

1 (This opinion is a DRAFT Opinion and is subject to revision or withdrawal until it is
2 finalized by the Ethics Committee – September 23, 2010)
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4 LEGAL ETHICS OPINION 1850 OUTSOURCING OF LEGAL SERVICES
5

6 This staff-generated opinion deals with the ethical issues involved when a lawyer
7 considers outsourcing legal or non-legal support services to lawyers or paralegals. Many
8 lawyers already engage in some form of outsourcing to provide more efficient and
9 effective service to their clients. Outsourcing takes many forms: reproduction of
10 materials, document retention database creation, conducting legal research, drafting legal
11 memoranda or briefs, reviewing discovery materials, conducting patent searches, and
12 drafting contracts, for example. Law firms have always and will always engage other
13 lawyers and nonlawyers in the provision of various legal and non-legal support services.
14 Legal outsourcing can be highly beneficial to the lawyer and the client, since it gives the
15 lawyer the opportunity to seek the services of outside lawyers and staff in complex
16 matters.
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18 With the uptick in outsourcing, the Committee would like to consider a number of
19 ethical concerns raised by outsourcing models: conflicts of interest, confidentiality, scope
20 of representation, professional independence and billing, and the unauthorized practice of
21 law and supervision of nonlawyers. There are many variations of outsourcing
22 arrangements and the Committee would like to consider several common scenarios to
23 provide guidance on the ethical issues. For purposes of this opinion, the Committee will
24 use the term *nonlawyer* to refer to an outsourced lawyer as well as a nonlawyer.
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26 In Scenario 1, Virginia Law Firm retains an outsourced law firm to conduct patent
27 searches and to prepare patent applications for some of their clients. Lawyers and
28 nonlawyers at the outsourced firm may work on the matters. The outsourced firm will
29 not have access to any client confidences with the exception of confidential information
30 that is necessary to perform the patent searches and prepare the patent applications. The
31 outsourced law firm routinely does patent searches and applications for many U.S. law
32 firms.
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34 Would it make a difference if the outsourced law firm was hired through an
35 intermediary company that verifies the credentials of the outsourced firm and checks
36 conflicts?
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38 In Scenario 2, Virginia Law Firm:
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40 (a) routinely hires Lawyer Z to perform specific legal tasks for them, such as legal
41 research, drafting legal memorandum and briefs, and other related legal work. Lawyer Z
42 is a Virginia licensed lawyer who works out of her home and works on an hourly basis
43 for Virginia Law Firm but does not meet with firm clients. Even though she works
44 remotely, she has complete access to firm files and matters as needed.
45

46 (b) occasionally hires Lawyer Z who works for several firms on an as needed
47 contract basis.

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49 In Scenario 3, Virginia Law Firm routinely sends legal work involving legal
50 research and brief writing to a legal research “think tank” to produce work product that is
51 then incorporated into the work product of the Virginia Law Firm.

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53 APPLICABLE RULES AND OPINIONS:

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55 Rule 1.1 deals with the lawyer’s duty to provide competent representation and
56 Rule 1.2(a)¹ addresses the scope of representation and states that the lawyer must abide
57 by the client’s decisions and consult with the client regarding the means by which the
58 objectives of the representation will be pursued. Application of Rule 1.2 leads the
59 Committee to consider Rule 1.4(b)²’s communication requirements that the lawyer keep
60 the client reasonably informed and explain enough about a matter to permit the client to
61 make an informed decision. A threshold issue is whether and under what circumstances a
62 lawyer must communicate with and seek approval from the client in order to outsource
63 legal work.

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65 Rule 1.6³ imposes duties of confidentiality. The lawyer must be mindful of
66 protecting all client information and must remain cautious that others to whom he may be
67 outsourcing work understand and abide by such client confidentiality provisions as
68 required by the rule. An important issue is whether and under what circumstances the
69 lawyer must seek client consent to share confidential information with third parties
70 involved in the outsourcing process. Outsourcing may also require a conflicts analysis
71 under Rules 1.7 and 1.9, which require loyalty to current and former clients and duties to
72 protect their information.

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74 Rule 1.5 applies to the questions that arise when the lawyer considers appropriate
75 billing and fees for outsourced work, and Rule 5.4 requires the lawyer to preserve his/her
76 professional and independent judgment when delegating tasks to nonlawyers outside the
77 firm.

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¹ Rule 1.2

(a) A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued.

² Rule 1.4

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation.

³ Rule 1.6

(a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or 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 unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

79 Outsourcing will also likely involve the supervision of nonlawyers. Rule 5.3(b)
80 requires that a lawyer having direct supervisory authority over the nonlawyer shall make
81 reasonable efforts to ensure that the nonlawyer's conduct is compatible with the
82 professional obligations of the lawyer. Rule 5.3(c)⁴ directs that the lawyer overseeing the
83 conduct of a nonlawyer will remain ultimately responsible for the ethical conduct of that
84 nonlawyer, when the lawyer has direct supervisory authority over that nonlawyer and
85 orders or ratifies that nonlawyer's conduct.

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87 Lastly, the lawyer must determine whether the work being undertaken or assigned
88 to nonlawyers might violate Rule 5.5⁵, which forbids lawyers to assist the unauthorized
89 practice of law.

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91 In addition to the Rules cited, Legal Ethics Opinions 1712 and 1735 provide
92 guidance. LEO 1712 involves the use of temporary lawyers and addresses conflicts
93 issues, client confidences, billing, communication and client consent, and maintaining the
94 lawyer's independent professional judgment on behalf of the client. Similarly, LEO 1735
95 addresses the firm's use of an independent contractor instead of an employee or partner
96 of the law firm to provide legal services to clients, and it reiterates the confidentiality
97 protections, needed conflicts analysis, and necessary client disclosure and consent.

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99 ANALYSIS:

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101 The Committee notes at the beginning that its analysis applies regardless of
102 whether legal services are outsourced overseas or locally.

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104 First, the Committee addresses the facts as described in Scenario 2(a) and finds
105 that this scenario is not an outsourcing relationship because the lawyer is working
106 directly for Virginia Law Firm from a remote location and is, therefore, associated with
107 the firm for all purposes and analysis of the Rules.

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⁴ Rule 5.3

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure the person's conduct is compatible with the professional obligations of the lawyer; and
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;

or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

⁵ Rule 5.5

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

109 *Supervision of Nonlawyers, Duty of Competence, and Avoiding the Unauthorized*
110 *Practice of Law*

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112 There is nothing unethical about a lawyer outsourcing legal and non-legal
113 services, provided the outsourcing lawyer renders legal services to the client with the
114 “legal knowledge, skill, thoroughness and preparation reasonably necessary for the
115 representation,” as required by Rule 1.1. Comment [1] further counsels:

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118 In determining whether a lawyer employs the requisite knowledge
119 and skill in a particular matter, relevant factors include the relative
120 complexity and specialized nature of the matter, the lawyer’s general
121 experience, the lawyer’s training and experience in the field in question,
122 the preparation and study the lawyer is able to give the matter and whether
123 it is feasible to refer the matter to, or associate or consult with, a lawyer of
124 established competence in the field in question.

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126 The lawyer’s initial duty when considering outsourcing, as outlined in Rule
127 5.3(b), is to exercise due diligence in the selection of the lawyer or nonlawyer. The
128 lawyer must ensure that they are competent and determine that they have the appropriate
129 training and skills to perform the tasks requested. Lawyers have a duty to be competent
130 in the representation of their clients and to ensure that those who are working under their
131 supervision perform competently. *See* Rule 1.1. To satisfy the duty of competence, a
132 lawyer who outsources legal work must ensure that the tasks in question are delegated to
133 individuals who possess the skills required to perform them and that the individuals are
134 appropriately supervised to ensure competent representation of the client.

135

136 The lawyer must also consider whether the lawyer or nonlawyer understands and
137 will comply with the ethical rules that govern the initiating lawyer’s conduct and will act
138 in a manner that is compatible with that lawyer’s professional obligations, just as with
139 any other supervisory matter.

140

141 Lawyers frequently hire contract lawyers and nonlawyers alike to do legal
142 research, document preparation, or document review. The role of the lawyer in these
143 situations is akin to outsourcing, but on a more localized level. In none of these
144 circumstances does contracting for such services constitute aiding the unlicensed practice
145 of law, provided there is adequate supervision by the lawyer. *See e.g.*, *Unauthorized*
146 *Practice of Law Op. 191 (1998)* (permitting an attorney or firm to employ nonlawyer
147 personnel to perform delegated functions under the direct supervision of a licensed
148 attorney). However, the Rules do not permit a nonlawyer to counsel clients about legal
149 matters or to engage in the unauthorized practice of law, and they require that the
150 delegated work shall merge into the lawyer’s completed work product. The lawyer must
151 examine and be responsible for all work delegated to nonlawyer personnel and must also
152 assure compliance by nonlawyer personnel with the Rules. Moreover, the initial and
153 continuing relationship with the client is the responsibility of the employing lawyer.

154 A client benefits from a lawyer's delegating work to a nonlawyer, but in order to
155 avoid the unauthorized practice of law, the lawyer must accept complete responsibility
156 for the nonlawyer's work. In short, the lawyer must, by applying professional skill and
157 judgment, first set the appropriate scope for the nonlawyer's work and then vet the
158 nonlawyer's work and ensure its quality.⁶

159
160 In order to comply with Rule 5.3(c), the lawyer must be able to adequately
161 supervise the nonlawyer if the work is outsourced. Specifically, the lawyer needs to
162 review the nonlawyer's work on an ongoing basis to ensure its quality, the lawyer must
163 maintain ongoing communication to ensure that the nonlawyer is discharging the
164 assignment in accordance with the lawyer's directions and expectations, and the lawyer
165 needs to review thoroughly all work product to ensure its accuracy and reliability and that
166 it is in the client's interest. The lawyer remains ultimately responsible for the conduct
167 and work product of the nonlawyer.

168
169 In each of our selected Scenarios, the challenge for outsourcing legal work is
170 seeking qualified and competent lawyers and nonlawyers and adequately overseeing the
171 execution of the project. This challenge can be extremely difficult with the physical
172 separation and potential time differences involved. Electronic communication can help
173 close the gap, but it may have its own challenges regarding monitoring and technology
174 security issues. The use of an intermediary company, as suggested by the question
175 presented in Scenario 1, may help to assure the credentials of the professionals
176 performing the work; however, the law firm needs to check the intermediary company's
177 references to ensure that the company's practices and supervisory procedures are
178 compatible with the lawyer's responsibilities. In addition, the intermediary should
179 produce references and a resume or curriculum vitae, etc., for the individual lawyers and
180 nonlawyers who will be providing the services to the law firm.

181
182 *Independent Professional Judgment*

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184 Rule 5.4 requires that the lawyer must exercise his or her own independent
185 judgment on the client's behalf at all times and cannot abdicate that role to a nonlawyer.
186 Rule 5.4 applies with equal force to outsourced legal services because these are
187 arrangements in which nonlawyer intermediaries exercise control over the delivery of
188 legal services; therefore, outsourced legal services may engender interference with the
189 lawyer's obligations to (1) exercise independent professional judgment on behalf of a
190 client, (2) maintain client confidences and secrets, (3) avoid conflict of interests, and (4)
191 practice law competently. *See, e.g.,* LEO 1712, UPL Opinion No. 60 (liability insurer
192 may use in-house staff counsel to defend claims brought against insureds).

193
194 Under each of our selected scenarios, the lawyer must maintain independent legal
195 judgment regarding the client's matters and must feel assured that any outsourcing
196 arrangement would not jeopardize this responsibility. Similar concerns are expressed in
197 the context of in-house counsel handling liability claims against an insured, the provision

⁶ See City of New York Bar Association 2006-3 that addresses the issues involved in a lawyer outsourcing legal services overseas.

198 of legal services under prepaid legal service plans, and the use of lawyer temp placement
199 services.

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201 *Client Communication/Consent*

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203 Client communication may be the foremost issue the lawyer needs to address. If
204 the lawyer is considering outsourcing part of the client's matter, Rule 1.4 requires the
205 lawyer to have communication with the client and to obtain the client's informed consent
206 to engage lawyers or nonlawyers who *are not directly associated with the lawyer or law*
207 *firm that the client retained*. In LEO 1712, this Committee opined that when a lawyer
208 engages the services of a temporary lawyer, which is a form of outsourcing, the lawyer
209 must advise the client of that fact and must seek the client's consent if the temporary
210 lawyer will perform independent work for the client and will be outside of the firm.
211 Relying on Rule 1.2(a), requiring a lawyer to consult with a client as to the means by
212 which the client's objectives are to be pursued, Rule 1.4, relating to client
213 communication, and Rule 7.5(d), prohibiting lawyers from implying that they practice in
214 a partnership or other organization when that is not the fact, this Committee concluded
215 that the client is entitled to know who or what entity is representing him or her and can
216 veto the use of an outsourced lawyer or nonlawyer.

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218 It is agreed that nonlawyers often play more limited roles in matters than do
219 temporary/contract or foreign lawyers. There is little purpose to informing a client every
220 time a lawyer outsources legal support services that are truly tangential, clerical, or
221 administrative in nature, or even when basic legal research or writing is outsourced
222 without any client confidences being revealed, as in Scenario 3.

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224 In order to comply with Rule 1.4 in either Scenario 1 or 2(b), if the lawyer is
225 outsourcing legal work to a lawyer or nonlawyer who is not directly associated with the
226 lawyer or the law firm that the client retained, then there must be informed consent from
227 the client. This requirement does not mean the every time a law firm sends work out to
228 be copied or transcribed, the firm must acquire client consent. Certainly rudimentary
229 functions can be performed outside the firm without client consent. However,
230 substantive client work that involves legal analysis and work product related to
231 confidential client information and, therefore, involves application of the lawyer's
232 independent legal judgment and competence as discussed above, requires client consent
233 for the lawyer to involve either lawyers or nonlawyers who are not directly associated
234 with that lawyer's firm.

235

236 *Confidentiality*

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238 Rule 1.4's client communication duties tie right into ethical duties concerning
239 client confidentiality: If confidential client information will be shared with a lawyer or
240 nonlawyer outside of the law firm, the lawyer must secure the client's consent in
241 advance. The implied authorization of Rule 1.6(a) and its Comment [5a]⁷ to share

⁷ Rule 1.6, Comment [5a]

242 confidential information within a firm generally does not extend to entities or individuals
243 working outside the law firm. Thus, in a typical outsourcing relationship, no information
244 protected by Rule 1.6 may be revealed without the client's informed consent.
245 Additionally, the lawyer needs to ensure that all appropriate measures have been
246 employed to educate the nonlawyer on the lawyer's duties as they apply to client
247 confidences. Many foreign jurisdictions, however, have confidentiality rules that employ
248 less protection to client confidences. In these cases, the lawyer must assure the client that
249 the nonlawyer will abide by the same restrictions that apply to the lawyer, advise the
250 client of the risks and advantages of the outsourcing relationship, and obtain the client's
251 informed consent to the arrangement.

252
253 If the information outsourced will be transmitted electronically, the lawyer should
254 be mindful of and receive assurance that the security risks inherent in electronic
255 transmittal of confidential information are controlled. For example, the nonlawyer
256 should assure the lawyer that policies and procedures are in place to protect and secure
257 data while in transit and that he or she understands and will abide by the policies and
258 procedures. Written confidentiality agreements are strongly advisable in outsourcing
259 relationships. *See* Rule 1.6, Comment [5c].⁸

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261 To minimize the risk that confidential information might be disclosed when
262 outsourcing legal work, the lawyer must ensure that proper procedures are in place.
263 Since the lawyer remains ultimately responsible for protection of client confidences he or
264 she needs to ensure that adequate procedures are in place with the nonlawyer firm to
265 understand and ensure this protection. The outsourcing lawyer should ask the nonlawyer
266 whether he or she is performing legal services for any parties adverse to the lawyer's
267 client, and remind him or her, preferably in writing, of the need to safeguard the
268 confidences and secrets of the lawyer's current and former clients.

269
270 In Scenarios 1 and 2(b), the Virginia Law Firm should obtain client consent to
271 outsource the work because even though the firm has appropriately limited the amount of
272 client information disclosed to the outsourced firm or to the contract lawyer, the firm is
273 still sharing confidential client information. Additionally, the Virginia Law Firm should
274 ensure that the outsourced firm or contract lawyer is maintaining confidentiality and is
275 appropriately handling any potential conflicts. If the outsourced firm or contract lawyer
276 was hired through an intermediary, it would be prudent to have those terms and
277 conditions be part of the intermediary company's engagement agreement, since the
278 company is attesting to its employees' credentials.

Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections.

⁸ 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.

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In Scenario 2(a) where Lawyer Z works exclusively for the firm, Lawyer Z would be deemed associated with the firm for the purposes of client confidentiality and conflicts; therefore, she should be treated as such with regard to any work product she provides. If she does temporary or contract outsourced work for several firms, then she should confirm she uses a conflicts database to conduct an appropriate conflicts analysis on each case before accepting any new client matters from these firms.

Billing/Fees

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In LEO 1712, the Committee discusses the issue of payment arrangements when legal services are outsourced or when temporary lawyers are used. The Committee reiterates 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) as follows:

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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.

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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 herself 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 her to charge the client the full rate and to retain the profit for herself instead of giving the client the discount. Clients could view this practice as an attempt to create profit centers when the client had been told he would be billed for disbursements. LEO 1712.

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This Committee believes that these same principles apply in the case of outsourced legal services. The overhead costs associated with the provision of such services may be minimal or nonexistent. Therefore, the outsourced services should be billed at *cost* plus the reasonable allocation of cost for supervision if the lawyer is not otherwise charging legal fees associated with review and integration of the nonlawyer's work. In a contingent fee case it would also 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.

325 This Committee further relies upon its analysis earlier in this opinion regarding
326 Client Communication/Consent and reiterates that the lawyer must advise the client of the
327 outsourcing of legal services and must obtain client consent anytime there is disclosure of
328 client confidential information to a nonlawyer outside of the lawyer's firm, thereby
329 superseding any ability for the lawyer to avoid discussing the legal fees and specific costs
330 associated with the outsourcing of legal services. With adequate disclosure as required
331 by Rule 1.5(b)⁹, the lawyer's fee must ultimately meet the reasonableness standard as
332 required in Rule 1.5(a).¹⁰ If outsourcing is contemplated at the outset of an engagement,
333 the outsourcing lawyer should fulfill his duties under Rules 1.2, 1.4, 1.5, and 1.6 by
334 obtaining client consent to the arrangement and providing a reasonable explanation of the
335 fees and costs associated with the outsourced project. These arrangements should be
336 memorialized in writing at the earliest possible date to avoid confusion and disputes over
337 the outsourcing arrangement or its cost to the client.

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339 Additionally, if the firm plans to bill the client on a basis other than the actual cost
340 which can include a reasonable allocation of overhead charges associated with the work,
341 then advanced client consent should be obtained even if confidential client information
342 will not be disclosed in the outsourcing relationship.

343

344 CONCLUSION

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346 A lawyer may ethically outsource legal support services to a nonlawyer if the
347 lawyer (1) rigorously supervises the nonlawyer so as to avoid aiding the nonlawyer in the
348 practice of law and ensuring that the nonlawyer's work meets the lawyer's requirements
349 of competency, (2) preserves the client's confidences, (3) bills for the services
350 appropriately, and (4) obtains the client's informed advance consent to outsourcing the
351 work.

⁹ Rule 1.5(b) The lawyer's fee shall be adequately explained to the client. When the lawyer has not regularly represented the client, the amount, basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

¹⁰ Rule 1.5(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client;
 - (7) the experience, reputation and ability of the lawyer or lawyers performing the services;
- and
- (8) whether the fee is fixed or contingent.