

Ethics Informational Packet

OUTSOURCING PARALEGAL WORK

Courtesy of
The Florida Bar
Ethics Department

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PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 07-2 January 18, 2008

A lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing. The lawyer should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties.

Note: This opinion was approved by The Florida Bar Board of Governors on July 25, 2008.

RPC: 4-1.6, 4-5.3, 4-5.5,

OPINIONS: 68-49, 73-41, 76-33, 76-38, 88-6, 88-12, 89-5; Los Angeles County Bar Association 518, City of New York Bar Association 2006-3

CASES: *Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980); *Florida Bar v. Sperry*, 140 So. 2d 587 (Fla. 1962)

A member of the Florida Bar has inquired whether a law firm may ethically outsource legal work to overseas attorneys or paralegals. The overseas attorneys, who are not admitted to the Florida Bar, would do work including document preparation, for the creation of business entities, business closings and immigration forms and letters. Paralegals, who are not foreign attorneys, would transcribe dictation tapes. The foreign attorneys and paralegals would have remote access to the firm's computer files and may contact the clients to obtain information needed to complete a form. In addition to the facts presented in the written inquiry, the Committee was advised that the outsourcing company employs lawyers admitted to practice in India who are capable of providing much broader assistance to law firms in the U.S. besides outsourcing merely paralegal work, including contract drafting, litigation support, legal research, and forms preparation. The details of the proposed activity are complex, and a number of issues are potentially involved.

The inquiry raises ethical concerns regarding the unauthorized practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing.

Law firms frequently hire contract paralegals to perform services such as legal research and document preparation. It is the committee's opinion that there is no ethical distinction when hiring an overseas provider of such services versus a local provider, and that contracting for such services does not constitute aiding the unlicensed practice of law, provided that there is adequate supervision by the law firm.

Rule 4-5.5, Rules Regulating The Florida Bar, prohibits an attorney from assisting in the unlicensed practice of law. In *Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), *judg. vacated on other grounds*, 373 U.S. 379 (1963) the Court found that setting forth a broad

definition of the practice of law was "nigh onto impossible" and instead developed the following test to determine whether an activity is the practice of law:

. . .if the giving of [the] advice and performance of [the] services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.

When applying this test it should be kept in mind that "the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." *Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980). The Committee is not authorized to make the determination whether or not the proposed activities constitute the unlicensed practice of law. It is the obligation of the attorney to determine whether activities (legal work) being undertaken or assigned to others might violate Rule 4-5.5 and any applicable rule of law.

Rule 4-5.3, Rules Regulating The Florida Bar, requires an attorney to directly supervise nonlawyers who are employed or retained by the attorney. The rule also requires that the attorney make reasonable efforts to ensure that the nonlawyers' conduct is consistent with the ethics rules. This is required regardless of whether the overseas provider is an attorney or a lay paralegal. The comment to the rule states:

A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. The measures employed in supervising nonlawyers should take account of the level of their legal training and the fact that they are not subject to professional discipline. If an activity requires the independent judgment and participation of the lawyer, it cannot be properly delegated to a nonlawyer employee.

Additionally, Florida Ethics Opinions 88-6 and 89-5 provide that nonlawyers (defined as persons who are not members of The Florida Bar) may accomplish certain activities but only under the "supervision" of a Florida lawyer.

In Florida Opinion 88-6, which discusses initial interviews that are conducted by nonlawyers, this committee advised that:

the lawyer is responsible for careful, direct supervision of nonlawyer employees and must make certain that (1) they clearly identify their nonlawyer status to prospective clients, (2) they are used for the purpose of obtaining only factual information from prospective clients, and (3) they give no legal advice concerning the case itself or the representation agreement. Any questions concerning an assessment of the case, the applicable law or the representation agreement would have to be answered by the lawyer.

Florida Ethics Opinion 89-5 provides that a law firm may permit a paralegal or other trained employee to handle a real estate closing at which no lawyer in the firm is present if the following conditions are met:

1. A lawyer supervises and reviews all work done up to the closing;
2. The supervising lawyer determines that handling or attending the closing will be no more than a ministerial act. Handling the closing will constitute a ministerial act only if the supervising lawyer determines that the client understands the closing documents in advance of the closing;
3. The clients consent to the closing being handled by a nonlawyer employee of the firm. This requires that written disclosure be made to the clients that the person who will handle or attend the closing is a nonlawyer and will not be able to give legal advice at the closing;
4. The supervising lawyer is readily available, in person or by telephone, to provide legal advice or answer legal questions should the need arise;
5. The nonlawyer employee will not give legal advice at the closing or make impromptu decisions that should be made by the supervising lawyer.

The committee has specifically addressed the employment of law school graduates who are admitted in other jurisdictions in Florida Opinions 73-41 and 68-49. These opinions state that a law firm may employ attorneys who are not admitted to the Florida Bar only for work that does not constitute the practice of law.

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. Ethics opinions from other states indicate that an attorney may need to take extra steps to ensure that the foreign employees are familiar with Florida's ethics rules governing conflicts of interest and confidentiality. See Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518 and Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2006-3. This committee agrees with the conclusion of Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518, which states that a lawyer's obligation regarding conflicts of interest is as follows:

[T]he attorney should satisfy himself that no conflicts exist that would preclude the representation. [Cite omitted.] The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney's relationship with Company.

Of particular concern is the ethical obligation of confidentiality. The inquirer states that the foreign attorneys will have remote access to the firm's computer files. The committee believes that the law firm should instead limit the overseas provider's access to only the information necessary to complete the work for the particular client. The law firm should

provide no access to information about other clients of the firm. The law firm should take steps such as those recommended by The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Opinion 2006-3 to include “contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality.”

The requirement for informed consent from a client should be generally commensurate with the degree of risk involved in the contemplated activity for which such consent is sought. It is assumed that most information outsourced will be transmitted electronically to the legal service provider. If so, an attorney must be mindful of, and receive appropriate and sufficient assurances relative to, the risks inherent to transmittal of information containing confidential information. For example, assurances by the foreign provider that policies and processes are employed to protect the data while in transit, at rest, in use, and post-provision of services should be set forth in sufficient detail for the requesting attorney. Moreover, foreign data-breach and identity protection laws and remedies, where such exist at all, may differ substantially in both scope and coverage from U.S. Federal and State laws and regulations. In light of such differing rules and regulations, an attorney should require sufficient and specific assurances (together with an outline of relevant policies and processes) that the data, once used for the service requested, will be irretrievably destroyed, and not sold, used, or otherwise be capable of access after the provision of the contracted-for service. While the foregoing issues are likewise applicable to domestic service providers, they present a heightened supervisory and auditability concern in foreign (i.e., non-U.S.) jurisdictions, and should be accorded heightened scrutiny by the attorney seeking to use such services.¹

The committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client’s interests. Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar. In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services. For example, in Opinion 88-12, we stated that a law firm’s use of a temporary lawyer may need to be disclosed to a client if the client would likely consider the information to be material.

¹ See, Indian data breach hits HSBC - 28 Jun 2006 - IT Week www.itweek.co.uk/itweek/news/2159326/indian-breach-hits-hsbc, UK banks escape punishment over India data breach, www.services.silicon.com/offshoring/0,3800004877,39155588,00.htm, Indian call center under suspicion of ID breach, Cnet.com 2005-08-16 http://news.com.com/2100-1029_3-5835103.html, Florida State Data Breach Result of Inappropriate Offshoring to India, About.com 2006-04-1, <http://idtheft.about.com/b/a/256546.htm>, Outsourcing to India: Dealing with Data Theft and Misuse, Morrison & Foerster White Paper November 2006, <http://www.mofo.com/news/updates/files/update02268.html>. U.S. Firm Says Outsourcer Holding Its Data Hostage, Paul McDougall, Information Week, August 7, 2007: <http://www.informationweek.com/story/showArticle.jhtml?articleID=201204202>

In addition to concerns regarding the confidentiality of client information, there are concerns about disclosure of sensitive information of others, such as an opposing party or third party. In outsourcing, there is the possibility that information of others will be disclosed in addition to the disclosure of client information. Lawyers should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties, particularly where the information concerns medical records or financial information.

Additionally, in Consolidated Opinion 76-33 and 76-38, regarding billing for nonlawyer personnel, the committee stated:

[T]he lawyer should not in fact or effect duplicate charges for services of nonlawyer personnel, and if those charges are separately itemized, the salaries of such personnel employed by the lawyer should in some reasonable fashion be excluded from consideration as an overhead element in fixing the lawyer's own fee. If that exclusion cannot, as a practical matter, be accomplished in some rational and reasonably accurate fashion, then the charges for nonlawyer time should be credited against the lawyer's own fee.

As to whether knowledge and specific advance consent of the client as to such uses of nonlawyer personnel, and charges therefor, are necessary, the Committee majority feels that it is in some instances and is not in others. For example, it would not seem appropriate for a lawyer to always have to seek the consent of the client as to use of a law clerk in conducting legal research. And under EC 3-6 and DR 3-104 the work delegated to nonlawyer personnel should be so much under the lawyer's supervision and ultimately merged into the lawyer's own product that the work will be, in effect, that of the lawyer himself, who presumably has entered into a "clear agreement with his client as to the basis of the fee charges to be made." EC 2-19. However, we feel that such "clear agreement" could not exist in many situations where the lawyer intends to make substantial use of nonlawyer personnel, and to bill directly or indirectly therefor, unless the client is informed of that intention at the time the fee agreement is entered into.

Therefore, if there is a potentiality of dispute with, or of lack of clear agreement with and understanding by, the client as to the basis of the lawyer's charges, including the foregoing elements of nonlawyer time, whether or not the nonlawyer personnel time is to be separately itemized, the lawyer's intention to so use nonlawyer personnel and charge directly or indirectly therefor should be discussed in advance with, and approved by, the client. This would seem especially the case where substantial use is to be made of any kind of such nonlawyer services. See also EC 2-19 as to explaining to clients the reasons for particular fee arrangements proposed.

The Committee suggests that the potentiality of such dispute or lack of clear agreement and understanding referred to in the foregoing paragraph may exist in the case of work to be done by nonlawyer personnel who are employed by the lawyer and who perform services of a type known by the lay public to be regularly available through independent contractors, e.g., investigators. The

Committee feels that such potentiality especially may exist where the lawyer enters into a contingent fee arrangement with the client and then separately itemizes charges to the client for the time of nonlawyer personnel who are full-time employees of the lawyer; the arrangement may be susceptible of interpretation as involving charging the client for such nonlawyer services and at the same time, in fact or effect, duplicating the charges by including the salaries of such personnel as overhead and an element of the lawyer's own fee, as proscribed hereinabove.

The law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be 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.

In sum, a lawyer is not prohibited from engaging the services of an overseas provider, as long as the lawyer adequately addresses the above ethical obligations.

GUIDELINES REGARDING OFFSHORING LEGAL SERVICES¹

(Florida Ethics Opinion 07-2)

The Professional Ethics Committee recently responded to an inquiry by a member of The Florida Bar regarding the outsourcing of legal services in Ethics Opinion 07-2. The Florida Bar Board of Governors asked the Professional Ethics Committee to “look comprehensively at the use of others outside of a law firm to assist in the provision of legal services and whether additional guidelines should be adopted including but not limited to, whether there are differences between outsourcing inside the United States and outsourcing outside the United States.” The Professional Ethics Committee fully considered the issues.

The Committee considered appropriate conduct of attorneys regarding outsourcing and off-shoring assuming that the attorney complies with all the ethical considerations. Nothing in the opinion should be viewed as endorsing outsourcing or off-shoring in any way by The Florida Bar.

To assist the members of The Florida Bar in interpreting and applying the rules of ethics in this ever-changing age of technology the Committee offers the following guidance. There is a difference between **outsourcing** legal services and **off-shoring** legal services. Outsourcing implies that the legal services will be provided by a person or company within the jurisdiction of the United States. Off-shoring legal services implies that the legal services will be provided by a person or company outside of the United States.² The Committee finds that the three major factors which affect the ethical provision of off-shoring legal services are geographical, legal and cultural.

Geographical distance may impede a lawyer’s ability to guide and supervise the provision of legal services. The lawyer’s ability to supervise third party legal service providers may be limited by the lack of day to day observations of their skills, conduct and training and may be further hampered by geographically distant lawyers’ inability to make firsthand observations of the resources and work environments afforded service providers.

The law of non-U.S. hosts of legal service providers may impact the types of work that can be offshored or otherwise limit a U.S. lawyer’s ability to use offshore services. For example, laws of some host nations may prevent the retransmission back to the United States of certain personal identifying information. Performance of work in non-U.S. jurisdictions also limits or prevents a lawyer’s or client’s ability to seek damages for any breaches of confidence, negligence, intentional crimes, or other injuries. Also, United States courts may not have jurisdiction over people working in non-U.S. jurisdictions. The lack of any legal or regulatory authority over a

¹ These guidelines apply to offshoring legal services, but some may be applicable to domestic outsourcing as well.

² See [Outsourced Legal Services - Introduction and Explanation](http://www.prismlegal.com), Prism Legal, www.prismlegal.com, April 12, 2005.

paralegal or third party service provider establishing a code of ethics, disciplinary procedures and rules regulating their conduct may limit a client's recourse to seeking recourse from the attorney in the event of any misconduct or breach of ethics.

The cultural differences, while not having the force of law behind them, may provide behavioral drivers that differ from nation to nation. Whether related to privacy, "property ownership" or data sharing issues, these differences can result in behavior that would not be accepted in the United States in general, and specifically in Florida. Failure to understand cultural differences, including language differences, may lead to unexpected results, including unusable work product.

The ABA Formal Opinion 88-356 regarding temporary lawyers notes that two functions are involved with using outside lawyers, "preserving confidentiality and avoiding positions adverse to a client" The Comment states as follows:

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients."]

As the use of information technology becomes more prevalent in the practice of law, the lawyer's ethical duties to maintain client confidentiality and to supervise nonlawyers become more complex. Lawyers should maintain physical, electronic and procedural safeguards to securely store information about clients and safeguard it from unauthorized access, alteration and destruction. Lawyers should understand the technology of the creation, transmission, storage, and deletion of electronic data to the extent necessary to prevent inadvertent disclosure of client's data and to the extent necessary to maximize resources to perform work more efficiently for clients. The use of access codes, passwords and firewalls, virus protection, secure transmission and storage methods should be explored. Lawyers should limit disclosure of client identifiable data whenever possible. For information which is required to be used in client identifiable data, consent should be obtained for both the disclosure of the information and the purpose for which it is used. Lawyers should also familiarize themselves with privacy laws of their offshore service providers to avoid situations in which the hosting jurisdiction arrests the transmission of data back to the United States.

The actual "how to" supervise the nonlawyer legal service provider is a personnel or human resource issue that falls outside the purview of the Rules of Professional Conduct. However, the following are some suggestions offered by the Committee:

1. Communicate regularly with the third party service provider to ensure that all offshoring employees have the proper training and an understanding regarding the importance of confidentiality.
2. Within the parameters of the hosting nation's laws, utilize technology to monitor activities of third parties.
3. Within the parameters of the hosting nations' laws, consider available technology such as sophisticated monitoring devices, which can provide remote checking of e-mail, web sites and programs that employees access, when employees log in and out of their computers and even their exact key strokes.
4. Restrict any direct client contact from the third party service provider.
5. In addition to carefully reviewing final work product, assess the means by which that work was performed. Lawyers should evaluate such facts as whether the length of time needed to perform the services was reasonable given the resources available to the service provider.
6. Do not substitute non-lawyer work product for that of lawyers exercising their independent professional judgment.
7. Consider whether the lawyer and the offshore provider can enter a valid and enforceable contract that would provide the lawyer and clients with recourses for damages resulting from a breach of confidentiality, negligence, or other harmful conduct.

The ABA examined ethics opinions and guidelines that have been issued by courts and bar association committees and indicated that following are the basic precepts that lawyers must observe regarding the employment of nonlawyer assistants:³

1. The lawyer must retain a direct relationship with the client.
2. The lawyer is personally responsible for the training, supervision and work product of the nonlawyer assistant.
3. The lawyer must inform the client that the nonlawyer assistant is not a lawyer and that the lawyer is personally responsible for her supervision and work product.

³ "Model Guidelines for the Utilization of Legal Assistant Services" (1991), quoted in New York State Bar Association Guidelines for the Utilization by Lawyers of the Services of Legal Assistants, 1997.

4. The lawyer must instruct nonlawyer assistants in the relevant Rules of Professional Conduct and their correlative obligations thereunder.

The New Jersey Bar Association discussed independent paralegals and stated the following⁴:

Without the direct supervisory control contemplated by RPC 5.3, the attorney who utilizes the independent paralegal might not have professional responsibility for the paralegal's misconduct. With the separation of the independent paralegal from the attorney, both by distance and relationship, the ability of the attorney to make reasonable efforts to insure that the paralegal's conduct is compatible with the professional obligations of the lawyer must diminish. The danger of legal work being done without appropriate professional responsibility to the public increases to a point wherein it cannot be condoned.

⁴ New Jersey Unlicensed Practice of Law Opinion #24 (11/15/90)