus. & Prof. Code §§ 6125 and 6126.)

The State Bar Act does not define the practice of law. In 1922, the California Supreme Court defined the practice of law as "the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure." (*People ex rel. Lawyers' Institute of San Diego v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535, internal quotation marks and citation omitted.) The practice of law "includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court." (*Ibid.*, internal quotation marks and citations omitted.) The definition delineates "those services which only licensed attorneys can perform." (*Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 543.)

The California Supreme Court has refined the scope of the unauthorized practice of law to include legal work by New York attorneys in connection with prospective private arbitration in California. (*Birbower*,

Montalbano, Condon & Frank, PC v. Superior Court (1998) 17 Cal.4th 119 (“Birbower”).) In that fee collection/malpractice action, the Court rejected the New York attorneys’ argument that section 6125 is not meant to apply to out-of-state attorneys. “Competence in one jurisdiction does not necessarily guarantee competence in another. By applying section 6125 to out-of-state attorneys who engage in the extensive practice of law in California without becoming licensed in our state, we serve the statute’s goal of assuring the competence of all attorneys practicing law in this state.” (Id. at 132.)

In *Birbower*, the Court focused on what is meant by the practice of law “in California” for purposes of section 6125. The Court concluded that the New York attorneys “clearly” had practiced law “in California” in violation of section 6125 by: (1) traveling to California on several occasions over a two-year period to discuss with the client and others various matters pertaining to the dispute; (2) “discuss[ing] strategy for resolving the dispute and advis[ing] [the client] on this strategy” in California; (3) meeting with the client “for the stated purpose of helping to reach a settlement agreement and to discuss the agreement that was eventually proposed”; (4) and traveling to California “to initiate arbitration proceedings before the matter was settled.” (Id. at p. 131.)

The Court further made it clear that section 6125 could be offended by actions taken by the attorneys when they were not physically present in the state. “The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state or created a continuing relationship with the California client that included legal duties and obligations. [] Our definition does not necessarily depend on or require the unlicensed lawyer’s physical presence in the state. . . . For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means.” (Id. at pp. 128-129.) Conversely, the Court rejected a rule that “a person automatically practices law in California’ whenever that person practices California law anywhere, or ‘virtually’ enters the state by telephone, fax, e-mail, or satellite.” (Id. at p. 129, emphasis in the original, citations omitted.) In other words, physical presence in the state is neither necessary nor sufficient to engage in activities constituting the practice of law “in California” in violation of section 6125. Instead, California courts “must decide each case on its individual facts.” (Ibid.)

Nonetheless, it is clear from the nature of the work Legalworks performed that, if Legalworks had done the work directly for the client, Legalworks would have been engaged in the unauthorized practice of law.<sup>1</sup> The question is whether Legalworks' act of contracting to do the work for a California attorney, who in turn exercised independent judgment<sup>2</sup> in deciding how and whether to use it on the client's behalf, rendered the services that Legalworks provided something other than the practice of law. We conclude that it did.

While there is no case law on point,<sup>3</sup> there is instructive case law in analogous contexts. In *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, an insured sued an insurer's captive law firm seeking a declaration, among other things, that the insurer had engaged in the unauthorized practice of law by using the captive firm briefly to defend the insured. Both the trial court and the Court of Appeal rejected the contention. The insurer did not "influence or interfere" with the attorney's ability to represent the insured or direct or control the attorney's representation in any way. (Id. at 1415.)

In further determining that the insurer had not engaged in the impermissible corporate practice of law, the Court of Appeal favorably discussed State Bar Opinion 1987-91, even while emphasizing it was not bound by State Bar Opinions. That State Bar Opinion concluded that in-house counsel does not aid an insurer in engaging in the unauthorized practice of law by representing insureds in litigation as long as, among other things, "the insurance company does not control or interfere with the exercise of professional judgment in representing insureds. . . ." (*Gafcon, Inc.*, 98 Cal.App.4th at 1413, citing State Bar Opinion 1987-91 at \*1.) The State Bar Opinion further concluded that use of salaried employee attorneys within an insurer's law division to represent insureds does not violate the corporate practice of law "as long as [inter alia] attorneys within the law division (1) do not permit the division to 'become a front or subterfuge for lay adjustors or others unlicensed personnel to practice law;' [and] (2) adequately supervise nonattorney personnel working under the attorneys' supervision. . . ." (*Gafcon, Inc.*, 98 Cal.App.4th at 1413, quoting State Bar Opinion 1987-91. See also Orange County Bar Formal Opinion No. 94-002 (1994) (opining that a paralegal who does work of a preparatory nature, such as drafting initial estate planning documents, is not engaged in the unauthorized practice of law where the attorney supervising the paralegal maintains a "direct relationship" with the client, citing ABA Ethical Consideration 3-6). The key issue appears to be the amount of supervision over the non-lawyer:

the greater the independence of the non-lawyer in performing functions, the greater the likelihood that the non-lawyer is practicing law.

Thus, the attorney does not aid in the unauthorized practice of law where he retains supervisory control over and responsibility for those tasks constituting the practice of law. The authorities make it clear that under no circumstances may the non-California attorney “tail” wag the California attorney “dog.”<sup>4</sup> The California Supreme Court in *Birbower* specifically rejected the trial court’s implicit assumption that the New York attorneys may have been able to perform the legal work that they did in California had they simply associated California counsel into the case. There is “no statutory exception to section 6125 [that] allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar.” (*Birbower*, 17 Cal.4th at 126, note 3. Compare Rule of Court 983, authorizing pro hac vice admission to practice of law in California of out-of-state attorney in good standing in his jurisdiction who associates an active member of the California bar as attorney of record and subjects himself to the California Rules of Professional Conduct.)

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 those who were not California attorneys. His fiduciary duties and potential liability to his corporate client for all of the legal work that was performed were undiluted by the assistance he obtained from Legalworks. In short, in the usual arrangement, and in the scenario described above in particular, the company to whom work was outsourced has assisted the California lawyer in practicing law in this state, not the other way around. And that is not prohibited.<sup>5</sup>

#### B. Did the Attorneys Have the Duty to Inform the Client of the Firm’s Arrangement with Legalworks?

The only published California opinion which addresses this issue, LACBA Opinion No. 518, concludes that the use by a California lawyer of the services of non-lawyers (commonly referred to as “outsourcing”) “may be a ‘significant development’ within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m),” and that, when it is a “significant development,” rule 3-500 and Section 6068 require that the California attorney inform the client prior to utilizing the outsourcing service. Opinion 518 applies COPRAC’s

analysis in Formal Opinion 2004-165 (this opinion holds that the use of a contract lawyer may be a “significant development” which would require that the client be informed) to services provided by non-lawyers. Formal Opinion 2004-165, in turn, relies upon the rule established in Formal Opinion 1994-138, in which COPRAC found that the use of an outside lawyer can constitute a “significant development.”

Formal Opinion 2004-165 holds that the use of a contract lawyer may be a “significant development” but acknowledges that the determination of whether the use of a contract lawyer is a “significant development” is based upon the circumstances of each case. Opinion No. 518 considers the somewhat different issue of whether the client must be informed of a decision to “outsource” the drafting of an appellate brief to a non-lawyer outsourcing company, but relies upon Formal Opinion 2004-165 to conclude similarly that “[t]he relationship with [the outsourcing company] may be a ‘significant development’ within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m).” Although Opinion No. 518 further states that “[i]n most instances, the filing of an appellate brief will be a ‘significant development,’” it does not provide specific guidance under other facts.

Although an issue may once have existed as to whether the decision to use the services of lawyers outside of the attorney’s firm could constitute a “significant development” which required that the client be informed, that issue appears settled by both COPRAC Formal Opinions 1994-138 and 2004-165. Formal Opinion 1994-138, recognizes that the use of another attorney is a “significant development,” but states that the determination of “whether it is a significant development” should be made by considering the following factors: (1) whether responsibility for overseeing the client’s matter is being changed; (2) whether the new attorney will be performing a significant portion or aspect of the work; and (3) whether staffing of the matter has been changed from what was specifically represented to or agreed to by the client. In Formal Opinion 2004-165, COPRAC held that the determination as to whether a development is “significant” is not only a function of the three factors discussed in Formal Opinion 1994-138, but also whether the client had a “reasonable expectation under the circumstances” that a contract lawyer would be used to provide the service. To determine whether the “outsourcing” of services to non-lawyers is a “significant development,” Opinion No. 518 merely extends COPRAC’s analysis in “contract lawyer” cases to that factual scenario. Although the factual scenarios are different in each case, all of these decisions clearly are founded upon a

recognition that the determination of whether and when to inform the client as to the use of outside services can be a “significant event” is a function of the client’s expectations with respect to the services which are to be provided by the attorney.

We agree with Opinion No. 518 that the factors addressed by COPRAC in Formal Opinion 2004-165 should not be limited to the use of outside attorneys, and will also determine whether the client must be informed when a service is “outsourced” by an attorney to a non-attorney. The analysis of Formal Opinion 2004-165 should not be limited to whether the service to be “outsourced” technically involves the practice of law; to the contrary, the duty to inform the client is determined by the client’s reasonable expectation as to who will perform those services. Therefore, if the work which is to be performed by the outside service is within the client’s “reasonable expectation under the circumstances” that it will be performed by the attorney, the client must be informed when the service is “outsourced.” Conversely, if the service is not a service that is within the client’s reasonable expectation that it will be performed by the attorney, the attorney is not necessarily required to inform the client immediately, absent other requirements compelling disclosure.

We believe that, in the absence of a specific understanding between the attorney and client to the contrary, the “reasonable expectation” of the client is that the attorney retained by the client, using the resources within the attorney’s firm, will perform the work required to develop the legal theories and arguments to be presented to the trial court, and that the attorney will have a significant role in preparing correspondence and court filings.<sup>6</sup>

C. Did the Attorneys Violate RPC 3-110 by the Extent to which the Firm Relied on Legalworks to Provide Substantive Expertise that the Attorneys Lacked?

### 1. Duty of Competence

Section 6067 of the California Business & Professions Code recites the attorney’s oath “to faithfully discharge the duties of an attorney at law to the best of his knowledge and ability.” California Rule of Professional Conduct 3-110(A) states, “A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” Rule 3-110(B) defines acting with “competence” to mean applying “the

1) diligence, 2) learning and skill, and 3) mental, emotional and physical ability reasonably necessary for the performance of such service.”

An attorney may, consistent with the duty of competence, enlist the services of others when they are unfamiliar with the area of law at stake. Specifically, RPC 3-110(C) states, “If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.” (See also ABA Model Rule 1.1, Comment 1—competent representation can be provided by associating with counsel that established competence in a particular field.)

An attorney unfamiliar with the area of law in a case must acquire the knowledge and skill necessary to act competently in the case. The attorney may acquire that knowledge and skill by learning the area of law, associating experienced counsel who already knows the law, or other means suited to the case. Failure to acquire such knowledge can be the basis for sanctions. (See CRC 227.) Overall, the duty to act competently requires an attorney to know whether they can handle a particular case and, if they are unable to do so, the attorney must choose a suitable alternative to protect the client’s interests.

Retaining a firm experienced in American intellectual property litigation does not relieve the attorney from the duty to act competently. The attorney retains the duty to supervise the work performed competently, whether that work is outsourced out-of-state or out of the country.<sup>7</sup> An attorney’s duty to act competently in a supervisory role is highlighted in the discussion section of rule 3-110, which states, “The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorneys and non-attorney employees or agents.” (See *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 (“An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority;” see also ABA Model Rule 5.1(b)—“a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to insure that the other lawyer conforms to the rules of professional conduct.”))

Nor does procuring work product from a firm experienced in American intellectual property litigation fulfill the attorney’s duty to act competently. To satisfy that duty, an attorney must be able to determine



for himself or herself whether the work under review is competently done. To make such a determination, the attorney must know enough about the subject in question to judge the quality of the work.

As noted above, there are various ways an attorney may acquire the knowledge needed to perform such a review. Whether an attorney has acquired such knowledge will, of course, depend on the facts and issues of the case at hand. An attorney may not, however, rely on a firm such as Legalworks to evaluate its own work. The duty to act competently requires informed review, not blithe reliance.

In addition to knowledge of the legal and factual issues in a case, and regardless of the attorney's level of expertise and experience in the subject matter of the assignment, the duty of competence may require an attorney to learn enough about a firm such as Legalworks to evaluate its general quality and reliability. The degree to which the duty requires such an inquiry will depend on the facts of the case. Factors relevant to (though not exhaustive of) discharging the duty could include inquiry into (a) pertinent background information about the firm (such as industry reputation), and the individuals (such as qualifications), who will perform the work; (b) references of the firm or individuals assigned to perform the work. The duty also could require that the attorney (c) interview the firm in advance; (d) request a sample of the firm's work product that is comparable to your project; (e) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and executing it to the attorney's expectations; and (f) review ethical standards with individuals who will perform work and incorporate the ethical standards into the terms of the contract with the firm. (See ABCNY Formal Op. 2006-3; Marcia Proctor, *Considerations in Outsourcing Legal Work*, Mich. Bar Journal, September 2005, at 24.)

In the hypothetical scenario, whether the attorney discharged his duty of competence—or even whether he was capable of discharging his duty of competence without further study before accepting the representation—turns on how “limited” his experience was in intellectual property litigation at the time of the outsourcing. There is plainly a point at which an attorney will lack sufficient understanding of a kind of legal work that he will be unable to accept the work and outsource aspects of it at all because he will be incapable of critically and independently evaluating the work product he receives. The outsourcing posited by the hypothetical may constitute “professionally consulting another lawyer

reasonably believed to be competent” for purposes of RPC 3-110 only if the attorney’s “limited” experience was sufficiently substantial to enable him to perform that indispensable evaluative function.

## 2. Responsibility for Work

In addition to bearing a duty to competently supervise the performance of the outsourced work, an attorney also retains ultimate responsibility for that work. (*Vaughn v. State Bar* (1972) 6 Cal.3d 847, 857; *Matter of Phillips* (Rev.Dept. 2001) 4 Cal.State Bar Ct. Rpt 315, 335-336; Cal. State Bar Form. Opn. 1982-68; ABA Model Rule 5.3). By retaining responsibility for the work, the supervising attorney is subject to the ABA Model Rules that hold a lawyer responsible for another lawyer’s violation of professional responsibility rules where: 1) the lawyer orders or ratifies the misconduct; or where 2) the lawyer has supervisory authority over the other lawyer and knows of the conduct at the time when the consequences could have been avoided or mitigated but failed to take remedial action. (ABA Model Rule 5.1(c) & Comment 5.)<sup>8</sup>

## 3. Considerations in Supervising Work Performed Abroad

The degree of supervision warranted for outsourced work was magnified by the work being performed in India rather than a United States jurisdiction. A number of obstacles can arise when work is assigned to foreign companies. An attorney acting with competence will foresee and understand such obstacles and will weigh them against the client’s interests. Some legal ethics experts, like Stephen Gillers, believe that “[t]here is no problem with offshoring, because even though the lawyer in India is not authorized by an American state to practice law, the review by American lawyers sanitizes the process.” (Ellen Rosen, *Corporate America Sending More Legal Work to Bombay*, NY Times, March 14, 2004.) We agree only to a point. In order to satisfy the duty of competence, an attorney should have an understanding of the legal training and business practices in the jurisdiction where the work will be performed.

One factor should be considered when outsourcing work is the educational background of those persons performing the work. While an attorney in another U.S. state will have a legal educational background comparable to that of the assigning attorney, an attorney abroad may not. The necessary training to become a lawyer differs around the world. In order to determine the applicable ethical rules, a lawyer must first

determine whether the worker is a “nonlawyer” or “lawyer” within the foreign jurisdiction. In order to do so, the U.S. lawyer must know something about the requirements of lawyering where the work will be performed and the credentials of those who will actually perform the work. In cases where the attorney is supervising nonlawyers, reasonable steps must be taken to ensure that the nonlawyer’s conduct meets the assigning attorney’s professional obligations. (ABA Model Rule 5.3(b).) In the instant scenario, this means the lawyer should make sure that anyone who assists on the case will not expose the assigning attorney to a possible violation of the professional responsibility rules in the attorney’s jurisdiction. (ABA Model Rule 5.1(b).)

Other questions the State Bar may consider in determining the adequacy of supervision of non-California lawyers include: i. whether the non-attorney be disciplined, perhaps even terminated, by the attorney for improper conduct; ii. whether the non-attorney’s compensation be adjusted by the attorney for poor performance by the non-attorney; iii. whether the non-attorney has been educated and/or trained in any way by the attorney; iv. whether the attorney has the ability to review the non-attorney’s work ethics and practices; v. whether the attorney regularly provides input to the non-attorney on his/her performance; and vi. whether the attorney has the ability or discretion to restrict or confine the non-attorney’s areas of work or scope of responsibility. In the case of a paralegal or other employee, the answer to these questions would be yes, but for an overseas lawyer the answers would be no. Those distinctions as well, then, justify a heightened duty of supervision under the hypothetical facts.

In addition, part of acting competently in the case of outsourcing work is ensuring other duties are fulfilled as well. An additional duty of an attorney who outsources work, whether within the U.S. or abroad, is to “maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, or his or her client.” (See Business & Professions Code section 6068(e).) This is especially important as the legal and ethical standards applicable to foreign lawyers may differ from those applicable to domestic lawyer, particularly with respect to client confidentiality, the attorney-client privilege, and conflicts of interests.<sup>9</sup> One unfortunate example of a breach of confidentiality involving an outsourced project concerns a medical transcription project that was subcontracted to India. There, the subcontractor threatened to post confidential patient records on the Internet unless the UC San Francisco Medical Center retrieved money owed to the subcontractor from a

middleman. (David Lazarus, Looking Offshore: Outsourced UCSF notes highlight privacy risk. How one offshore worker sent tremor through medical system, S.F. Chron., March 28, 2004.)

Legalworks was not retained as an attorney but to provide law-related assistance. Thus, there would be an argument that the attorney-client privilege that applies in the outsourcing company's jurisdiction would be irrelevant. Instead, the applicable rule is that the attorney-client privilege is not waived for disclosure of information "reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted. . . ." (Cal. Evid. Code §912(d).) As the above example shows, it is not clear that California privilege law would apply to a threatened breach of confidentiality by the outsourcing company. Given the uncertainty—not to mention the substantial geographical distances—imposing a duty of heightened due diligence is warranted.

## V. CONCLUSION

The Committee concludes that outsourcing does not dilute the attorney's professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged. Under the hypothetical as we have framed it, the California attorneys may satisfy their obligations to their client in the manner in which they used Legalworks, but only if they have sufficient knowledge to supervise the outsourced work properly and they make sure the outsourcing does not compromise their other duties to their clients. However, they would not satisfy their obligations to their clients unless they informed the client of Legalworks' anticipated involvement at the time they decided to use the firm to the extent stated in this hypothetical.

1. The important effect of that conclusion is that corporations, at least, may not directly contract with non-California attorneys to represent them in court in California absent pro hac vice admission of the attorney by the court. "As a general rule, it is well established in California that a corporation cannot represent itself in a court of record either in propria persona or through an officer or agent who is not an attorney." (Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd. (2002) 99 Cal.App.4th 1094, 1101, citations omitted. See also Rule of Court 965, requiring registration of non-California in-house counsel advising corporations with California contacts and prohibiting their appearance in court absent pro hac vice admission.)

2. See discussion, *infra*, at Section C(1) regarding the attorney's duty of competence to be able to evaluate Legalworks' work product.

3. Through a somewhat different route, we reach the same general conclusion on this point as our colleagues in the Los Angeles County Bar Association. (See LACBA Professional Responsibility and Ethics Committee Opinion No. 518 (June 19, 2006) pp. 5-6 ("LACBA Opinion"). See also, Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2006-3 (August 2006).)

4. See LACBA Opinion at p. 9: "[I]n performing services for the client, the attorney must remain ultimately responsible for any work product on behalf of the client and cannot delegate to [outsourcing] Company any authority over legal strategy, questions of judgment, or the final content of any product delivered to the client or filed with the court. [] It follows that if a term of the agreement between the attorney and Company delegates to Company a decision-making function that is non-delegable, then the attorney may be assisting Company in the unauthorized practice of law or violating the ethical duties of competence and obligation to exercise independent professional judgment." We differ only in not qualifying the conclusion that such an abdication of a non-delegable duty would constitute assisting in the unauthorized practice of law in violation of RPC 1-300.

5. We do not address the interesting and perhaps fact-specific question whether an attorney who is incompetent to evaluate the work of an outsourced contractor, even if he retains control over the matter and exercise such independent judgment as he can, would indeed violate the prohibition on assisting the contractor in the unauthorized practice of law. For a discussion of the duty of competence, see *infra* Section (C)(1).

6. The client's reasonable expectation does not preclude use of employees of the attorney's firm, including partners, associate attorneys and paralegals, to perform work on the case, including research and drafting of documents. It should not ordinarily preclude other attorneys of the firm from making appearances on behalf of the client.

7. We note that California Rule of Professional Conduct 1-100 (B)(3) defines the term "lawyer" to include members of the State Bar of California, attorneys licensed in other state, the District of Columbia, and United States territories, "or is admitted in good standing and eligible to

practice before the bar of the highest court of, a foreign country or any political subdivision thereof.”

8. In this case, of course, the ABA Model Rule is only applicable by analogy. As set forth in part II.A above, the work was not delegated and the person doing the work was not a California attorney. That, however, imposes more of a supervisory burden on the attorney not less of one.

9. Under India’s attorney-client privilege, no attorney may: “(i) disclose any communication made to him in the course of or for the purpose of his employment as such attorney, by or on behalf of his client; (ii) state the contents or condition of any document with which he has become acquainted in the course of and for the purpose of his professional employment; or (iii) disclose any advise [sic] given by him to his client in the course and for the purpose of such employment.” (Indian Evidence Act of 1972, quoted at [www.lexmundi.com](http://www.lexmundi.com), India.) The attorney-client privilege is more limited than in America. For example, “[a]n in-house counsel is not recognized as an ‘attorney’ under Indian law. Thus, professional communications between an in-house counsel and officers, directors and employees are not protected as privileged communications between an attorney and his client. . . .” ([lexmuni.com](http://lexmuni.com), India. Compare: “In *Upjohn Co. v. United States* (1981) 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, the United States Supreme Court expanded the previous ‘control group test’ and held that all confidential communications concerning the scope of their employment between corporate employees and the corporation’s in-house counsel are covered by the attorney-client privilege.” *Chicago Title Ins. Co. v. Superior Court* (1985) 174 Cal.App.3d 1142, 1151 holding, however, that attorney-client privilege did not apply where in-house counsel merely acted as a negotiator, gave business advice, or otherwise acted as company’s business agent. (Ibid).)

**APPENDIX B****LOS ANGELES COUNTY BAR ASSOCIATION****PROFESSIONAL RESPONSIBILITY AND ETHICS  
COMMITTEE**

OPINION NO. 518\*

June 19, 2006

**ETHICAL CONSIDERATIONS IN OUTSOURCING OF LEGAL  
SERVICES****SUMMARY**

An attorney in a civil case who charges an hourly rate may contract with an out-of-state company to draft a brief provided the attorney is competent to review the work, remains ultimately responsible for the final work product filed with the court by the attorney on behalf of the client, the attorney does not charge an unconscionable fee, client confidences and secrets are protected, and there is no conflict of interest between the client and the contracting entity. The attorney may be required to inform the client of the nature and scope of the contract between attorney and out-of-state company if the brief provided is a significant development in the representation or if the work is a cost which must be disclosed to the client under California law. Any refund of charges by the out-of-state company to the attorney should be passed through to the client if the client was separately charged for the service.

**AUTHORITIES CITED****Statutes:**

California Business and Professions Code § 6068

California Business and Professions Code § 6125

California Business and Professions Code § 6126

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Cases:

*Bushman v. State Bar* (1974) 11 Cal.3d 558  
*Crawford v. State Bar* (1960) 54 Cal.2d 659  
*Farnham v. State Bar* (1976) 17 Cal.3d 605  
*Jones v. State Bar* (1989) 49 Cal.3d 273  
*Simmons v. State Bar* (1970) 2 Cal.3d 719

California Rules of Professional Conduct:

Rule 1-100  
Rule 1-120  
Rule 1-310  
Rule 1-320  
Rule 1-400  
Rule 2-200  
Rule 3-110  
Rule 3-310  
Rule 3-500  
Rule 5-200

Opinions:

COPRAC Formal Opinions 1994-138  
COPRAC Formal Opinions 2004-165  
LACBA Formal Opinions 374  
LACBA Formal Opinions 423  
LACBA Formal Opinions 473

FACTS

An attorney licensed to practice law in California has filed a notice of appeal in a civil case on the client's behalf. The attorney charges an hourly rate for the appellate services. Shortly thereafter, the attorney receives a solicitation from a legal research and brief writing company to draft the appellant's opening brief for a comparatively low hourly fee. The legal research and brief writing company ("Company") is not located in California, and employs both lawyers (none of whom are licensed to practice law in California) and non-lawyers. Company promises to deliver a ready to file brief, to be signed by the California attorney. Company also promises to refund all fees paid to Company for the brief if the appeal is unsuccessful.



The attorney decides to hire Company to write the brief, but has not decided yet whether to pass the charge through to the client, or to treat payment for the work as an internal cost.

### DISCUSSION

In this opinion, we address two fundamental issues. First, is it ethically permissible for a California attorney, in a civil case, to hire an out-of-state legal research and brief writing company to conduct legal research and/or draft legal briefs for the attorney's use in connection with the attorney's representation of the client? Second, if such arrangements are permissible, what must the attorney do to comply with the ethical issues presented by such arrangements? This opinion is not intended to apply to criminal cases, nor does it apply to any case or any matter where the attorney has been appointed by the court.

We conclude that such arrangements may be ethically permissible, with some limitations depending on the specific terms and conditions of the arrangement, and provided that the attorney complies with several ethical requirements. Specifically, the Committee is of the opinion that the attorney may ethically enter into the arrangement with 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. The attorney must sign the brief and in so doing adopts the work and is ultimately responsible for the accuracy of brief to both the court and to the client. Depending on the facts and circumstances, the attorney may have a duty to disclose to the client the nature and specifics of the contract with Company. The attorney is responsible for determining, and for ensuring, that there is no violation of client confidences or secrets, and that there is no conflict of interest created for the client by the attorney's contracting with Company. Finally, any refund of costs paid by Company to the attorney should be refunded to the client if the client is charged for the cost of the service.

#### Ethical Issues Involving Financial Arrangements with Company

Several rules address financial arrangements among lawyers, and between members and non-members of the State Bar of California.

California Rule of Professional Conduct [hereinafter “Rule” or “rule”] 1-310 states that a “member<sup>1</sup> shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership constitute the practice of law.” A partnership generally involves a joint ownership and can be evidenced by firm name, declarations of co-ownership, or sharing of profits. (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 667.) In this instance, the attorney has not formed a partnership with Company since the attorney has merely purchased services at a specified rate. Therefore, the restrictions contained in rule 1-310 are inapplicable.

Rule 2-200 prohibits the division of “a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member” unless the client has consented in writing after full disclosure, and the total fee charged by all lawyers is not increased by reason of the provision for division of the fees, and is not unconscionable as defined in rule 4-200. Rule 2-200 is inapplicable here because Company charges the attorney a specific amount for its service and the contract between Company and the attorney does not involve the division of a legal fee paid by the client.<sup>2</sup>

The work being performed by Company is indistinguishable from other types of services that an attorney might purchase, such as hourly paralegal assistance, research clerk assistance, computer research, graphics illustrations, or other services. Thus, even if the attorney passes the cost directly on to the Client, the arrangement does not violate Rule 2-200.

Rule 1-320 provides that “[n]either a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer.” This rule is also inapplicable to the facts presented in this inquiry since the attorney has contracted for services, at an hourly rate, from Company.

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1. A “member” for purposes of the California Rules of Professional Conduct “means a member of the State Bar of California.” (Rule 1-100 (B)(2).)

2. Several ethics opinions discuss when a payment constitutes a division of a fee. See, e.g., LACBA Formal Opinion 457 (discussing fee arrangements with non-lawyers) and State Bar of California Standing Committee on Professional Responsibility and Conduct [“COPRAC”] Formal Opinion 1994-138. COPRAC Formal Opinion 1994-138 concluded that the criteria to determine whether there is a division of fees is whether: (1) the amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If all three criteria are met, there is no division of fees. See also *Chambers v. Kay* (2002) 29 Cal.4th 142, 154.

### Aiding and Abetting in the Unlawful Practice of Law

Business and Professions Code section 6125, which is part of the State Bar Act, states that “[n]o person shall practice law in California unless the person is an active member of the State Bar.”<sup>3</sup> Rule 1-120 states that “[a] member shall not knowingly assist in, solicit, or induce any violation of these rules [of Professional Conduct] or the State Bar Act.” The practice of law includes giving legal advice and counsel and the preparation of legal instruments. (*Farnham v. State Bar* (1976) 17 Cal.3d 605, 612; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 667-668.) The Committee is of the opinion that attorneys who contract for services which assist the attorneys in representation of their clients do not assist in a violation of Bus. and Prof. Code § 6125, so long as the attorney remains ultimately responsible for the final work product provided to or on behalf of the client.<sup>4</sup>

### Duty to Inform the Client

Both Rule 3-500 and Business and Professions Code section 6068, subdivision (m), require that an attorney keep the client reasonably informed of significant developments relating to the employment or the representation.<sup>5</sup> COPRAC Formal Opinion 2004-165 states that a member of the State Bar of California who uses an outside contract lawyer to make appearances on behalf of the member’s client must disclose to the client the fact of the arrangement between the member and the outside lawyer when the use of the outside lawyer constitutes a significant development. Whether use of an outside lawyer constitutes a

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3. It is a misdemeanor to hold oneself out as practicing or entitled to practice law or otherwise practicing law when not an active member of the State Bar of California. (Bus. and Prof. Code § 6126.)

4. Attorneys continually contract for assistance in legal research, preparation of documents, and expertise, be it from lawyers or non-lawyers, in furtherance of the representation of the client. It is the opinion of the Committee that where an attorney contracts for these types of services, it does not involve the unlawful practice of law. The same would apply under this inquiry.

5. The language of rule 3-500, and the language of Business and Professions Code section 6068, subdivision (m), are slightly different. However, the disclosure requirements to the client under both provisions are the same. Rule 3-500 states: “[a] member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed.” Business and Professions Code section 6068, subdivision (m), states that it is the duty of an attorney “[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.”

“significant development” is based upon the circumstances of each case. The opinion states that if, at the outset of the engagement, the member anticipates using outside lawyers to make appearances on the member’s behalf for the client, that situation should be addressed in the written fee agreement which would also include specifying any costs of the appearance relationship which are billed to the client. That COPRAC opinion quotes relevant language in COPRAC Formal Opinion, 1994-138:

Depending on the circumstances, rule 3-500 and Business and Professions Code section 6068 (m) will generally require the law office to inform the client that an outside lawyer is involved in the client’s representation if the outside lawyer’s involvement is a significant development. In general, a client is entitled to know who or what entity is handling the client’s representation. However, whether use of an outside lawyer constitutes a significant development for purposes of rule 3-500 and Business and Professions Code section 6068 (m) depends on the circumstances of the particular case. Relevant factors, any of which may be sufficient to require disclosure, include the following: (i) whether responsibility for overseeing the client’s matter is being changed, (ii) whether the new attorney will be performing a significant portion or aspect of the work, or (iii) whether staffing of the matter has been changed from what was specifically represented to or agreed with the client. (See L.A. Cty. Bar Assn. Formal Opn. No. 473.) The listed factors are not intended to be exhaustive, but are identified to provide guidance.

The relationship with Company may be a “significant development” within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m), and, if a “significant development,” the client must be informed of the specifics of the agreement between the attorney and Company.<sup>6</sup> If possible, and where disclosure is required, disclosure of the nature and extent of the attorney/Company relationship should be made in the written retainer agreement. (COPRAC Formal Opinion 2004-265.<sup>7</sup> See also LACBA Formal Opinion 473 which

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6. In most instances, the filing of an appellate brief will be a “significant development.”

7. The following language, found in COPRAC Formal Opinion 2004-165, is applicable to this inquiry:

[“[T]he attorney bears the responsibility to be reasonably aware of the client’s expectations regarding counsel working on client’s matter because the responsibility can be readily discharged by the attorney through a standard written retainer agreement or disclosure before or during the course of the representation.”]; compare Cal. State Bar Formal Opn. No 1994-138 at fn.8 [“it would be prudent for the law firm to include the disclosure to the client in the

requires disclosure to the client where the expectation of the client is that the retained attorney alone will be acting as attorney for the client.)

### Duty of Competence and Duty to Exercise Independent Judgment

An attorney has a duty to act competently in any representation. Rule 3-110 (A) - (C). "If the member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Rule 3-110 (C). Since the instant arrangement does not involve associating with or professionally consulting another lawyer, this arrangement cannot be the basis of the member's competence in this representation.

The discussion to rule 3-110 states that compliance with that rule "include[s] the duty to supervise the work of subordinate attorney and non-attorney agents. [Citations omitted.]"<sup>8</sup> Therefore, the attorney must review the brief or other work provided by Company and independently verify that it is accurate, relevant, and complete, and the attorney must revise the brief, if necessary, before submitting it to the appellate court.

In addition to being competent, an attorney must also exercise independent professional judgment on behalf of the client at all times. (*Beck v. Wecht* (2002) 28 Cal.4th 289, 295 (fundamental duty of undivided loyalty cannot be diluted by a duty owed to some other person, which would be inconsistent with lawyer's duty to exercise independent professional judgment); *Dynamic Concepts Inc. v. Truck Insurance Exchange* (1998) 61 Cal.App.4th 999, 1009 (imposition of restrictions by third party on attorney's decisions may interfere with lawyer's duty to exercise independent professional judgment); *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 (holding that "[a]n attorney is responsible for the work product of his employees which is performed pursuant to his

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attorney's initial retainer letter or make that disclosure as soon thereafter as the decision to hire is made.']. If Lawyer charges [contract lawyer's] fees and costs to the client as a disbursement, Business and Professions Code sections 6147 and 6148 require Lawyer to state the client's obligations for those charges in the written fee agreement, if contemplated at the time of the initial fee agreement, to the same extent as other costs charged to the client."]

8. Rule 1-100, subdivision (C), states with respect to the purpose of "Discussions" to the rules: "Because it is a practical impossibility to convey in black letter form all of the nuances of the disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them."

direction and authority”).) Therefore, in performing services for the client, the attorney must remain ultimately responsible for any work product on behalf of the client and cannot delegate to Company any authority over legal strategy, questions of judgment, or the final content of any product delivered to the client or filed with the court.

It follows that if a term of the agreement between the attorney and Company delegates to Company a decision-making function that is non-delegable, then the attorney may be assisting Company in the unauthorized practice of law or violating the ethical duties of competence and obligation to exercise independent professional judgment. An improper delegation might also affect the application of rule 1-310 (prohibition against forming partnerships with non-lawyers), rule 1-320 (sharing of legal fees with a non-lawyer) and rule 2-200 (division of legal fees). For example, if Company contractually required the attorney to accept and use any work product delivered “as is” and without change, then the attorney might be improperly delegating the attorney’s fundamental obligation to exercise independent professional judgment on behalf of the client. In this case, Company has promised a full refund of its fees if the appeal is unsuccessful. If a condition of that guarantee is that the attorney must accept and use the work product (for example, a legal brief) as written, or obtain Company’s approval of any changes to the work product, then the attorney might be put into the position of having to elect between employing independent professional judgment on behalf of the client and losing a contractual guaranteed right which the attorney values. The Committee is of the view that provisions of a guarantee which have the possibility of creating such a dilemma for the attorney could be considered a violation of the duty to exercise independent professional judgment on behalf of the client. Thus, the attorney should ensure that no contractual provision in the agreement gives Company control over the final work product produced for the client.

### Ethical Duties to the Court

An attorney is responsible for all of the attorney’s submissions to the court. Any inaccuracies in the materials submitted to the court could not only be a violation of rule 3-110, but also could be a violation of rule 5-200(A) and (B),<sup>9</sup> and a violation of Business and Professions Code section 6068, subdivision (d).<sup>10</sup>

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9. Rule 5-200(A) and (B) state: “In presenting a matter to a tribunal, a member

### Charging the Cost to the Client

The attorney may elect simply to pay Company for the cost of the legal research or brief without passing on any of the cost to the client. In such a case, the Committee believes that the attorney could keep any refund that might be received from Company under any otherwise ethical guarantee provision. However, the attorney may also elect to: (a) pass the cost directly on to the client for payment; (b) mark up the cost and pass the marked up cost on to the client or (c) charge the client a flat fee. These scenarios have different consequences.

Sections of the California Business and Professions Code address an attorney's duty to advise a client about costs. Section 6147(a)(2) requires an attorney with a contingency fee agreement to disclose how disbursements and costs incurred in connection with the prosecution or settlement of the client will affect the contingency fee and the client's recovery. Section 6148 addresses many fee agreements not coming within the scope of section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars. Under section 6148(a)(1), the attorney must disclose any basis of compensation, including standard rates, fees, and charges applicable to the case. The attorney must also render bills that clearly identify the costs and expenses incurred and the amount of the costs and expenses. (See Bus. and Prof. Code § 6148(b).)

Whether or not there is a written fee agreement between the attorney and the client, disclosure of the arrangement with Company may be required. See rule 3-500 and Bus. and Prof. Code § 6068, subdivision (m), which require that the client be kept reasonably informed about significant developments relating to the representation and in regard to which the attorney has agreed to provide legal services. The Committee is of the opinion that if the client pays both the attorney's fees and costs of the contract with Company, the contract is a "significant development" within the meaning of both rule 3-500 and Business and

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(A) Shall employ, for the purposes of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."

10. Business and Professions Code section 6068, subdivision (d), states that it is the duty of an attorney "[t]o employ, for maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

Professions Code section 6068, subdivision (m), since the client has hired the attorney to prepare and submit the appellate brief.

The Committee believes that the attorney must accurately disclose the basis upon which any cost is passed on to the client. If the cost of Company's services is simply passed through to the client, the client should be so informed. The client should also be informed of the possibility of a refund of the cost if offered by the Company. If the attorney marks up the cost of Company's services, the attorney must disclose the mark-up. (Rule 3-500, Bus. and Prof. Code § 6068(m).)

### Illegal or Unconscionable Fee

Rule 4-200 subdivision (A) states that “[a] member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.” Rule 4-200 explains that “[u]nconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events.” Factors relevant to this inquiry in determining the conscionability of a fee include, but are not limited to:

(1) The amount of the fee in proportion to the value of the services performed.

(10) The time and labor required.

(11) The informed consent of the client to the fee.<sup>11</sup>

A fee which “shocks the conscience” is unconscionable. (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 564.) Charging a fee and not providing substantial services has been determined to be grounds for discipline. (*Jones v. State Bar* (1989) 49 Cal.3d 273, 284.) Therefore, whether there is a violation of rule 4-200 depends on the facts and circumstance of each specific situation as determined at the time the fee agreement is initiated. (Rule 4-200(A) and (B).)

The ethical issue presented here is whether the attorney's fee to the client could be deemed unconscionable because of the attorney's reliance on the work of the Company. The Committee believes that the amount paid by the attorney for Company's work is not determinative on the

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11. See rule 4-200(B) for the entire list of eleven “factors to be considered, where appropriate, in determining the conscionability of a fee. . . .”



question of whether a fee is unconscionable. (*Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993 (in legal malpractice action, the amount of money paid to a contract attorney by a law firm was found irrelevant to the question of whether law firm had charged client an unconscionable fee; nothing in rule 4-200 suggests that the attorney's profit margin is relevant to the issue. What is relevant to the issue of conscionability is the fee which the client paid to the law firm as measured by the factors listed in rule 4-200).)

### Duty to Preserve Client Confidences and Secrets

COPRAC Formal Opinion 2004-165 explains the duty to preserve inviolate client confidences and secrets:

Business and Professions Code section 6068(e) states: "It is the duty of an attorney [t]o . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The scope of the protection of client confidential information under Section 6068(e) has been liberally applied. (See *People v. Singh* (1932) 123 Cal.App. 365 [11 P.2d 73].) The duty to preserve a client's confidential information is broader than the protection afforded by the lawyer-client privilege. Confidential information for purpose of section 6068(e) includes any information gained in the engagement which the client does not want disclosed or the disclosure of which is likely to be embarrassing or detrimental to the client. (Cal. State Bar Formal Opn. No. 1993-133.) The duty has been applied even when the facts are already part of the public record or where there are other sources of information. (See L.A. Cty. Bar Assn. Formal Opn. Nos. 267 & 386.)

Confidential information can be disclosed to outside contractors so long as the outside contractors agree to keep the client confidences and secrets inviolate. (See LACBA Formal Opinions 374, 423 (use of centralized computer billing requires compliance with Business and Professions Code section 6068, subdivision (e)).) It is incumbent upon the attorney to ensure that client confidences and secrets are protected, both by the attorney and by Company, throughout and subsequent to the attorney's contract relationship with Company. (Rule 3-310, "Discussion"; LACBA Formal Opinion 374.)

### Conflicts of Interest

Company may be working on other matters which conflict with and are potentially or actually adverse to the attorney's client. Rule 3-110,

subdivision (A), imposes upon an attorney a duty to supervise the work of legal assistants, which includes the duty to “give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment. . . .” (*Hu v. Fang* (2002) 104 Cal.App.4th 61, 64, quoting ABA Model Rules Prof. Conduct, rule 5.3, com.) Therefore, the attorney should satisfy himself that no conflicts exist that would preclude the representation. See, e.g., Rule 3-310. The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney’s relationship with Company.

### Rule 1-400 and Standard (1)

Rule 1-400 is directed to disciplinary restrictions on attorney advertising and solicitation.<sup>12</sup> Standard (1) of the rule creates a presumption of a violation of rule 1-400 where a “communication” contains a guarantee or warranty regarding the result of the representation.<sup>13</sup> A “communication” within the meaning of rule 1-400 is “[a]ny unsolicited correspondence from a member [of the State Bar of California] or law firm directed to any person or entity.” (Rule 1-400 (A)(4).) Company offers to refund to the attorney all its charges if the appeal is not successful. Since the representation of a contingent refund is made by Company to the attorney, it is not a “communication” within the meaning of rule 1-400(A)(4) as defined above since Company is not a member of the State Bar of California, nor is Company a law firm.<sup>14</sup> However, the attorney must consider the unconscionability of accepting any refund from Company which is not paid over to the client. (See discussion of rule 4-200, *supra*.)

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12. “The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline.” (Rule 1-100, “Discussion.”)

13. Standard (1) of rule 1-400, for which there is a presumption of impropriety in violation of that rule, “Advertising and Solicitation,” states: “[a] ‘communication’ which contains guarantees, warranties, or predictions regarding the result of the representation.”

14. Were Company a “law firm,” then the Standard would apply if the communication respecting the refund was deemed to be a guarantee or warranty regarding the result of the representation. However, that would be a concern of Company, and not the attorney to whom the communication was made unless the attorney was also to communicate the same representation to the client. It is assumed that is not the case under the facts of this inquiry. Since the focus of this opinion is solely upon the ethical obligations of the attorney, the application of the Standard to Company is not addressed.

This opinion is advisory only. The committee acts on specific questions submitted ex parte, and its opinion is based on the facts set forth in the inquiry submitted.

## APPENDIX C

### THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2006-3\*  
August 2006

**TOPICS:** Outsourcing Legal Support Services Overseas, Avoiding Aiding a Non-Lawyer in the Unauthorized Practice of Law, Supervision of Non-Lawyers, Competent Representation, Preserving Client Confidences and Secrets, Conflicts Checking, Appropriate Billing, Client Consent.

**DIGEST:** A New York lawyer may ethically outsource legal support services overseas to a non-lawyer, if the New York lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserves the client's confidences and secrets when outsourcing; (c) avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) when necessary, obtains advance client consent to outsourcing.

**CODE:** DR 1-104, DR 3-101, DR 3-102, DR 4-101, DR 5-105, DR 5-107, DR 6-101, EC 2-22, EC 3-6, EC 4-2, EC 4-5.

### QUESTION

May a New York lawyer ethically outsource legal support services overseas when the person providing those services is (a) a foreign lawyer

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not admitted to practice in New York or in any other U.S. jurisdiction or (b) a layperson? If so, what ethical considerations must the New York lawyer address?

## DISCUSSION

For decades, American businesses have found economic advantage in outsourcing work overseas.<sup>1</sup> Much more recently, outsourcing overseas has begun to command attention in the legal profession, as corporate legal departments and law firms endeavor to reduce costs and manage operations more efficiently.

Under a typical outsourcing arrangement, a lawyer contracts, directly or through an intermediary, with an individual who resides abroad and who is either a foreign lawyer not admitted to practice in any U.S. jurisdiction or a layperson, to perform legal support services, such as conducting legal research, reviewing document productions, or drafting due diligence reports, pleadings, or memoranda of law.<sup>2</sup>

We address first whether, under the New York Code of Professional Responsibility (the “Code”), a lawyer would be aiding the unauthorized practice of law if the lawyer outsourced legal support services overseas to a “non-lawyer,” which is how the Code describes both a foreign lawyer not admitted to practice in New York, or in any other U.S. jurisdiction, and a layperson.<sup>3</sup> Concluding that outsourcing is ethically permitted under the conditions described below, we then address the ethical obligations of the New York lawyer to (a) supervise the non-lawyer and ensure that the non-lawyer’s work contributes to the lawyer’s competent representation of the client; (b) preserve the client’s confidences and secrets when outsourcing; (c) avoid conflicts of interest when outsourcing; (d) bill for outsourcing appropriately; and (e) obtain advance client consent for outsourcing.<sup>4</sup>

### **The Duty to Avoid Aiding a Non-Lawyer in the Unauthorized Practice of Law**

Under DR 3-101(A), “[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law.” In turn, Judiciary Law § 478 makes it “unlawful for any natural person to practice or appear as an attorney-at-law . . . without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state and without having taken the constitutional oath.” Prohibiting the unauthorized

practice of law “aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions.” *Spivak v. Sachs*, 16 N.Y.2d 163, 168, 211 N.E.2d 329, 331, 263 N.Y.S.2d 953, 956 (1965).

Alongside these prohibitions, the last 30 years have witnessed a dramatic increase in the extent to which law firms and corporate law departments have come to rely on legal assistants and other non-lawyers to help render legal services more efficiently.<sup>5</sup> Indeed, in EC 3-6, the Code directly acknowledges both the benefits flowing from a lawyer’s properly delegating tasks to a non-lawyer, and the lawyer’s concomitant responsibilities:

A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

In this context, we have underscored that the lawyer’s supervising the non-lawyer is key to the lawyer’s avoiding a violation of DR 3-101(A). In N.Y. City Formal Opinion 1995-11, we wrote:

Some jurisdictions have concluded that any work performed by a non-lawyer under the supervision of an attorney is by definition not the “unauthorized practice of law” violative of prohibitory provisions, *see, e.g.,* In re Opinion 24 of Committee on Unauthorized Practice of Law, 128 N.J. 114, 123, 607 A.2d 962 (1992). This committee does not go so far. However, given that the Code holds the attorney accountable, the tasks a non-lawyer may undertake under the supervision of an attorney should be more expansive than those without either supervision or legislation. Supervision within the law firm thus is a key consideration.

The Committee on Professional Ethics of the New York State Bar Association has specifically addressed the unauthorized practice of law in the context of a lawyer’s using an outside legal research firm staffed by non-lawyers. In N.Y. State Opinion 721 (1999), that Committee opined that a New York lawyer may ethically use such a research firm if the lawyer exercises proper supervision, which involves “considering in advance the work that will be done and reviewing after the fact what in fact occurred, assuring its soundness.” *Id.* Without proper supervision

by a New York lawyer, the legal research firm would be engaging in the unauthorized practice of law. *Id.* That Committee also noted that, “other ethics committees in New York have determined 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 *under the supervision* of an admitted lawyer” (citations omitted).<sup>6</sup>

In this same vein, the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association recently wrote, “[T]he attorney must review the brief or other work provided by [the non-lawyer] and independently verify that it is accurate, relevant, and complete, and the attorney must revise the brief, if necessary, before submitting it to the . . . court.” L.A. County Bar Assoc. Op. 518 ( June 19, 2006) at 8-9. We agree.

The potential benefits resulting from a lawyer’s delegating work to a non-lawyer cannot be denied. But at the same time, to avoid aiding the unauthorized practice of law, the lawyer must at every step shoulder complete responsibility for the non-lawyer’s work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer’s work and then vet the non-lawyer’s work and ensure its quality.

### **The Duties to Supervise and to Represent a Client Competently When Outsourcing Overseas**

The supervisory responsibilities of law firms and lawyers in this context are set forth, respectively, in DR 1-104(C) and (D).<sup>7</sup> DR 1-104(C) articulates the supervisory responsibility of a law firm for the work of partners, associates, and non-lawyers who work at the firm:

C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

DR 1-104(D) articulates the supervisory responsibilities of a lawyer for a violation of the Disciplinary Rules by another lawyer and for the conduct of a non-lawyer “employed or retained by or associated with the lawyer”:

D. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:

1. The lawyer orders, or directs the specific conduct, or with knowledge of the specific conduct, ratifies it; or
2. The lawyer is a partner in the law firm in which the other lawyer practices or the non-lawyer is employed, or has supervisory authority over the other lawyer or the non-lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.

Proper supervision is also critical to ensuring that the lawyer represents his or her client competently, as required by DR 6-101—obviously, the better the non-lawyer’s work, the better the lawyer’s work-product.

Given these considerations and given the hurdles imposed by the physical separation between the New York lawyer and the overseas non-lawyer, the New York lawyer must be both vigilant and creative in discharging the duty to supervise. Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the professional résumé of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or by voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer’s suitability for the particular assignment; and (d) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the non-lawyer is discharging the assignment according to the lawyer’s expectations.

### **The Duty to Preserve the Client's Confidences and Secrets When Outsourcing Overseas**

DR 4-101 imposes a duty on a lawyer to preserve the confidences and secrets of clients. Under DR 4-101, a "confidence" is "information protected by the attorney-client privilege under applicable law," and a "secret" is "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A). DR 4-101(D) requires that a lawyer "exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client." *See also* EC 4-5 ("a lawyer should be diligent in his or her efforts to prevent the misuse of [information acquired in the course of the representation of a client] by employees and associates.").

In N.Y. City Formal Opinion 1995-11, this Committee addressed a lawyer's supervisory obligations regarding a non-lawyer's maintaining client confidences and secrets. This Committee noted that "the transient nature of lay personnel is cause for heightened attention to the maintenance of confidentiality. . . . Lawyers should be attentive to these issues and should sensitize their non-lawyer staff to the pitfalls, developing mechanisms for prompt detection of . . . breach of confidentiality problems."

We conclude 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. In this regard, the lawyer must be mindful that different laws and traditions regarding the confidentiality of client information obtain overseas. *See* N.Y. State Opinion 762 (2003) (a New York law firm must explain to a client represented by lawyers in foreign offices of the firm the extent to which confidentiality rules in those foreign jurisdictions provide less protection than in New York); *Cf.* N.Y. State Opinion 721 (1999) ("[i]f the lawyer would have to disclose confidences and secrets of the client [to the outside research service] in connection with commissioning research or briefs, the attorney should tell the . . . client what confidential client information the attorney will provide and obtain the client's consent").<sup>8</sup>



Measures that New York lawyers may take to help preserve client confidences and secrets when outsourcing overseas include restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality.<sup>9</sup>

### **The Duty to Check Conflicts When Outsourcing Overseas**

DR 5-105(E) requires a law firm to maintain contemporaneous records of prior engagements and to have a system for checking proposed engagements against current and prior engagements. N.Y. State Opinion 720 (1999) concluded that a law firm must add information to its conflicts-checking system about the prior engagements of lawyers who join the firm. In N.Y. State Opinion 774 (2004), that Committee subsequently concluded that this same obligation does not apply when non-lawyers join a firm, but noted that there are circumstances under which it is nonetheless advisable for a law firm to check conflicts when hiring a non-lawyer, such as when the non-lawyer may be expected to have learned confidences or secrets of a client's adversary.

As a threshold matter, the outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients. 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. The outsourcing New York lawyer should pursue further inquiry as required, while also reminding both the intermediary and the non-lawyer, preferably in writing, of the need for them to safeguard the confidences and secrets of their other current and former clients.

### **The Duty to Bill Appropriately for Outsourcing Overseas**

By definition, the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer to include the cost of outsourcing in his or her legal fees. *See* DR 3-102. Absent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service. ABA Formal Opinion 93-379 (1993).

### **The Duty to Obtain Advance Client Consent to Outsourcing Overseas**

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.” N.Y. City Formal Opinion 1989-2; *see also* N.Y. City Formal Opinion 1988-3 (“The temporary lawyer and the Firm have a duty to disclose the temporary nature of their relationship to the client,” citing DR 5-107(A)(1)); EC 2-22 (“Without the consent of the client, a lawyer should not associate in a particular matter another lawyer outside the lawyer’s firm); EC 4-2 (“[I]n the absence of consent of the client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter. . .”). Similarly, many ethics opinions from other jurisdictions have concluded that clients should be informed in advance of the use of temporary attorneys in all situations.<sup>10</sup>

The Committee on Professional Ethics of the New York State Bar Association adopted a more nuanced approach in N.Y. State Opinion 715 (1999), explaining that the lawyer’s obligations to disclose the use of a contract lawyer and to obtain client consent depend upon whether client confidences and secrets will be disclosed to the contract lawyer, the degree of involvement that the contract lawyer has in the matter, and the significance of the work done by the contract lawyer. The Opinion further explained that “participation by a 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.” *Id.*

Non-lawyers often play more limited roles in matters than contract or temporary lawyers do. Thus, there is little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to outsource legal support services overseas to a non-lawyer. But the presence of one or more additional considerations may alter the analysis: for example, if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-

lawyer, in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed.

## CONCLUSION

A lawyer may ethically outsource legal support services overseas to a non-lawyer if the lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserves the client's confidences and secrets when outsourcing; (c) under the circumstances described in this Opinion, avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) under the circumstances described in this Opinion, obtains the client's informed advance consent to outsourcing.

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1. See, e.g., Adam Johnson & John D. Rollins, *Outsourcing: Unconventional Wisdom*, Accenture Outlook Journal, (October 2004), at [http://www.accenture.com/Global/Services/By\\_Industry/Travel/R\\_and\\_I/UnconventionalWisdom.htm](http://www.accenture.com/Global/Services/By_Industry/Travel/R_and_I/UnconventionalWisdom.htm); Fakir Chand, *Business Process Outsourcing Propels the 21st Century*, SME Outsourcing (October 2003), at <http://smeoutsourcing.com/viewnew.php?id=9bd912e64b470d2f28ea096a56bdebd0>.
  2. See, e.g., Jonathan D. Glater, *Even Law Firms Join the Trend to Outsourcing*, N.Y. Times, Jan. 13, 2006; Eric Bellman & Nathan Koppel, *More U.S. Legal Work Moves to India's Low-Cost Lawyers*, Wall St. J., Sept. 28, 2005; George W. Russell, *In-house or Outsourced? The Future of Corporate Counsel*, Asia Law (July/Aug. 2005); Ellen L. Rosen, *Corporate America Sending More Legal Work, to Bombay: U.S. Firms Face Challenge Over Outsourcing Legal Work to India*, N.Y. Times, Mar. 14, 2004; Ann Sherman, *Should Small Firms Get on Board with Outsourcing?*, Small Firm Business, Sept. 12, 2005.
  3. See, e.g., New York State Bar Association Committee on Professional Ethics Opinion ("N.Y. State Opinion") 721 (1999).
  4. This opinion concerns outsourcing of "substantive legal support services," which include legal research, drafting, due diligence reports, patent and trademark work, review of transactional and litigation

documents, and drafting contracts, pleadings, or memoranda of law. This is distinguished from “administrative legal support services,” which include transcription of voice files from depositions, trials and hearings; accounting support in the preparation of timesheets and billing materials; paralegal and clerical support for file management; litigation support graphics; and data entry for marketing, conflicts, and contact management.

5. *See, e.g.*, NYC Formal Op. 1995-11 (“In the two decades since this committee issued its Formal Opinion on paralegals, *see* N.Y. City 884 (1974), much has happened with regard to non-lawyers’ involvement in the provision of legal services.”) (describing the paralegal field as one of the fastest growing occupations in America).

6. *See, e.g.*, Ellen L. Rosen, *Corporate America Sending More Legal Work to Bombay*, N.Y. Times, Mar. 14, 2004 (quoting Professor Stephen Gillers of NYU School of Law as stating that “even though the lawyer [in the foreign country] is not authorized by an American state to practice law, the review by American lawyers sanitizes the process.”); Jennifer Fried, *Change of Venue; Cost-Conscious General Counsel Step up Their Use of Offshore Lawyers, Creating Fears of an Exodus of U.S. Legal Jobs*, *The American Lawyer*, (Dec. 2003) (Professor Geoffrey Hazard, Jr. of University of Pennsylvania Law School stated that if foreign attorneys are “acting under the supervision of U.S. lawyers, I wouldn’t think it would make much difference where they are.”).

7. DR 1-104(C) requires a law firm, *inter alia*, to supervise the work of non-lawyers who “work at the firm,” whereas DR 1-104(D) describes, *inter alia*, the supervisory responsibilities of a lawyer for the conduct of a non-lawyer “employed or retained by or associated with the lawyer.” Based on this difference in language, it can be argued that DR 1-104(C) should not apply in the case of an overseas non-lawyer because that person does not “work at the firm,” whereas DR 1-104(D) should apply because the overseas non-lawyer is “retained by” the New York lawyer. Nonetheless, the Committee believes that these two phrases were intended to be equivalent. To conclude otherwise and make the individual lawyer, but not the law firm, responsible for supervising the overseas non-lawyer would be difficult to justify and could also easily lead to untoward results. For example, a law firm seeking to cabin responsibility under DR 1-104(D)(2) for the conduct of the overseas non-lawyer could simply refuse to appoint anyone to supervise the non-lawyer.

8. We do not mean to suggest that confidentiality laws and traditions overseas always provide less protection than in New York. *See, e.g., M. McCary, Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 *Tex. Int'l L.J.* 289, 313 (2000) (“Although difficult to imagine, a Muslim party or client may expect a higher degree of confidentiality than a [ U.S.] lawyer is accustomed to.”).
9. Mary Daly, *How to Protect Confidentiality When Outsourcing*, *Small Firm Business*, Sept. 12, 2005.
10. *See, e.g., Oliver v. Board of Governors, Kentucky Bar Ass'n*, 779 S.W.2d 212, 216 (Ky. 1989) (recommending “disclosure to the client of the firm’s intention, whether at the commencement or during the course of representation, to use a temporary attorney service on the client’s case, in any capacity, in order to allow the client to make an intelligent decision whether or not to consent to such an arrangement.”); Ohio Bd. of Comm’rs on Grievances and Discipl. Opinion No. 90-23 (Dec. 14, 1990) (finding a duty under DR 5-107(A)(1) to “disclose to the client the temporary nature of the relationship in order to accept compensation for the legal services”); Los Angeles County Bar Assoc. Formal Opinion 473 (Jan. 1994); New Hampshire Bar Assoc. Ethics Comm. Formal Opinion 1989-90/9 (July 25, 1990).

## APPENDIX D

### PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 07-2\*

January 18, 2008

A lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing. The lawyer should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties.

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Note: This opinion was approved by The Florida Bar Board of Governors on July 25, 2008.

**RPC:** 4-1.6, 4-5.3, 4-5.5,

**OPINIONS:** 68-49, 73-41, 76-33, 76-38, 88-6, 88-12, 89-5; Los Angeles County Bar Association 518, City of New York Bar Association 2006-3

**CASES:** *Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980); *Florida Bar v. Sperry*, 140 So. 2d 587 (Fla. 1962)

A member of the Florida Bar has inquired whether a law firm may ethically outsource legal work to overseas attorneys or paralegals. The overseas attorneys, who are not admitted to the Florida Bar, would do work including document preparation, for the creation of business entities, business closings and immigration forms and letters. Paralegals, who are not foreign attorneys, would transcribe dictation tapes. The foreign attorneys and paralegals would have remote access to the firm's computer files and may contact the clients to obtain information needed to complete a form. In addition to the facts presented in the written inquiry, the Committee was advised that the outsourcing company employs lawyers admitted to practice in India who are capable of providing much broader assistance to law firms in the U.S. besides outsourcing merely paralegal work, including contract drafting, litigation support, legal research, and forms preparation. The details of the proposed activity are complex, and a number of issues are potentially involved.

The inquiry raises ethical concerns regarding the unauthorized practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing.

Law firms frequently hire contract paralegals to perform services such as legal research and document preparation. It is the committee's opinion that there is no ethical distinction when hiring an overseas provider of such services versus a local provider, and that contracting for such services does not constitute aiding the unlicensed practice of law, provided that there is adequate supervision by the law firm.

Rule 4-5.5, Rules Regulating The Florida Bar, prohibits an attorney from assisting in the unlicensed practice of law. In *Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), *judg. vacated on other grounds*, 373 U.S. 379 (1963) the Court found that setting forth a broad definition of the

practice of law was “nigh onto impossible” and instead developed the following test to determine whether an activity is the practice of law:

... if the giving of [the] advice and performance of [the] services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

When applying this test it should be kept in mind that “the single most important concern in the Court’s defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation.” *Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980). The Committee is not authorized to make the determination whether or not the proposed activities constitute the unlicensed practice of law. It is the obligation of the attorney to determine whether activities (legal work) being undertaken or assigned to others might violate Rule 4-5.5 and any applicable rule of law.

Rule 4-5.3, Rules Regulating The Florida Bar, requires an attorney to directly supervise nonlawyers who are employed or retained by the attorney. The rule also requires that the attorney make reasonable efforts to ensure that the nonlawyers’ conduct is consistent with the ethics rules. This is required regardless of whether the overseas provider is an attorney or a lay paralegal. The comment to the rule states:

A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. The measures employed in supervising nonlawyers should take account of the level of their legal training and the fact that they are not subject to professional discipline. If an activity requires the independent judgment and participation of the lawyer, it cannot be properly delegated to a nonlawyer employee.

Additionally, Florida Ethics Opinions 88-6 and 89-5 provide that nonlawyers (defined as persons who are not members of The Florida Bar) may accomplish certain activities but only under the “supervision” of a Florida lawyer.

In Florida Opinion 88-6, which discusses initial interviews that are conducted by nonlawyers, this committee advised that:

the lawyer is responsible for careful, direct supervision of nonlawyer employees and must make certain that (1) they clearly identify their nonlawyer status to prospective clients, (2) they are used for the purpose of obtaining only factual information from prospective clients, and (3) they give no legal advice concerning the case itself or the representation agreement. Any questions concerning an assessment of the case, the applicable law or the representation agreement would have to be answered by the lawyer.

Florida Ethics Opinion 89-5 provides that a law firm may permit a paralegal or other trained employee to handle a real estate closing at which no lawyer in the firm is present if the following conditions are met:

A lawyer supervises and reviews all work done up to the closing;

The supervising lawyer determines that handling or attending the closing will be no more than a ministerial act. Handling the closing will constitute a ministerial act only if the supervising lawyer determines that the client understands the closing documents in advance of the closing;

The clients consent to the closing being handled by a nonlawyer employee of the firm. This requires that written disclosure be made to the clients that the person who will handle or attend the closing is a nonlawyer and will not be able to give legal advice at the closing;

The supervising lawyer is readily available, in person or by telephone, to provide legal advice or answer legal questions should the need arise;

The nonlawyer employee will not give legal advice at the closing or make impromptu decisions that should be made by the supervising lawyer.

The committee has specifically addressed the employment of law school graduates who are admitted in other jurisdictions in Florida Opinions 73-41 and 68-49. These opinions state that a law firm may employ attorneys



who are not admitted to the Florida Bar only for work that does not constitute the practice of law.

Attorneys who use overseas legal outsourcing companies should recognize that providing adequate supervision may be difficult when dealing with employees who are in a different country. Ethics opinions from other states indicate that an attorney may need to take extra steps to ensure that the foreign employees are familiar with Florida's ethics rules governing conflicts of interest and confidentiality. *See* Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518 and Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2006-3. This committee agrees with the conclusion of Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518, which states that a lawyer's obligation regarding conflicts of interest is as follows:

[T]he attorney should satisfy himself that no conflicts exist that would preclude the representation. [Cite omitted.] The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney's relationship with Company.

Of particular concern is the ethical obligation of confidentiality. The inquirer states that the foreign attorneys will have remote access to the firm's computer files. The committee believes that the law firm should instead limit the overseas provider's access to only the information necessary to complete the work for the particular client. The law firm should provide no access to information about other clients of the firm. The law firm should take steps such as those recommended by The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Opinion 2006-3 to include "contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality."

The requirement for informed consent from a client should be generally commensurate with the degree of risk involved in the contemplated activity for which such consent is sought. It is assumed that most information outsourced will be transmitted electronically to the legal service provider. If so, an attorney must be mindful of, and receive appropriate and sufficient assurances relative to, the risks inherent to transmittal of information containing confidential information. For

example, assurances by the foreign provider that policies and processes are employed to protect the data while in transit, at rest, in use, and post-provision of services should be set forth in sufficient detail for the requesting attorney. Moreover, foreign data-breach and identity protection laws and remedies, where such exist at all, may differ substantially in both scope and coverage from U.S. Federal and State laws and regulations. In light of such differing rules and regulations, an attorney should require sufficient and specific assurances (together with an outline of relevant policies and processes) that the data, once used for the service requested, will be irretrievably destroyed, and not sold, used, or otherwise be capable of access after the provision of the contracted-for service. While the foregoing issues are likewise applicable to domestic service providers, they present a heightened supervisory and auditability concern in foreign (*i.e.*, non-U.S.) jurisdictions, and should be accorded heightened scrutiny by the attorney seeking to use such services. See, Indian data breach hits HSBC—28 Jun 2006—IT Week [www.itweek.co.uk/itweek/news/2159326/indian-breach-hits-hsbc](http://www.itweek.co.uk/itweek/news/2159326/indian-breach-hits-hsbc), UK banks escape punishment over India data breach, [www.services.silicon.com/offshoring/0,3800004877,39155588,00.htm](http://www.services.silicon.com/offshoring/0,3800004877,39155588,00.htm), Indian call center under suspicion of ID breach, Cnet.com 2005-08-16 [http://news.com.com/2100-1029\\_3-5835103.html](http://news.com.com/2100-1029_3-5835103.html), Florida State Data Breach Result of Inappropriate Offshoring to India, About.com 2006-04-1, <http://idtheft.about.com/b/a/256546.htm>, Outsourcing to India: Dealing with Data Theft and Misuse, Morrison & Foerster White Paper November 2006, <http://www.mofo.com/news/updates/files/update02268.html>. U.S. Firm Says Outsourcer Holding Its Data Hostage, Paul McDougall, Information Week, August 7, 2007: <http://www.informationweek.com/story/showArticle.jhtml?articleID=201204202>

The committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests. Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar. In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services. For example, in Opinion 88-12, we stated that a law firm's use of a temporary lawyer may need to be disclosed to a client if the client would likely consider the information to be material.

In addition to concerns regarding the confidentiality of client information, there are concerns about disclosure of sensitive information of others, such as an opposing party or third party. In outsourcing, there is the possibility that information of others will be disclosed in addition to the disclosure of client information. Lawyers should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties, particularly where the information concerns medical records or financial information.

Additionally, in Consolidated Opinion 76-33 and 76-38, regarding billing for nonlawyer personnel, the committee stated:

[T]he lawyer should not in fact or effect duplicate charges for services of nonlawyer personnel, and if those charges are separately itemized, the salaries of such personnel employed by the lawyer should in some reasonable fashion be excluded from consideration as an overhead element in fixing the lawyer's own fee. If that exclusion cannot, as a practical matter, be accomplished in some rational and reasonably accurate fashion, then the charges for nonlawyer time should be credited against the lawyer's own fee.

As to whether knowledge and specific advance consent of the client as to such uses of nonlawyer personnel, and charges therefor, are necessary, the Committee majority feels that it is in some instances and is not in others. For example, it would not seem appropriate for a lawyer to always have to seek the consent of the client as to use of a law clerk in conducting legal research. And under EC 3-6 and DR 3-104 the work delegated to nonlawyer personnel should be so much under the lawyer's supervision and ultimately merged into the lawyer's own product that the work will be, in effect, that of the lawyer himself, who presumably has entered into a "clear agreement with his client as to the basis of the fee charges to be made." EC 2-19. However, we feel that such "clear agreement" could not exist in many situations where the lawyer intends to make substantial use of nonlawyer personnel, and to bill directly or indirectly therefor, unless the client is informed of that intention at the time the fee agreement is entered into.

Therefore, if there is a potentiality of dispute with, or of lack of clear agreement with and understanding by, the client as to the basis of the lawyer's charges, including the foregoing elements of nonlawyer time, whether or not the nonlawyer personnel time is to be separately itemized, the lawyer's intention to so use nonlawyer personnel and charge directly or indirectly therefor should be discussed in advance with, and approved by, the client. This would seem especially the

case where substantial use is to be made of any kind of such nonlawyer services. See also EC 2-19 as to explaining to clients the reasons for particular fee arrangements proposed.

The Committee suggests that the potentiality of such dispute or lack of clear agreement and understanding referred to in the foregoing paragraph may exist in the case of work to be done by nonlawyer personnel who are employed by the lawyer and who perform services of a type known by the lay public to be regularly available through independent contractors, e.g., investigators. The Committee feels that such potentiality especially may exist where the lawyer enters into a contingent fee arrangement with the client and then separately itemizes charges to the client for the time of nonlawyer personnel who are full-time employees of the lawyer; the arrangement may be susceptible of interpretation as involving charging the client for such nonlawyer services and at the same time, in fact or effect, duplicating the charges by including the salaries of such personnel as overhead and an element of the lawyer's own fee, as proscribed hereinabove.

The law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third party provider.

In sum, a lawyer is not prohibited from engaging the services of an overseas provider, as long as the lawyer adequately addresses the above ethical obligations.

*[Revised: 07-30-2008 ]\*\**

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\*\* The Professional Ethics Committee affirmed Proposed Advisory Opinion 90-6 (Reconsideration) at its June 20, 2008 meeting. The Florida Bar Board of Governors will review this proposed advisory opinion at its December 12, 2008 meeting in Orlando, Florida, at the request of several Florida Bar members. The Board of Governors affirmed Proposed Advisory Opinion 07-2, on the issue of outsourcing at its meeting of July 25, 2008. The board revised the opinion very slightly to make clear that lawyers should be mindful of any obligation they may have under law regarding disclosure of sensitive information of an opposing party or third party.

## APPENDIX E

## THE NORTH CAROLINA STATE BAR

## 2007 Formal Ethics Opinion 12\*

April 25, 2008

## Outsourcing Legal Support Services

*Opinion rules that a lawyer may outsource limited legal support services to a foreign lawyer or a nonlawyer (collectively “foreign assistants”) provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client’s advanced informed consent.*

**Inquiry:**

May a lawyer ethically outsource legal support services abroad, if the individual providing the services is either a nonlawyer or a lawyer not admitted to practice in the United States (collectively “foreign assistants”)?

**Opinion:**

The Ethics Committee has previously determined that a lawyer may use nonlawyer assistants in his or her practice, and that the assistants do not have to be employees of the lawyer’s firm or physically present in the lawyer’s office. *See, e.g.,* RPC 70, RPC 216, 99 FEO 6, 2002 FEO 9. The previous opinions emphasize that the lawyer’s use of nonlawyer assistants must comply with the Rules of Professional Conduct. Generally, the ethical considerations when a lawyer uses foreign assistants are similar to the considerations that arise when a lawyer uses the services of any nonlawyer assistant.

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\* N.C. State Bar, 2007 Formal Op. 12 (Apr. 25, 2008). This adopted opinion of the North Carolina State Bar is a public record and is available on the bar’s website, <http://www.ncbar.gov/ethics/ethics.asp>. A printer-friendly version of this opinion is available at <http://www.ncbar.gov/ethics/printopinion.asp?id=774>. Ed. Note: this appendix preserves the form of the citations as they appear in the original opinion.

Pursuant to RPC 216, a lawyer has a duty under the Rules of Professional Conduct to take reasonable steps to ascertain that a nonlawyer assistant is competent; to provide the nonlawyer assistant with appropriate supervision and instruction; and to continue to use the lawyer's own independent professional judgment, competence, and personal knowledge in the representation of the client. *See also* Rule 1.1, Rule 5.3, Rule 5.5. The opinion further states that the lawyer's duty to provide competent representation mandates that the lawyer be responsible for the work product of nonlawyer assistants. *See also* Rule 5.3.

2002 FEO 9 states that, in any situation where a lawyer delegates a task to a nonlawyer assistant, the lawyer must determine that delegation is appropriate after having evaluated the complexity of the transaction, the degree of difficulty of the task, the training and ability of the nonlawyer, the client's sophistication and expectations, and the course of dealing with the client. *See also* Rule 1.1 and Rule 5.3.

Therefore, as long as the lawyer's use of the nonlawyer assistant's services is in accordance with the Rules of Professional Conduct, the location of the nonlawyer assistant is irrelevant. Rule 5.3(b) requires lawyers having supervisory authority over the work of nonlawyers to make "reasonable efforts" to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

When contemplating the use of foreign assistants, the lawyer's initial ethical duty is to exercise due diligence in the selection of the foreign assistant. RPC 216 states that, before contracting with a nonlawyer assistant, a lawyer must take reasonable steps to determine that the nonlawyer assistant is competent. 2002 FEO 9 states that the lawyer must evaluate the training and ability of the nonlawyer in determining whether delegation of a task to the nonlawyer is appropriate. The lawyer must ensure that the foreign assistant is competent to perform the work requested, understands and will comply with the ethical rules that govern a lawyer's conduct, and will act in a manner that is compatible with the lawyer's professional obligations.

In the selection of the foreign assistant, the lawyer should consider obtaining background information about any intermediary employing the foreign assistants; obtaining the foreign assistants' resumes; conducting reference checks; interviewing the foreign assistants to ascertain their suitability for the particular assignment; obtaining a work product

sample; and confirming that appropriate channels of communication are present to ensure that supervision can be provided in a timely and ongoing manner. Individual cases may require special or further measures. *See* New York City Bar Ass'n. Formal Opinion 2006-3; San Diego County Bar Ass'n. Ethics Opinion 2007-1.

Another ethical concern is the lawyer's ability adequately to supervise the foreign assistants. Pursuant to RPC 216, to supervise properly the work delegated to the foreign assistants, the lawyer must possess sufficient knowledge of the specific area of law. The lawyer must also ensure that the assignment is within the foreign assistant's area of competency. In supervising the foreign assistant, the lawyer must review the foreign assistant's work on an ongoing basis to ensure its quality; have ongoing communication with the foreign assistant to ensure that the assignment is understood and that the foreign assistant is discharging the assignment in accordance with the lawyer's directions and expectations; and review thoroughly all work-product of foreign assistants to ensure that it is accurate, reliable, and in the client's interest. The lawyer has an ongoing duty to exercise his or her professional judgment and skill to maintain the level of supervision necessary to advance and protect the client's interest.

If physical separation, language barriers, differences in time zones, or inadequate communication channels do not allow a reasonable and adequate level of supervision to be maintained over the foreign assistant's work, the lawyer should not retain the foreign assistant to provide services.

A lawyer must retain at all times the duty to exercise his or her independent judgment on the client's behalf and cannot abdicate that role to any assistant. A lawyer who utilizes foreign assistants will be held responsible for any of the foreign assistants' work-product used by the lawyer. *See* Rule 5.3. A lawyer may use foreign assistants for administrative support services such as document assembly, accounting, and clerical support. A lawyer may also use foreign assistants for limited legal support services such as reviewing documents; conducting due diligence; drafting contracts, pleadings, and memoranda of law; and conducting legal research. Foreign assistants may not exercise independent legal judgment in making decisions on behalf of a client. Additionally, a lawyer may not permit any foreign assistant to provide any legal advice or services directly to the client to assure that the lawyer is not assisting another person, or a corporation, in the unauthorized

practice of law. *See* Rule 5.5(d). The limitations on the type of legal services that can be outsourced, in conjunction with the selection and supervisory requirements associated with the use of foreign assistants, insures that the client is competently represented. *See* Rule 5.5(d). Nevertheless, when outsourcing legal support services, lawyers need to be mindful of the prohibitions on unauthorized practice of law in Chapter 84 of the General Statutes and on the prohibition on aiding the unauthorized practice of law in Rule 5.5(d).

Another significant ethical concern is the protection of client confidentiality. A lawyer has a professional obligation to protect and preserve the confidences of a client against disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rule 1.6, cmt. [17]. When utilizing foreign assistants, the lawyer must ensure that procedures are in place to minimize the risk that confidential information might be disclosed. *See* RPC 133. Included in such procedures should be an effective conflict-checking procedure. *See* RPC 216. The lawyer must make certain that the outsourcing firm and the foreign assistants working on the particular client matter are aware that the lawyer's professional obligations require that there be no breach of confidentiality in regard to client information. The lawyer also must use reasonable care to select a mode of communication that will best maintain any confidential information that might be conveyed in the communication. *See* RPC 215.

Finally, the lawyer has an ethical obligation to disclose the use of foreign, or other, assistants and to obtain the client's written informed consent to the outsourcing. In the absence of a specific understanding between the lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer retained by the client, using the resources within the lawyer's firm, will perform the requested legal services. *See* Rule 1.4, 2002 FEO 9; San Diego County Bar Ass'n. Ethics Opinion 2007-1.



