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The Ethics of Outsourcing

By Alan Feigenbaum

Outsourcing tasks to non-lawyers, whether in the United States or abroad, raises a host of issues regarding attorneys' ethical obligations to their clients. These issues have been fleshed out in advisory opinions issued by the bar associations in various states. Specifically, the New York City, Los Angeles County, San Diego County, and Florida Bar Associations have provided guidance to attorneys on the ethical considerations that must be addressed prior to outsourcing work overseas.

Each of these opinions focuses primarily on the following ethical mandates: (1) the duty to avoid aiding a non-lawyer in the unauthorized practice of law; (2) the duty to supervise; (3) the duty to preserve client confidences; (4) the duty to check conflicts; (5) the duty to bill appropriately; and (6) the duty to obtain client consent. Although each of the opinions provides that under certain circumstances an attorney may ethically outsource legal support services overseas to a non-lawyer, ensuring that the requisite ethical mandates are adhered to may prove difficult in practice.

The discussion that follows focuses on the New York City Bar Association's Opinion, taking into account any additional considerations or distinctions set forth in the opinions of the Los Angeles County, San Diego County and Florida Bar Associations.

Duty to Avoid Aiding the Unauthorized Practice of Law

First, with respect to the duty to avoid aiding a non-lawyer in the unauthorized practice of law, the New York City Opinion explicitly states that to fulfill this duty, the attorney must "at every step shoulder complete responsibility for the non-lawyer's work."¹ This means that the attorney cannot lessen his or her ultimate responsibility for the competence of the work product, but rather must "ensure its quality."²

Duty to Supervise

Second, the duty to supervise is inherently difficult considering the "physical separation" between a New



York attorney and an overseas non-lawyer.³ The Florida Bar Association has raised the same concern.⁴ To effectively fulfill this duty, the Opinion advises attorneys to obtain background information about any intermediary employing the non-lawyer, conduct reference checks, interview the non-lawyer in advance by telephone or Webcast, and communicate with the non-lawyer throughout the assignment. There is undoubtedly an increased challenge with properly discharging the duty to supervise a non-lawyer overseas. That challenge may well require New York attorneys to spend more time supervising than they otherwise would with non-lawyers in the United States; this, in turn, might increase costs to the client.

Duty to Preserve Client Confidences

Third, assuming the outsourcing assignment will require the attorney "to disclose client confidences or secrets to the overseas non-lawyer," the attorney "should secure the client's informed consent in advance."⁵ Moreover, the attorney should take measures to help preserve those confidences, including "restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality."⁶ Clients may understandably be concerned about disclosing confidences or secrets to overseas non-lawyers, and New York attorneys must adequately address these concerns before making any such disclosure. To ensure adequate protection, the Florida Bar Association recommends that the overseas non-lawyer provide assurances that "policies and processes are *employed* to protect the data while in transit, at rest, in use, and post-provision of services."⁷

Duty to Check Conflicts

Fourth, attorneys should not outsource tasks to overseas non-lawyers before doing a sufficient conflicts check. Satisfaction of this duty requires two checks. The New York attorney has to consider whether the overseas non-lawyer is performing or has performed work that

is adverse to the attorney's client. And, the New York attorney has to question the overseas non-lawyer's employer about its conflict-checking procedures to see whether it has any conflicts with handling the outsourced work.

Duty to Bill Appropriately

Fifth, because the overseas non-lawyer cannot perform "legal services," it is not appropriate for the New York attorney to "include the cost of outsourcing in his or her legal fees."⁸ Unless the client has specifically agreed otherwise with the attorney, the attorney 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."⁹ The Florida Bar Association found that a law firm "may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead."¹⁰ In a contingency case, however, the Florida Opinion found that it is "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."¹¹

Duty to Obtain Client Consent

Finally, the extent to which a New York attorney must obtain client consent prior to outsourcing work to overseas non-lawyers depends upon the significance of the work to be outsourced. For example, if overseas non-lawyers are expected to play a "significant role in the matter," or will be performing an "important document review," the New York attorney should obtain client consent prior to outsourcing the work.¹² The Florida Bar Association arguably takes a broader view and recommends that law firms obtain "prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests."¹³

The Los Angeles and San Diego Bar County Bar Associations' Opinions focus more on the specific instance of outsourcing the preparation (such as drafting) of a brief. For example, the San Diego Opinion considered the extent to which a California attorney can ethically outsource a brief to India-based Legalworks.¹⁴ The key issue addressed by the San Diego Opinion was whether Legalworks was engaged in the practice of law. In the hypothetical posed by the San Diego Opinion, the California attorney had retained "full control" over the client's representation and "exercised independent judgment" in reviewing Legalworks' brief.¹⁵ As to whether the attorney had a duty to inform the client prior to outsourcing the work to Legalworks, the San Diego Opinion instructs that, if work to be performed is "within the client's 'reasonable expectation under the circumstances' that it will be performed by the attorney," the attorney

must provide advance notification prior to outsourcing the work.¹⁶ Most important, the attorney must satisfy the duty to act competently. To do so, "the attorney must know enough about the subject in question to judge the quality of the work."¹⁷ Thus, for example, an attorney who has no knowledge of patent law who outsources a motion for summary judgment on infringement of a patent to Legalworks cannot satisfy the duty to act competently. Absent such knowledge of the applicable legal issues at stake, the attorney cannot possibly assess the quality of the work performed by a company such as Legalworks.

The Los Angeles County Bar Association's Opinion considered whether an attorney in a civil case can ethically contract with an out-of-state company to draft a brief.¹⁸ Like the San Diego Opinion, the Los Angeles Opinion concluded that outsourcing of this sort is appropriate if several of the ethical duties discussed above are satisfied. Namely, the attorney must be competent to review the work, have ultimate responsibility for the brief submitted with the court, refrain from charging an unconscionable fee, protect client confidences and secrets, and ensure there is no conflict of interest with the entity hired to draft the brief. As to whether the fee is unconscionable, the Los Angeles County Bar found that "the amount paid by the attorney" for the out-of-state company's work "is not determinative on the question of whether a fee is unconscionable."¹⁹ ■

1. N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2006-3, at 3 (2006) (N.Y.C. Op.).

2. *Id.*

3. *Id.* at 4.

4. Fla. Bar Ass'n Proposed Advisory Op. 07-2, June 18, 2008, at 2 ("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.") (Fla. Proposed Op.).

5. N.Y.C. Op. 2006-3, at 4.

6. *Id.* at 5.

7. Fla. Proposed Op. 07-2, at 3 (emphasis in original).

8. N.Y.C. Op. 2006-3, at 5.

9. *Id.* at 5 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993)).

10. Fla. Proposed Op. 07-2, at 5.

11. *Id.*

12. *Id.* at *6.

13. Fla. Proposed Op. 07-2, at 4.

14. San Diego County Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2007-1 (2007).

15. *Id.* at 5.

16. *Id.* at 6.

17. *Id.* at 7.

18. L.A. County Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 518 (2006).

19. *Id.* in L.A. Lawyer, Nov. 2006 75, 77 (citing *Shaffer v. Super. Ct.*, 39 Cal. Rptr. 2d 506 (1995)).