

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, 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.

With the uptick in outsourcing, the Committee would like to consider a number of ethical concerns raised by outsourcing models: conflicts of interest, confidentiality, scope of representation, professional independence and billing, and the unauthorized practice of law and supervision of nonlawyers. There are many variations of outsourcing arrangements and the Committee would like to consider several common scenarios to provide guidance on the ethical issues. For purposes of this opinion, the Committee will use the term *nonlawyer* to refer to an outsourced lawyer who is not licensed in Virginia as well as a nonlawyer.

In Scenario 1, Virginia Law Firm retains an outsourced law firm in India to conduct patent searches and to prepare patent applications for some of their clients. Lawyers and nonlawyers at the outsourced firm may work on the matters. The outsourced firm will not have access to any client confidences with the exception of confidential information that is necessary to perform the patent searches and prepare the patent applications. The outsourced law firm routinely does patent searches and applications for many U.S. law firms.

Would it make a difference if the outsourced law firm was hired through an intermediary company that verifies the credentials of the outsourced firm and checks conflicts?

In Scenario 2, Virginia Law Firm:

(a) routinely hires Lawyer Z to perform specific legal tasks for them, such as legal research, drafting legal memorandum and briefs, and other related legal work. Lawyer Z is a Virginia licensed lawyer who works out of her home and works on an hourly basis for Virginia Law Firm, but does not meet with firm clients. Even though she works remotely, she has complete access to firm files and matters as needed and works directly with and under the direct supervision of Partner A with the Virginia Law Firm

(b) Alternatively, Law Firm occasionally hires Lawyer Z who works for several firms on an as needed contract basis.

In Scenario 3, Virginia Law Firm routinely 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 Virginia Law Firm.

APPLICABLE RULES AND OPINIONS:

Rule 1.1 deals with the lawyer’s duty to provide competent representation and Rule 1.2(a)¹ addresses the scope of representation and states that the lawyer must abide by the client’s decisions and consult with the client regarding the means by which the objectives of the representation will be pursued. Application of Rule 1.2 leads the Committee to consider Rule 1.4’s² communication requirements that the lawyer keep the client reasonably informed and explain enough about a matter to permit the client to make an informed decision. A threshold issue is whether and under what circumstances a lawyer must communicate with and seek approval from the client in order to outsource legal work.

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

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

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

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(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).

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

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

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

ANALYSIS:

The Committee notes at the beginning that its analysis applies regardless of whether legal services are outsourced overseas or locally. Additionally, the Committee reminds lawyers that their duties of communication with a client include the duty to advise a

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.

client of possible alternatives that might involve outsourcing when the lawyer believes that such services may benefit the client. Rule 1.4.⁶

First, the Committee addresses the facts as described in Scenario 2(a) and finds that this scenario is not an outsourcing relationship because the lawyer is working under the direct supervision of Partner A for Virginia Law Firm from a remote location and is associated with the firm for all purposes and analysis of the Rules.

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

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

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

The lawyer’s initial duty when considering outsourcing, as outlined in Rule 5.3(b), is to exercise due diligence in the selection of lawyers or nonlawyers. The lawyer must ensure that they are competent and determine that they have the appropriate training and skills to perform the tasks requested. 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 with any other supervisory matter.

Lawyers frequently hire contract lawyers and nonlawyers alike to do legal research, document preparation, or document review. The role of the lawyer in these situations is akin to outsourcing, but on a more localized level. In none of these circumstances does contracting for such services constitute aiding the unlicensed practice of law, provided

⁶ The Committee relies upon the language in Rule 1.4, Comment [5]: The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

there is adequate supervision by the lawyer. *See e.g.*, Unauthorized Practice of Law Op. 191 (1998) (permitting an attorney or firm to employ nonlawyer personnel to perform delegated functions under the direct supervision of a licensed attorney). However, the Rules do not permit a nonlawyer to counsel clients about legal matters or to engage in the unauthorized practice of law, and they require that the delegated work shall merge into the lawyer's completed work product. The lawyer must examine and be responsible for all work delegated to nonlawyer personnel and must also assure compliance by nonlawyer personnel with the Rules. Rule 5.3(b). Moreover, the initial and continuing relationship with the client is the responsibility of the employing lawyer.

A client may benefit from a lawyer's delegation of work to a nonlawyer, but in order to avoid the unauthorized practice of law, the lawyer must accept complete responsibility for the nonlawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the nonlawyer's work and then vet the nonlawyer's work and ensure its quality.⁷

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).

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

The Committee recommends that overseas outsourcing in particular, should include a written outsourcing agreement to protect the Virginia Law Firm. The agreement should include recitals regarding confidentiality, security, conflicts, unauthorized practice of law issues, client contact, and assurances that the third party vendor will meet all professional obligations of the hiring lawyer. The hiring lawyer should make reasonable inquiry and

⁷ See City of New York Bar Association 2006-3 that addresses the issues involved in a lawyer outsourcing legal services overseas.

act competently in choosing such a provider and use reasonable measures to follow-up and supervise the third party vendor's work, which should bring the lawyer in compliance with the requirements of supervision required in Rule 5.1 and 5.3.

Independent Professional Judgment

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

Under each of our selected scenarios, the lawyer must maintain independent legal judgment regarding the client's matters and must feel assured that any outsourcing arrangement would not jeopardize this responsibility. Similar concerns are expressed in the context of in-house counsel handling liability claims against an insured, the provision of legal services under prepaid legal service plans, and the use of lawyer temp placement services.

Client Communication/Consent

Client communication may be the foremost issue the lawyer needs to address. As mentioned earlier, Rule 1.4 may require in appropriate circumstances consideration of outsourcing as a potential client benefit. If the lawyer considers outsourcing part of the client's matter, Rule 1.4 requires the lawyer to have communication with the client and to obtain the client's informed consent to engage lawyers or nonlawyers who *are not directly associated with or under the direct supervision of the lawyer or law firm that the client retained*. In LEO 1712, this Committee opined that when a lawyer engages the services of a temporary lawyer, which is a form of outsourcing, the lawyer must advise the client of that fact and must seek the client's consent 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. Relying on Rule 1.2(a), requiring a lawyer to consult with a client as to the means by which the client's objectives are to be pursued, Rule 1.4, relating to client communication, and Rule 7.5(d)⁸, prohibiting lawyers from implying that they practice in a partnership or other organization when that is not the fact, this Committee concluded that the client is entitled to know who or what entity is representing him or her and can veto the use of an outsourced lawyer or nonlawyer.

⁸ Rule 7.5 Firm Names and Letterheads

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

In order to comply with Rule 1.4 in either Scenario 1 or 2(b), if the lawyer is outsourcing legal work to a lawyer or nonlawyer who is not directly associated with or working under the direct supervision of a lawyer in the firm that the client retained, then there must be informed consent from the client. This requirement does not mean that every time a law firm sends work out to be copied or transcribed, the firm must acquire client consent. Certainly rudimentary functions can be performed outside the firm without client consent. There is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed, as in Scenario 3. However, substantive client work that involves legal analysis and work product related to confidential client information and, therefore, involves application of the lawyer's independent legal judgment and competence as discussed above, requires client consent for the lawyer to involve either lawyers or nonlawyers who are not directly associated with that lawyer's firm.

Confidentiality

Rule 1.4's client communication duties tie right into ethical duties concerning client confidentiality: If confidential client information will be shared with a lawyer or nonlawyer outside of the law firm (meaning either not associated with the firm or 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 [5a]⁹ 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. Additionally, the lawyer needs to ensure that all appropriate measures have been employed to educate the nonlawyer on the lawyer's duties as they apply to client confidences. Many foreign jurisdictions have confidentiality rules that provide less protection to client confidences.¹⁰ In these cases, the lawyer must assure the client that the nonlawyer will abide by the same restrictions that apply to the lawyer, advise the client of the risks and advantages of the outsourcing relationship, and obtain the client's informed consent to the arrangement.

If the information outsourced will be transmitted electronically, the lawyer should be mindful of and receive assurance that the security risks inherent in electronic transmittal of confidential information are controlled. For example, the nonlawyer should assure the

⁹ Rule 1.6, Comment [5a]

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.

¹⁰ The Committee believes that the lawyer has a duty of diligence to understand the legal and ethical implications of confidentiality and other potential threats to the safety and security of the transmission of client's matters before outsourcing to a jurisdiction outside of Virginia.

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. *See* Rule 1.6, Comment [5c].¹¹

To minimize the risk that confidential information might be disclosed when outsourcing legal work, the lawyer must ensure that proper procedures are in place. Since the lawyer remains ultimately responsible for protection of client confidences he or she needs to ensure that adequate procedures are in place with the nonlawyer firm to understand and ensure this protection. The outsourcing lawyer should ask the nonlawyer whether he or she is performing legal 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.

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

In Scenario 2(a) where Lawyer Z works exclusively for the firm under the direct supervision of Partner A, 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

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:

¹¹ 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.

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. LEO 1712.

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.

This Committee further relies upon its analysis earlier in this opinion regarding Client Communication/Consent and reiterates that the lawyer must advise the client of the outsourcing of legal services and must obtain client consent anytime there is disclosure of client confidential information to a nonlawyer who is working independently and outside the direct supervision of a lawyer in the firm, thereby superseding any exception allowing the lawyer to avoid discussing the legal fees and specific costs associated with the outsourcing of legal services. With adequate disclosure as required by Rule 1.5(b)¹², the lawyer’s fee must ultimately meet the reasonableness standard as required in Rule 1.5(a).¹³ If outsourcing is contemplated at the outset of an engagement, the outsourcing

¹² 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.

¹³ 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;

lawyer should fulfill his duties under Rules 1.2, 1.4, 1.5, and 1.6 by obtaining client consent to the arrangement and providing a reasonable explanation of the fees and costs associated with the outsourced project. These arrangements should be memorialized in writing at the earliest possible date to avoid confusion and disputes over the outsourcing arrangement or its cost to the client.

Additionally, in cases where the nonlawyer is working independently and outside the direct supervision of a lawyer in the firm, if the firm plans to bill the client on a basis other than the actual cost which can include a reasonable allocation of overhead charges associated with the work, then advance client consent should be obtained even if confidential client information will not be disclosed in the outsourcing relationship.

CONCLUSION

A lawyer may ethically outsource legal support services to a 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 supervises the nonlawyer so as to avoid aiding the nonlawyer in the unauthorized practice of law and ensuring that the nonlawyer's work meets the lawyer's requirements of competency, (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.

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- (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.