VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

IN THE MATTER OF
REVISED LEGAL ETHICS OPINION 1850

PETITION OF THE VIRGINIA STATE BAR

Brian L. Buniva, President
Karen A. Gould, Executive Director
James M. McCauley, Ethics Counsel
Emily F. Hedrick, Assistant Ethics Counsel
Virginia State Bar
1111 East Main Street, Suite 700
Richmond, VA 23219-3565
Phone (804) 775-0500
Fax (804) 775-0501

TABLE OF CONTENTS

I. Overview of the Issues 1

II. Publication and Comments 3

III. Proposed Legal Ethics Opinion 4

IV. CONCLUSION 14

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

IN THE MATTER OF
REVISED LEGAL ETHICS OPINION 1850

PETITION

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10-4 of the Rules of this Court, and requests review and approval of amendments to Legal Ethics Opinion 1850, as set forth below. The proposed amendments were approved by a unanimous vote of the Council of the Virginia State Bar on October 23, 2020 (Appendix, Page 1).

I. Overview of the Issues

The Virginia State Bar Standing Committee on Legal Ethics ("Committee") has proposed amendments to LEO 1850. In the proposed revisions to LEO 1850 (2010), the Committee concludes a lawyer may ethically outsource services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer (1) rigorously monitors and reviews the work to ensure that the

outsourced work meets the lawyer's requirements of competency and to avoid aiding a nonlawyer in the unauthorized practice of law, (2) preserves the client's confidences, (3) bills for the services appropriately, and (4) obtains the client's informed advance consent to outsourcing the work. The proposed revisions simplify and streamline the scenarios and analysis in the opinion and clarify what a lawyer must disclose to a client when outsourcing services.

Specifically, the revisions to the opinion emphasize that a lawyer who outsources work to a lawyer or nonlawyer working outside the direct supervision of a lawyer in the firm must obtain the client's consent to disclose confidential information and must adequately explain how fees for the outsourced services will be billed to the client. If the lawyer or nonlawyer to whom the work is being outsourced works on site or under the direct supervision of the outsourcing lawyer, they can be considered "associated" with the firm for purposes of the ethics rules and the lawyer may bill for that work in the same way that they bill for any lawyer or employee, even if the charge is more than what the firm pays the staffing agency, vendor, or the lawyer/nonlawyer directly. On the other hand, if the fee is billed to the client as a disbursement, then the lawyer must disclose the actual amount of the disbursement and any mark-up or surcharge on

the amount actually paid to the nonlawyer.

The proposed changes are included below in Section III as a clean version of the proposed revised opinion. A comparison document showing the changes from the original version is included in the Appendix (Appendix, Page 23).

II. Publication and Comments

The Standing Committee on Legal Ethics approved the proposed amendments to LEO 1850 at its meeting on December 12, 2019 (Appendix, Page 4). The Virginia State Bar issued a publication release dated December 13, 2019, pursuant to Part 6, § IV, Paragraph 10-2(c) of the Rules of this Court (Appendix, Page 5). Notice of the proposed amendments was also published in the bar's newsletter on January 7, 2020 (Appendix, Page 7) and on the bar's website on the "Actions on Legal Ethics Opinions" page (Appendix, Page 10) and on the bar's "News and Information" page on December 16, 2019 (Appendix, Page 15).

Three comments were received, from Rogers (on behalf of the Local Government Attorneys), Weaver, and Crouch (Appendix, Page 17). The Committee made a number of primarily grammatical changes in response to Crouch's comments. The substantive change is at line 110 of the proposed opinion, which discusses the fact that disclosure of confidential

information between lawyers in a firm is permitted, but disclosure to others outside of the firm generally is not. The commenter was correct that Comment [5a] was not the most helpful reference for that statement, so the Committee replaced that reference with a citation to Comment [6] to Rule 1.6 and also added the phrase “when outsourcing” at line 105 to clarify that the requirement for client consent to disclosure of confidential information applies to outsourcing arrangements, not to consultations with another lawyer as permitted by Comment [5a]. The Committee also added language at line 113 of the proposed opinion to point out that certain types of outsourcing for office management purposes do not require client consent per Rule 1.6(b)(6).

The Committee did not make the change to the “Billing and Fees” section suggested by that comment; the Committee decided to retain the conclusion established in LEOs 1712 and 1735 that a lawyer (or law firm) can add a surcharge to a disbursement as long as that surcharge is adequately disclosed to the client and the client consents. *See also* ABA Formal Opinion 93-379 (1993).

III. Proposed Legal Ethics Opinion

LEGAL ETHICS OPINION 1850 OUTSOURCING OF LEGAL SERVICES

This opinion deals with the ethical issues involved when a lawyer considers outsourcing legal or non-legal support services to lawyers or paralegals. Many lawyers already engage in some form of outsourcing to provide more efficient and effective service to their clients. Outsourcing takes many forms: reproduction of materials, document retention database creation, conducting legal research, case and litigation management, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts, for example. Law firms have always and will always engage other lawyers and nonlawyers in the provision of various legal and non-legal support services. Legal outsourcing can be highly beneficial to the lawyer and the client, since it gives the lawyer the opportunity to seek the services of outside lawyers and staff in complex matters. Legal outsourcing also gives sole practitioners and small law firms more flexibility in not having to hire staff or employees when they experience temporary work overflows for which a contract lawyer or non-lawyer may be appropriate.

A few examples of outsourcing arrangements are:

1. A Virginia law firm retains an outsourced law firm in India to conduct patent searches and to prepare patent applications for some of its clients. Lawyers and nonlawyers at the outsourced firm may work on the

matters. The outsourced firm will not have access to any client confidences except confidential information that is necessary to perform the patent searches and prepare the patent applications. The outsourced law firm regularly does patent searches and applications for U.S. law firms. In some situations, the outsourced law firm might be hired through an intermediary company that verifies the credentials of the firm and checks conflicts; in other situations, the Virginia law firm might directly retain the outsourced law firm.

2. A Virginia law firm occasionally hires Lawyer Z, who works for several firms on an as-needed contract basis, to perform specific legal tasks such as legal research and drafting legal memoranda and briefs. Lawyer Z is a Virginia-licensed lawyer who works out of her home and works on an hourly basis for the law firm, but does not meet with firm clients. She has access to firm files and matters only as needed for the discrete tasks she is hired to perform.

3. A Virginia law firm sends legal work involving legal research and brief writing to a legal research “think tank” to produce work product that is then incorporated into the work product of the law firm.

On the other hand, a situation that may be colloquially called “outsourcing” but that does not raise any of the concerns identified in this

opinion is: a Virginia law firm regularly hires Lawyer Y to perform specific legal tasks for them, which may or may not involve contact with firm clients, working directly with and under the supervision of lawyers in the law firm. In that scenario, Lawyer Y is working under the direct supervision of lawyers in the firm and has full access to information about the firm's clients, and therefore is associated with the firm for purposes of the Rules of Professional Conduct, including confidentiality and conflicts.

Applicable Rules and Opinions

The applicable Rules of Professional Conduct are: Rule 1.1, Competence, Rule 1.2(a), Scope of Representation, Rule 1.4, Communication, Rule 1.5, Fees, Rule 1.6, Confidentiality of Information, Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, and Rule 5.5, Unauthorized Practice of law; Multijurisdictional Practice of Law.

Applicable legal ethics opinions are LEOs 1712 and 1735, regarding the use of temporary lawyers and contract lawyers.

Analysis

A lawyer's ethical duties when outsourcing tasks fall into four categories: supervision of nonlawyers, including unauthorized practice of law issues, client communication and the need for consent to outsourcing

arrangements, confidentiality, and billing and fees. This opinion will address each of these categories in order.

Supervision and unauthorized practice of law

The lawyer's initial duty when considering outsourcing, as established by Rule 5.3(b), is to exercise due diligence in the selection of lawyers or nonlawyers. Lawyers have a duty to be competent in the representation of their clients and to ensure that those who are working under their supervision perform competently. See Rule 1.1. To satisfy the duty of competence, a lawyer who outsources legal work must ensure that the tasks in question are delegated to individuals who possess the skills required to perform them and that the individuals are appropriately supervised to ensure competent representation of the client.

The lawyer must also consider whether the lawyer or nonlawyer understands and will comply with the ethical rules that govern the initiating lawyer's conduct and will act in a manner that is compatible with that lawyer's professional obligations, just as in any other supervisory situation. In order to comply with Rule 5.3(b), the lawyer must be able to adequately supervise the nonlawyer if the work is outsourced. Specifically, the lawyer needs to review the nonlawyer's work on an ongoing basis to ensure its quality, the lawyer must maintain ongoing communication to ensure that the

nonlawyer is discharging the assignment in accordance with the lawyer's directions and expectations, and the lawyer needs to review thoroughly all work product to ensure its accuracy and reliability and that it is in the client's interest. The lawyer remains ultimately responsible for the conduct and work product of the nonlawyer. Rule 5.3(c).

The Committee recommends that overseas outsourcing, in particular, should include a written outsourcing agreement to protect the law firm and its clients. The agreement should include assurances that the outsourced firm or vendor will meet all professional obligations of the hiring lawyer, specifically including confidentiality, information security, conflicts, and the unauthorized practice of law. The hiring lawyer should make reasonable inquiry and act competently in choosing a provider that will honor these obligations and use reasonable measures to supervise the vendor's work.

Client communication and consent

In LEO 1712, the Committee concluded that when a lawyer hires a temporary lawyer to work on a client's matter, the lawyer must advise the client of that fact and must obtain the client's consent to the arrangement if the temporary lawyer will perform independent work for the client and will not work under the direct supervision of a lawyer in the firm. Applying Rules 1.2(a) and 1.4, the Committee concluded that the client is entitled to know

who is involved in the representation and can refuse to allow the use of an outsourced lawyer or nonlawyer. Extending that analysis to other outsourcing situations, a lawyer must obtain informed consent from the client if the lawyer is outsourcing legal work to a lawyer or nonlawyer who is not associated with or working under the direct supervision of a lawyer in the firm that the client retained, even if no confidential information is being shared outside of the firm.

Confidentiality

If, when outsourcing, confidential client information will be shared with a lawyer or nonlawyer outside of the law firm (where "outside of the law firm" means neither associated with the firm nor directly supervised by a lawyer in the firm), the lawyer must secure the client's consent in advance. The implied authorization of Rule 1.6(a) and its Comment [6][1] to share confidential information within a firm generally does not extend to entities or individuals working outside the law firm. Thus, in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client's informed consent. The exception to this requirement is when the

1 Rule 1.6, Comment [6]: Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be limited to specified lawyers.

outsourced service is an "office management" task of the types identified in Rule 1.6(b)(6)[2], for which client consent is not required. In all cases, the lawyer needs to ensure that appropriate measures have been employed to educate the nonlawyer on the lawyer's duties to protect client confidences.

When sharing or storing confidential information, the lawyer must act reasonably to safeguard the information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by anyone under the lawyer's supervision. *See* Rule 1.6, Comment [19]. For example, the nonlawyer should assure the lawyer that policies and procedures are in place to protect and secure data while in transit and that he or she understands and will abide by the policies and procedures. Written confidentiality agreements are strongly advisable in outsourcing relationships. The outsourcing lawyer should also ask the nonlawyer whether he or she is performing services for any parties adverse to the lawyer's client, and remind him or her, preferably in writing, of the need to safeguard the confidences and secrets of the lawyer's current and former clients. *See* Rule 1.6, Comment [5c].[3]

2 Rule 1.6(b)(6): To the extent a lawyer reasonably believes necessary, the lawyer may reveal information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential.
3 Rule 1.6 Comment [5c]: Compliance with Rule 1.6(b)(5) might require a written confidentiality agreement with the outside agency to which the lawyer discloses information.

Billing and Fees

In LEO 1712, the Committee discussed the issue of payment arrangements when legal services are outsourced or when temporary lawyers are used. The Committee reiterated its position in LEO 1735, which deals with a lawyer independent contractor. This Committee opines that if payment is billed to the client as a *disbursement*, then the lawyer must disclose the actual amount of the disbursement including any mark-up or surcharge on the amount actually disbursed to the nonlawyer. Any mark-up or surcharge on the disbursement billed to the client is tested by the principles articulated in ABA Formal Opinion 93-379 (1993):

> When that term ["disbursements"] is used, clients justifiably should expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf. Thus, if a lawyer hires a court stenographer to transcribe a deposition, the client can reasonably expect to be billed as a disbursement the amount the lawyer pays to the court reporting service. Similarly, if the lawyer flies to Los Angeles for the client, the client can reasonably expect to be billed as a disbursement the amount of the airfare, taxicabs, meals and hotel room.
>
> It is the view of this Committee that in the absence of disclosure to the contrary it would be improper for the lawyer to assess the surcharge on these disbursements over and above the amount actually incurred unless the lawyer incurred additional expenses beyond the actual cost of the disbursement item. In the same regard, if a lawyer receives a discounted rate from a third-party provider, it would be improper for the lawyer to charge the client the full rate and to retain the profit instead of giving the client the discount. Clients

> could view this practice as an attempt to create profit centers when they had been told they would be billed for disbursements.
>
> On the other hand, if the lawyer or firm hires a contract lawyer or non-lawyer to work on site or under the direct supervision of the lawyer such that they are considered "associated" with the firm, the lawyer or firm may bill the client for the usual or customary charge the firm would bill for any other associate or employee even if that amount is more than what the firm pays the staffing agency or vendor. The amount paid to the staffing agency or vendor is an overhead expense that the firm is not required to disclose to a client.

This Committee believes that these same principles apply in the case of outsourced legal services. Fees must be reasonable, as required by Rule 1.5(a), and adequately explained to the client, as required by Rule 1.5(b). Further, in a contingent fee case it would be improper to charge separately for work that is usually done by the client's own lawyer and that is incorporated into the standard fee paid to the lawyer, even if that cost is paid to a third-party provider.

Conclusion

A lawyer may ethically outsource services to a lawyer or nonlawyer who is not associated with the firm or working under the direct supervision of a lawyer in the firm if the lawyer (1) rigorously monitors and reviews the work to ensure that the outsourced work meets the lawyer's requirements of competency and to avoid aiding a nonlawyer in the unauthorized practice of law, (2) preserves the client's confidences, (3) bills for the services

appropriately, and (4) obtains the client's informed consent in advance of outsourcing the work.

IV. CONCLUSION

The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of professional conduct are promulgated and implemented. The amendments to LEO 1850 were developed and approved in compliance with all requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve the proposed amendments to Legal Ethics Opinion 1850 for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR

By
Brian L. Buniva, President

By
Karen A. Gould, Executive Director

Dated this 29th day of October, 2020.