

Opinion No. 518: Ethical Considerations in Outsourcing of Legal Services

SUMMARY: An attorney in a civil case who charges an hourly rate may contract with an out-of-state company to draft a brief provided the attorney is competent to review the work, remains ultimately responsible for the final work product filed with the court by the attorney on behalf of the client, the attorney does not charge an unconscionable fee, client confidences and secrets are protected, and there is no conflict of interest between the client and the contracting entity. The attorney may be required to inform the client of the nature and scope of the contract between attorney and out-of-state company if the brief provided is a significant development in the representation or if the work is a cost which must be disclosed to the client under California law. Any refund of charges by the out-of-state company to the attorney should be passed through to the client if the client was separately charged for the service.

AUTHORITIES CITED: Statutes: California Business and Professions Code Section 6068, California Business and Professions Code Section 6125, California Business and Professions Code Section 6126. Cases: *Bushman v. State Bar*, 11 Cal. 3d 558 (1974); *Crawford v. State Bar*, 54 Cal. 2d 659 (1960); *Farnham v. State Bar*, 17 Cal. 3d 605 (1976); *Jones v. State Bar*, 49 Cal. 3d 273 (1989), *Simmons v. State Bar*, 2 Cal. 3d 719 (1970). California Rules of Professional Conduct: Rule 1-100, Rule 1-120, Rule 1-310, Rule 1-320, Rule 1-400, Rule 2-200, Rule 3-110, Rule 3-310, Rule 3-500, Rule 5-200. Opinions: COPRAC Formal Opinion 1994-138, COPRAC Formal Opinion 2004-165, LACBA Formal Opinion 374, LACBA Formal Opinion 423, LACBA Formal Opinion 473.

FACTS: An attorney licensed to practice law in California has filed a notice of appeal in a civil case on the client's behalf. The attorney charges an hourly rate for the appellate services. Shortly thereafter, the attorney receives a solicitation from a legal research and brief writing company to draft the appellant's opening brief for a comparatively low hourly fee. The legal research and brief writing company is not located in California, and employs both lawyers (none of whom are licensed to practice law in California) and nonlawyers. Company promises to deliver a ready-to-file brief, to be signed by the California attorney. Company also promises to refund all fees paid to Company for the brief if the appeal is unsuccessful.

The attorney decides to hire Company to write the brief but has not decided yet whether to pass the charge through to the client, or to treat payment for the work as an internal cost.

Discussion

In this opinion, we address two fundamental issues. First, is it ethically permissible for a California attorney, in a civil case, to hire an out-of-state legal research and brief writing company to conduct legal research and/or draft legal briefs for the attorney's use in connection with the attorney's representation of the client? Second, if such arrangements are permissible, what must the attorney do to comply with the ethical issues presented by such arrangements? This opinion is not intended to apply to criminal cases, nor does it apply to any

case or any matter where the attorney has been appointed by the court.

We conclude that such arrangements may be ethically permissible, with some limitations depending on the specific terms and conditions of the arrangement, and provided that the attorney complies with several ethical requirements. Specifically, the Committee is of the opinion that the attorney may ethically enter into the arrangement

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with Company provided that the attorney at all times retains and exercises independent professional judgment in connection with the performance of the attorney's legal services for the client. The attorney must sign the brief and in so doing adopts the work and is ultimately responsible for the accuracy of the brief to both the court and to the client. Depending on the facts and circumstances, the attorney may have a duty to disclose to the client the nature and specifics of the contract with Company. The attorney is responsible for determining, and for ensuring, that there is no violation of client confidences or secrets, and that there is no conflict of interest created for the client by the attorney's contracting with Company. Finally, any refund of costs paid by Company to the attorney should be refunded to the client if the client is charged for the cost of the service.

Ethical Issues Involving Financial Arrangements with Company

Several rules address financial arrangements among lawyers, and between members and nonmembers of the State Bar of California.

California Rule of Professional Conduct [hereinafter "Rule" or "rule"] 1-310 states that a "member¹ shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership constitute the practice of law." A partnership generally involves a joint ownership and can be evidenced by firm name, declarations of coownership, or sharing of profits. (*Crawford v. State Bar*, 54 Cal. 2d 659, 667 (1960).) In this instance, the attorney has not formed a partnership with Company since the attorney has merely purchased services at a specified rate. Therefore, the restrictions contained in Rule 1-310 are inapplicable.

Rule 2-200 prohibits the division of "a fee for legal services with a lawyer who is not a partner, associate of, or shareholder with the member" unless the client has consented in writing after full disclosure, and the total fee charged by all lawyers is not increased by reason of the provision for division of the fees, and is not unconscionable as defined in Rule 4-200. Rule 2-200 is inapplicable here because Company charges the attorney a specific amount for its service and the contract between Company and the attorney does not involve the division of a legal fee paid by the client.²

The work being performed by Company is indistinguishable from other types of services that an attorney might purchase, such as hourly paralegal assistance, research clerk assistance, computer research, graphics illustrations, or other services. Thus, even if the attorney passes the cost directly on to the Client, the arrangement does not violate Rule 2-200.

Rule 1-320 provides that "[n]either a member nor a law firm shall directly or indi-

rectly share legal fees with a person who is not a lawyer." This rule is also inapplicable to the facts presented in this inquiry, since the attorney has contracted for services, at an hourly rate, from Company.

Aiding and Abetting in the Unlawful Practice of Law

Business and Professions Code Section 6125, which is part of the State Bar Act, states that "[n]o person shall practice law in California unless the person is an active member of the State Bar."³ Rule 1-120 states that "[a] member shall not knowingly assist in, solicit, or induce any violation of these rules [of Professional Conduct] or the State Bar Act." The practice of law includes giving legal advice and counsel and the preparation of legal instruments. (*Farnham v. State Bar*, 17 Cal. 3d 605, 612 (1976); *Crawford v. State Bar*, 54 Cal. 2d 659, 667-68 (1960).) The Committee is of the opinion that attorneys who contract for services which assist the attorneys in representation of their clients do not assist in a violation of Business and Professions Code Section 6125, so long as the attorney remains ultimately responsible for the final work product provided to or on behalf of the client.⁴

Duty to Inform the Client

Both Rule 3-500 and Business and Professions Code Section 6068, Subdivision (m), require that an attorney keep the client reasonably informed of significant developments relating to the employment or the representation.⁵ COPRAC Formal Opinion 2004-165 states that a member of the State Bar of California who uses an outside contract lawyer to make appearances on behalf of the member's client must disclose to the client the fact of the arrangement between the member and the outside lawyer when the use of the outside lawyer constitutes a significant development. Whether use of an outside lawyer constitutes a "significant development" is based upon the circumstances of each case. The opinion states that if, at the outset of the engagement, the member anticipates using outside lawyers to make appearances on the member's behalf for the client, that situation should be addressed in the written fee agreement which would also include specifying any costs of the appearance relationship that are billed to the client. That COPRAC opinion quotes relevant language in COPRAC Formal Opinion 1994-138:

Depending on the circumstances, Rule 3-500 and Business and Professions Code Section 6068(m) will generally require the law office to inform the client that an outside lawyer is involved in the client's representation if the outside lawyer's involvement is a significant development. In general, a client is enti-

tled to know who or what entity is handling the client's representation. However, whether use of an outside lawyer constitutes a significant development for purposes of Rule 3-500 and Business and Professions Code Section 6068(m) depends on the circumstances of the particular case. Relevant factors, any of which may be sufficient to require disclosure, include the following: (i) whether responsibility for overseeing the client's matter is being changed, (ii) whether the new attorney will be performing a significant portion or aspect of the work, or (iii) whether staffing of the matter has been changed from what was specifically represented to or agreed with the client. (See L.A. Cty. Bar Assn. Formal Opn. No. 473.) The listed factors are not intended to be exhaustive, but are identified to provide guidance.

The relationship with Company may be a "significant development" within the meaning of both Rule 3-500 and Business and Professions Code Section 6068, Subdivision (m), and, if a "significant development," the client must be informed of the specifics of the agreement between the attorney and Company.⁶ If possible, and where disclosure is required, disclosure of the nature and extent of the attorney/Company relationship should be made in the written retainer agreement. (COPRAC Formal Opinion 2004-265.⁷ See also LACBA Formal Opinion 473, which requires disclosure to the client where the expectation of the client is that the retained attorney alone will be acting as attorney for the client.)

Duty of Competence and Duty to Exercise Independent Judgment

An attorney has a duty to act competently in any representation. Rule 3-110 (A)-(C). "If the member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Rule 3-110 (C). Since the instant arrangement does not involve associating with or professionally consulting another lawyer, this arrangement cannot be the basis of the member's competence in this representation.

The discussion to Rule 3-110 states that compliance with that rule "include[s] the duty to supervise the work of subordinate attorney and non-attorney agents."⁸ Therefore, the attorney must review the brief or other work provided by Company and independently verify that it is accurate, relevant, and complete, and the attorney must

revise the brief, if necessary, before submitting it to the appellate court.

In addition to being competent, an attorney must also exercise independent professional judgment on behalf of the client at all times. (*Beck v. Wecht*, 28 Cal. 4th 289, 295 (2002) (fundamental duty of undivided loyalty cannot be diluted by a duty owed to some other person, which would be inconsistent with lawyer's duty to exercise independent professional judgment); *Dynamic Concepts Inc. v. Truck Insurance Exchange*, 61 Cal. App. 4th 999, 1009 (1998) (imposition of restrictions by third party on attorney's decisions may interfere with lawyer's duty to exercise independent professional judgment); *Crane v. State Bar*, 30 Cal. 3d 117, 123 (1981) (holding that "[a]n attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority".)) Therefore, in performing services for the client, the attorney must remain ultimately responsible for any work product on behalf of the client and cannot delegate to Company any authority over legal strategy, questions of judgment, or the final content of any product delivered to the client or filed with the court.

It follows that if a term of the agreement between the attorney and Company delegates to Company a decision-making function that is nondelegable, then the attorney may be assisting Company in the unauthorized practice of law or violating the ethical duties of competence and obligation to exercise independent professional judgment. An improper delegation might also affect the application of Rule 1-310 (prohibition against forming partnerships with nonlawyers), Rule 1-320 (sharing of legal fees with a nonlawyer) and Rule 2-200 (division of legal fees). For example, if Company contractually required the attorney to accept and use any work product delivered "as is" and without change, then the attorney might be improperly delegating the attorney's fundamental obligation to exercise independent professional judgment on behalf of the client. In this case, Company has promised a full refund of its fees if the appeal is unsuccessful. If a condition of that guarantee is that the attorney must accept and use the work product (for example, a legal brief) as written, or obtain Company's approval of any changes to the work product, then the attorney might be put into the position of having to elect between employing independent professional judgment on behalf of the client and losing a contractual guaranteed right which the attorney values.

The Committee is of the view that provisions of a guarantee which have the possibility of creating such a dilemma for the attorney could be considered a violation of the duty to exercise independent professional judgment

on behalf of the client. Thus, the attorney should ensure that no contractual provision in the agreement gives Company control over the final work product produced for the client.

Ethical Duties to the Court

An attorney is responsible for all of the attorney's submissions to the court. Any inaccuracies in the materials submitted to the court could not only be a violation of Rule 3-110, but also could be a violation of Rule 5-200(A) and (B),⁹ and a violation of Business and Professions Code Section 6068, Subdivision (d).¹⁰

Charging the Cost to the Client

The attorney may elect simply to pay Company for the cost of the legal research or brief without passing on any of the cost to the client. In such a case, the Committee believes that the attorney could keep any refund that might be received from Company under any otherwise ethical guarantee provision. However, the attorney may also elect to: (a) pass the cost directly on to the client for payment, (b) mark up the cost and pass the marked up cost on to the client, or (c) charge the client a flat fee. These scenarios have different consequences.

Sections of the California Business and Professions Code address an attorney's duty to advise a client about costs. Section 6147(a)(2) requires an attorney with a contingency fee agreement to disclose how disbursements and costs incurred in connection with the prosecution or settlement of the client will affect the contingency fee and the client's recovery. Section 6148 addresses many fee agreements not coming within the scope of Section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars. Under Section 6148(a)(1), the attorney must disclose any basis of compensation, including standard rates, fees, and charges applicable to the case. The attorney must also render bills that clearly identify the costs and expenses incurred and the amount of the costs and expenses. (See Bus. and Prof. Code §6148(b).)

Whether or not there is a written fee agreement between the attorney and the client, disclosure of the arrangement with Company may be required. See Rule 3-500 and Bus. and Prof. Code §6068, Subdivision (m), which require that the client be kept reasonably informed about significant developments relating to the representation and in regard to which the attorney has agreed to provide legal services. The Committee is of the opinion that if the client pays both the attorney's fees and costs of the contract with Company, the contract is a "significant development" within the meaning of both Rule 3-500 and Business and Professions Code Section 6068, Subdivision

(m), since the client has hired the attorney to prepare and submit the appellate brief.

The Committee believes that the attorney must accurately disclose the basis upon which any cost is passed on to the client. If the cost of Company's services is simply passed through to the client, the client should be so informed. The client should also be informed of the possibility of a refund of the cost if offered by the Company. If the attorney marks up the cost of Company's services, the attorney must disclose the mark-up. (Rule 3-500, Bus. and Prof. Code §6068(m).)

Illegal or Unconscionable Fee

Rule 4-200 subdivision (A) states that "[a] member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." Rule 4-200 explains that "[u]nconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events." Factors relevant to this inquiry in determining the conscionability of a fee include, but are not limited to:

- (1) The amount of the fee in proportion to the value of the services performed...
- (10) The time and labor required.
- (11) The informed consent of the client to the fee.¹¹

A fee which "shocks the conscience" is unconscionable. (*Bushman v. State Bar*, 11 Cal. 3d 558, 564 (1974).) Charging a fee and not providing substantial services has been determined to be grounds for discipline. (*Jones v. State Bar*, 49 Cal. 3d 273, 284 (1989).) Therefore, whether there is a violation of Rule 4-200 depends on the facts and circumstance of each specific situation as determined at the time the fee agreement is initiated. (Rule 4-200(A) and (B).)

The ethical issue presented here is whether the attorney's fee to the client could be deemed unconscionable because of the attorney's reliance on the work of the Company. The Committee believes that the amount paid by the attorney for Company's work is not determinative on the question of whether a fee is unconscionable. (*Shaffer v. Superior Court*, 33 Cal. App. 4th 993 (1995) (in legal malpractice action, the amount of money paid to a contract attorney by a law firm was found irrelevant to the question of whether law firm had charged client an unconscionable fee; nothing in Rule 4-200 suggests that the attorney's profit margin is relevant to the issue. What is relevant to the issue of conscionability is the fee which the client paid to the law firm as measured by the factors listed in Rule 4-200.))

Duty to Preserve Client Confidences and Secrets

COPRAC Formal Opinion 2004-165 explains

the duty to preserve inviolate client confidences and secrets:

Business and Professions Code section 6068(e) states: "It is the duty of an attorney [t]o...maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The scope of the protection of client confidential information under Section 6068(e) has been liberally applied. (See *People v. Singh*, 123 Cal. App. 365, 11 P. 2d 73 (1932).) The duty to preserve a client's confidential information is broader than the protection afforded by the lawyer-client privilege. Confidential information for purpose of Section 6068(e) includes any information gained in the engagement which the client does not want disclosed or the disclosure of which is likely to be embarrassing or detrimental to the client. (Cal. State Bar Formal Opn. No. 1993-133.) The duty has been applied even when the facts are already part of the public record or where there are other sources of information. (See L.A. Cty. Bar Assn. Formal Opn. Nos. 267 & 386.)

Confidential information can be disclosed to outside contractors so long as the outside contractors agree to keep the client confidences and secrets inviolate. (See LACBA Formal Opinions 374, 423 (use of centralized computer billing requires compliance with Business and Professions Code Section 6068, Subdivision (e)).) It is incumbent upon the attorney to ensure that client confidences and secrets are protected, both by the attorney and by Company, throughout and subsequent to the attorney's contract relationship with Company. (Rule 3-310, Discussion; LACBA Formal Opinion 374.)

Conflicts of Interest

Company may be working on other matters which conflict with and are potentially or actually adverse to the attorney's client. Rule 3-110, subdivision (A), imposes upon an attorney a duty to supervise the work of legal assistants, which includes the duty to "give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment...." (*Hu v. Fang*, 104 Cal. App. 4th 61, 64 (2002) (quoting ABA Model Rules Prof. Conduct, Rule 5.3, com.)) Therefore, the attorney should satisfy himself that no conflicts exist that would preclude the representation. See, e.g., Rule 3-310. 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 rela-

tionship with Company.

Rule 1-400 and Standard (1)

Rule 1-400 is directed to disciplinary restrictions on attorney advertising and solicitation.¹² Standard (1) of the rule creates a presumption of a violation of Rule 1-400 where a "communication" contains a guarantee or warranty regarding the result of the representation.¹³ A "communication" within the meaning of Rule 1-400 is "[a]ny unsolicited correspondence from a member [of the State Bar of California] or law firm directed to any person or entity." (Rule 1-400 (A)(4).) Company offers to refund to the attorney all its charges if the appeal is not successful. Since the representation of a contingent refund is made by Company to the attorney, it is not a "communication" within the meaning of rule 1-400 (A)(4) as defined above since Company is not a member of the State Bar of California, nor is Company a law firm.¹⁴ However, the attorney must consider the unconscionability of accepting any refund from Company which is not paid over to the client. (See discussion of rule 4-200, supra.)

This opinion is advisory only. The committee acts on specific questions submitted ex parte, and its opinion is based on the facts set forth in the inquiry submitted. ■

¹ A "member" for purposes of the California Rules of Professional Conduct "means a member of the State Bar of California." Rule 1-100 (B)(2).

² Several ethics opinions discuss when a payment constitutes a division of a fee. See, e.g., LACBA Formal Opinion 457 (discussing fee arrangements with non-lawyers) and State Bar of California Standing Committee on Professional Responsibility and Conduct (COPRAC) Formal Opinion 1994-138. COPRAC Formal Opinion 1994-138 concluded that the criteria to determine whether there is a division of fees is whether: 1) the amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client, 2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client, and 3) the outside lawyer has no expectation of receiving a percentage fee. If all three criteria are met, there is no division of fees. See also *Chambers v. Kay*, 29 Cal. 4th 142, 154 (2002).

³ It is a misdemeanor to hold oneself out as practicing or entitled to practice law or otherwise practicing law when not an active member of the State Bar of California. BUS. & PROF. CODE §6126.

⁴ Attorneys continually contract for assistance in legal research, preparation of documents, and expertise, be it from lawyers or nonlawyers, in furtherance of the representation of the client. It is the opinion of the Committee that where an attorney contracts for these types of services, it does not involve the unlawful practice of law. The same would apply under this inquiry.

⁵ The language of Rule 3-500 and the language of Business and Professions Code §6068(m) are slightly different. However, the disclosure requirements to the client under both provisions are the same. Rule 3-500 states: "[a] member shall keep a client reasonably informed about significant developments relating to the

employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." Business and Professions Code §6068(m) states that it is the duty of an attorney "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

⁶ In most instances, the filing of an appellate brief will be a "significant development."

⁷ The following language, found in COPRAC Formal Opinion 2004-165, is applicable to this inquiry: "The attorney bears the responsibility to be reasonably aware of the client's expectations regarding counsel working on client's matter because the responsibility can be readily discharged by the attorney through a standard written retainer agreement or disclosure before or during the course of the representation." Compare Cal. State Bar Formal Opn. No. 1994-138 at fn.8: "It would be prudent for the law firm to include the disclosure to the client in the attorney's initial retainer letter or make that disclosure as soon thereafter as the decision to hire is made." If Lawyer charges [contract lawyer's] fees and costs to the client as a disbursement, Business and Professions Code Sections 6147 and 6148 require Lawyer to state the client's obligations for those charges in the written fee agreement, if contemplated at the time of the initial fee agreement, to the same extent as other costs charged to the client."

⁸ Rule 1-100(C) states with respect to the purpose of "Discussions" to the rules: "Because it is a practical impossibility to convey in black letter form all of the nuances of the disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them."

⁹ Rule 5-200(A) and (B) state: "In presenting a matter to a tribunal, a member:

- (A) Shall employ, for the purposes of maintaining the causes confided to the member such means only as are consistent with truth;
- (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."

¹⁰ Business and Professions Code §6068(d) states that it is the duty of an attorney "[t]o employ, for maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

¹¹ See Rule 4-200(B) for the entire list of 11 "factors to be considered, where appropriate, in determining the conscionability of a fee...."

¹² "The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline." (Rule 1-100, Discussion.)

¹³ Standard (1) of Rule 1-400, for which there is a presumption of impropriety in violation of that rule, "Advertising and Solicitation," states: "[a] 'communication' which contains guarantees, warranties, or predictions regarding the result of the representation."

¹⁴ Were Company a "law firm," then the Standard would apply if the communication respecting the refund was deemed to be a guarantee or warranty regarding the result of the representation. However, that would be a concern of Company, and not the attorney to whom the communication was made unless the attorney was also to communicate the same representation to the client. It is assumed that is not the case under the facts of this inquiry. Since the focus of this opinion is solely upon the ethical obligations of the attorney, the application of the Standard to Company is not addressed.