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## ***Ethics Committee Advisory Opinion #2011-12/5*** **Outsourcing Legal and Non-legal Support Services**

**By the NHBA Ethics Committee**  
*December 14, 2011*

**RULE REFERENCES:**

- Rule 1.1
- Rule 1.2
- Rule 1.6
- Rule 1.7
- Rule 2.1
- Rule 5.1
- Rule 5.3
- Rule 5.4
- Rule 5.5
- Rule 7.1

**SUBJECTS:**

- Competence
- Confidentiality
- Conflict of Interest
- Fees
- Independent Judgment
- Outsourcing
- Supervision
- Unauthorized Practice of Law

**QUESTIONS:**

May a New Hampshire attorney outsource litigation support services, such as document review, to a company



located overseas, on a temporary or an ongoing basis? Must that attorney notify the client of the use of these services?

#### FACTS:

A New Hampshire attorney has received a discovery request and would like to engage a company in India to review the client's documents for relevance, confidentiality, and privilege. The attorney would have the documents scanned by a local company and sent electronically to the company in India.

#### SHORT ANSWER:

Such engagement of support services does not of itself violate the Rules of Professional Conduct. The New Hampshire attorney must ensure that the individuals or companies providing the services maintain client confidences (Rule 1.6) and do not create conflicts of interest (Rule 1.7). The New Hampshire attorney must also ensure that the charges for these services do not result in an unreasonable fee or unreasonable expenses (Rule 1.5), and must not share fees with non-attorneys (Rule 5.4). The New Hampshire attorney must notify the client of the engagement of such services (Rules 1.2 and 2.1), must be competent (Rule 1.1) to review the services provided (Rules 5.1 and 5.3), and must avoid the assistance of the unauthorized practice of law (Rule 5.5).

#### DISCUSSION:

Lawyers regularly engage companies to provide support services. Banks hold client funds; telephone companies carry privileged communications; credit card companies facilitate the payment of bills; computer consultants maintain necessary technology.

Law firms have outsourced their libraries and certain support services, such as data processing and copying, for some time. Today, certain law firms outsource significant portions of their back-office support services. One foreign offshore firm offers law firms the option of outsourcing ten categories of activities, including financial and accounting services, presentation preparation services, and litigation support services. The outsourced work might be accomplished in a lower-cost area of the United States (which is sometimes called "homeshoring" or "farmshoring") or in another country, in either case taking advantage of lower labor and overhead costs.

Daly, Mary C & Silver, Carole, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 Geo. J. Int'l L. 401, 404 (2007) (footnotes omitted).

The American Bar Association has recently issued ABA Op. 08-451 (2008) (*Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services*). That opinion notes, as did the New Hampshire attorney seeking this opinion, that such services may be supplied by companies outside New Hampshire and indeed outside the United States. The ABA opinion calls the outsourcing trend "a salutary one for our globalized economy" noting that outsourcing may reduce costs to clients. *Id.* at 2.

The proposed conduct of the New Hampshire attorney actually involves the outsourcing of three services:

scanning the documents by a local company, transmission of the documents electronically through the Internet, and review of the documents by a company in India. The Committee has reviewed each service.

### **A. Document Scanning**

The scanning of documents would be a typical example of outsourcing non-legal support services. Over the last thirty years, the Committee reviewed such outsourcing and concluded that the services would not create an ethical problem, provided the attorney ensured that the companies involved maintained client confidentiality. See FO 1982-3/16 (1983) (independent word processing service, under prior Code); FO 1984-85/1 (1984) (credit card service, under prior Code); AO 1986-87/8 (1987) (microfilming service); FO 1989-90/2 (1989) (off-site storage retrieval service).

Ethical issues result, however, when the use of the outsourced service would result in unwarranted disclosure. See FO 1987-88/8 (1988) (attorney could not use a credit reporting agency to assist in collecting a debt as that would involve the disclosure of information relating to representation without client consent). The scanning of documents does not pose an inherent risk of disclosure, and should not violate the Rule 1.2 provided the attorney “exercise[s] due care in selecting outside providers and in taking all reasonable measures to ensure that they do not disclose or use client confidences.” FO 1989-90/2 (1989).

The outsourcing of the scanning function alone would probably not require disclosure to the client under most circumstances, as most clients would probably expect this task to be conducted in the most cost-efficient manner. “[W]here the client lacks business sophistication sufficient to realize that modern methods require the use of such technology, such notice may be advisable.” *Id.*

### **B. File Transmission**

The Internet provides a convenient medium to transmit information over long distances. For example, email is a widely used method of communication. The American Bar Association (ABA) considered a lawyer’s duty to protect the confidentiality of email in ABA Op. 99-413 (1999) (*Protecting the Confidentiality of Unencrypted E-Mail*). The Committee concluded that, in general, a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating Model Rule 1.6(a) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The opinion, nevertheless, cautioned lawyers to consult with their clients and follow their clients’ instructions as to the mode of transmitting highly sensitive information relating to the clients’ representation. It found that particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters. See also ABA Op. 11-459 (2011) (*Duty to Protect the Confidentiality of E-mail Communications with One’s Client*).

Where an attorney anticipates transmitting a large amount of data over the Internet, the lawyer should take protective measures to either protect the files themselves (by encryption) or protect the method of transmission (by using a secured protocol). The lawyer is cautioned to consult with the client and follow the client’s instruction as to the level of protection required. Cf. AO 1991-2/6 (1992) (cellular telephones in 1992 presented a risk of interception of privileged communications requiring disclosure to, and permission from, the client).

### C. Document Review

The Committee considers outsourced document review a legal support service, which presents significantly more issues than the previous non-legal support services. The Council of Bars and Law Societies of Europe recently reviewed the trend toward outsourcing legal services.

This situation poses many challenges to bars and other regulators responsible for regulating lawyers or giving guidance to lawyers on how to deal with legal outsourcing, in order that it is carried out in full conformity with the core values of the legal profession and the ethical-deontological rules applicable to the outsourcing lawyer.

CCBE Guidelines on Legal Outsourcing (2010).

The Committee has also considered outsourcing legal support services. In FO 1989-90/9 (1990), the Committee considered an arrangement whereby a management company would become the employer of a firm's attorneys and would lease those attorneys back to the firm, thereby assuming the firm's accounting and payroll functions. The primary concern in that opinion involved Rule 5.4(d), which prohibits a lawyer from practicing in a firm where a non-lawyer owns any interest. After concluding that Rule 5.4(d) did not bar the lease arrangement, the Committee suggested that the firm be mindful of a number of potential issues. The firm must not share, directly or indirectly, client fees. Rule 5.4(a). The arrangement must not interfere with the attorney's independent professional judgment. Rule 2.1. The firm must supervise the work of subordinate lawyers (Rule 5.1) and non-lawyers (Rule 5.3), and ensure that it does not enable the leasing company to engage in the unauthorized practice of law (Rule 5.5). The firm must ensure that the leasing company does not violate any client confidences (Rule 1.6) and avoids conflicts of interest (Rule 1.7). Finally, the lawyers must make full and adequate disclosure to clients of the nature of the lawyer's relationship to the firm. Rule 7.1.

In FO 1995-96/3 (1995), the Committee considered the issues raised by a company that placed lawyers and law graduates to provide temporary legal and quasi-legal services. The Committee again concluded that Rule 5.4(d) did not bar such an arrangement. The Committee again went on to list principles that the law firm and the temporary lawyer must observe, including disclosure to third parties, confidentiality, conflicts of interest, oversight of the temporary lawyer's conduct for compliance with ethics rules and quality of service.

On September 19, 2011, the ABA Commission on Ethics 20/20 issued a Revised Proposal on Outsourcing. The Commission's report explained the proposal:

The ABA Commission on Ethics 20/20 has concluded that, although changes to the text of the Model Rules are not necessary, comments to some of those Rules should be clarified to address this issue so that lawyers can more easily determine their ethical obligations. In particular, the Resolutions that accompany this Report propose three changes. First, the Commission proposes a new Comment to Model Rule 1.1 that identifies the factors that lawyers need to consider when retaining lawyers outside the firm to assist on a client's matter (i.e., outsourcing legal work to other lawyers). Second, the Commission proposes new Comments to Model Rule 5.3 in order to identify the factors that lawyers need to consider when using nonlawyers outside the firm (i.e., outsourcing work to nonlawyer service providers). Finally, the Commission proposes a new sentence to Comment [1] to Model Rule 5.5 in order to clarify that

lawyers cannot engage in outsourcing when doing so would facilitate the unauthorized practice of law. In each of these cases, the Commission's goal is to clarify how existing rules and principles apply to the particular context of outsourcing.

After reviewing our prior opinions, and the recent ABA opinion, the Committee concludes that the lawyer outsourcing document review must be mindful of the following ethical considerations.

*Disclosure of the arrangement to the client under Rule 1.2 (Scope of representation) and Rule 7.1 (Communications concerning a lawyer's services).* Even sophisticated clients may not anticipate that a lawyer will outsource document review. Accordingly, the lawyer should discuss the arrangement, all risks and benefits, and any possible alternatives with the client before outsourcing document review.

*Maintenance of client confidences under Rule 1.6.* The New Hampshire attorney should insist upon a provision in any outsourcing agreement that requires confidentiality, and should consider requiring the company to make the confidentiality requirement part of its employee manual.

*Avoidance of conflicts of interests under Rule 1.7.* The New Hampshire attorney should routinely require the service company to perform a conflicts check if it has more than one client.

*Avoidance of sharing of fees with non-lawyers under Rule 5.4.* A fixed fee agreement should help avoid the sharing of fees.

*Avoidance of assisting in the unauthorized practice of law under Rule 5.5.* The outsourcing of a limited function, such as document review, will probably not create an issue, but the New Hampshire attorney should nevertheless be mindful of not stepping over the line if outsourcing additional legal support services.

*Responsibilities under Rule 5.1 (for lawyers) and Rule 5.3 (for non-lawyer assistants).* The Supreme Court will not likely sanction an overseas company or its employees for any violations of the Rules of Professional Responsibility. Accordingly, the Court will likely place the responsibility on the New Hampshire attorney to oversee the work performed overseas, and ensure that it is performed competently and in an ethical manner. At a minimum, this will require that the attorney maintain independence of judgment under Rule 2.1, and be competent, under Rule 1.1, to review the work.

ABA Commission on Ethics 20/20 has proposed the following new comment to Rule 5.3.

When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. ... When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

The Committee need not address the level of supervision and review needed to achieve such reasonable assurance. The Supreme Court has suggested, however, that the attorney may have a variety of duties relating to the work of an independent contractor.

The attorney remains subject to liability for negligently hiring, supervising or retaining the abstractor, negligently reviewing the abstractor's report, or negligently rendering an opinion based upon the abstractor's report.

*Lawyers Title Ins. Corp. v. Groff*, 148 N.H. 333, 339 (2002) (*dictum*).



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