

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 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.¹ 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.²

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.³ 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.⁴

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.⁵ 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).⁶

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).⁷ 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").8.

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.9.

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.¹⁰

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.

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; 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).