SAN DIEGO BAR OPINION

Ethics Opinon 2007-1

I. FACTUAL BACKGROUND

A partner in a two-lawyer California litigation firm was contacted by a business acquaintance to defend a complex intellectual property dispute in San Diego Superior Court. The attorney and his partner had limited experience in intellectual property litigation.

The attorney nonetheless took the case and assured the client of his firm's ability to develop a solid understanding of the areas of law involved. Without telling his client, the attorney contracted on an hourly basis with Legalworks, a firm in India whose business is to do legal research, develop case strategy, prepare deposition outlines, and draft correspondence, pleadings, and motions in American intellectual property cases at a rate far lower than American lawyers could charge clients if they did the work themselves. None of the foreign-licensed attorneys at Legalworks held law licenses in any American jurisdiction.

The California attorney reviewed the work he got from Legalworks and signed all court submissions and communications with opposing counsel himself. The work of Legalworks was billed to the client at cost, but was classified on the bills in broad categories such as "legal research" or "preparation of pleadings."

Ultimately, the attorney and his partner obtained dismissal of the case on a summary judgment motion. When the client asked how the attorneys developed the theory on which summary judgment was granted, and had done the work so inexpensively, the attorney told him that virtually all of the work was done by India-based Legalworks.

II. QUESTIONS

A. Did the attorneys violate RPC 1-300 by aiding Legalworks in the unauthorized practice of law?

B. Did the attorneys have a duty to inform the client of the firm's arrangement with Legalworks before or at the time of entering the contract with Legalworks?

C. Did the attorneys violate RPC 3-110 by the extent to which that firm relied on Legalworks to provide substantive expertise that the attorneys lacked to defend the suit? Specifically, may a California lawyer with limited experience in the subject matter of the service to be undertaken outsource important responsibilities in performing the service to a "lawyer" reasonably believed to be competent who is not licensed or otherwise authorized to practice in California? Does the answer differ if the other lawyer is licensed to practice law in another U.S. state rather than in another country?

III. AUTHORITIES CITED

Cases
Baron v. City of Los Angeles (1970) 2 Cal.3d 535
Birbower, Montalbano, Condon & Frank, PC v.
Superior Court (1998) 17 Cal.4th 119
Bluestein v. State Bar (1974) 13 Cal.3d 162
Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.
(2002) 99 Cal.App.4th 1094
Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal.App.3d 1142
Crane v. State Bar (1981) 30 Cal.3d 117
Gafcon, Inc. v. Ponsor & Associates (2002) 98 Cal.App.4th 1388
Matter of Phillips (Rev.Dept. 2001) 4 Cal.State Bar Ct. Rpt. 315
People ex rel. Lawyers' Institute of San Diego v.
Merchants Protective Corp. (1922) 189 Cal. 531
Upjohn Co. v. United States (1981) 449 U.S. 383
Vaughn v. State Bar (1972) 6 Cal.3d 847

Statutes
California Business and Professions Code §6067
California Business and Professions Code §6068
California Business and Professions Code §6125
California Business and Professions Code §6126
California Evidence Code §912

Rules
ABA Model Rule 1.1
ABA Model Rule 5.1
ABA Model Rule 5.3
Rule of Court 227
Rule of Court 965
Rule of Court 983
Rule of Professional Conduct 1-100
Rule of Professional Conduct 1-300
Rule of Professional Conduct 3-110
Rule of Professional Conduct 3-500

Ethics Opinions
ABA Ethical Consideration 3-6
ABCNY Formal Op. 2006-3
Cal. State Bar Form. Opn. 1982-68
COPRAC Formal Opinion 1994-138
COPRAC Formal Opinion 2004-165
Los Angeles County Bar Association Professional Responsibility and Ethics
Committee Opinion No. 518 (June 19, 2006)

New York Committee on Professional and Judicial Ethics, Formal Opinion 2006-3 (August 2006)
Orange County Bar Formal Opinion No. 94-2002 (1994)
State Bar Opinion 1987-91

Other
David Lazarus, Looking Offshore: Outsourced UCSF notes highlight privacy risk. How one offshore worker sent tremor through medical system, S.F. Chron., March 28, 2004
Marcia Proctor, Considerations in Outsourcing Legal Work, Mich. Bar Journal, September 2005
Eileen Rosen, Corporate America Sending More Legal Work to Bombay, NY Times, March 14, 2004
Indian Evidence Act of 1972

IV. DISCUSSION

As an initial matter, the Committee emphasizes that a California attorney has a duty under the applicable law and rules to act loyally and carefully at all times. Outsourcing does not alter the attorney's obligations to the client, even though outsourcing may help the attorney discharge those obligations at lower cost.

A. Did the Attorneys Aid the Unauthorized Practice of Law?

California Business and Professions Code section 6125, part of the State Bar Act, states: "No person shall practice law in California unless the person is an active member of the State Bar." RPC 1-300(A) states: "A member shall not aid any person or entity in the unauthorized practice of law." Leading or assisting the layman in his or her unauthorized practice of law is considered aiding and abetting in California. (Bluestein v. State Bar (1974) 13 Cal.3d 162 ; Cal. Bus. & Prof. Code §§ 6125 and 6126.)

The State Bar Act does not define the practice of law. In 1922, the California Supreme Court defined the practice of law as "the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure." (People ex rel. Lawyers' Institute of San Diego v. Merchants Protective Corp. (1922) 189 Cal. 531, 535, internal quotation marks and citation omitted.) The practice of law "includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court." (Ibid., internal quotation marks and citations omitted.) The definition delineates "those services which only licensed attorneys can perform." (Baron v. City of Los Angeles (1970) 2 Cal.3d 535, 543.)

The California Supreme Court has refined the scope of the unauthorized practice of law to include legal work by New York attorneys in connection with prospective private arbitration in California. (Birbower, Montalbano, Condon & Frank, PC v. Superior Court (1998) 17 Cal.4th 119 ("Birbower").) In that fee collection/malpractice action, the Court

rejected the New York attorneys' argument that section 6125 is not meant to apply to out-of-state attorneys. "Competence in one jurisdiction does not necessarily guarantee competence in another. By applying section 6125 to out-of-state attorneys who engage in the extensive practice of law in California without becoming licensed in our state, we serve the statute's goal of assuring the competence of all attorneys practicing law in this state." (Id. at 132.)

In Birbower, the Court focused on what is meant by the practice of law "in California" for purposes of section 6125. The Court concluded that the New York attorneys "clearly" had practiced law "in California" in violation of section 6125 by: (1) traveling to California on several occasions over a two-year period to discuss with the client and others various matters pertaining to the dispute; (2) "discuss[ing] strategy for resolving the dispute and advis[ing] [the client] on this strategy" in California; (3) meeting with the client "for the stated purpose of helping to reach a settlement agreement and to discuss the agreement that was eventually proposed"; (4) and traveling to California "to initiate arbitration proceedings before the matter was settled." (Id. at p. 131.)

The Court further made it clear that section 6125 could be offended by actions taken by the attorneys when they were not physically present in the state. "The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state or created a continuing relationship with the California client that included legal duties and obligations. [] Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. . . . For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means." (Id. at pp. 128-129.) Conversely, the Court rejected a rule that "a person automatically practices law in California' whenever that person practices California law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite." (Id. at p. 129, emphasis in the original, citations omitted.) In other words, physical presence in the state is neither necessary nor sufficient to engage in activities constituting the practice of law "in California" in violation of section 6125. Instead, California courts "must decide each case on its individual facts." (Ibid.)

Nonetheless, it is clear from the nature of the work Legalworks performed that, if Legalworks had done the work directly for the client, Legalworks would have been engaged in the unauthorized practice of law.(1) The question is whether Legalworks' act of contracting to do the work for a California attorney, who in turn exercised independent judgment(2) in deciding how and whether to use it on the client's behalf, rendered the services that Legalworks provided something other than the practice of law. We conclude that it did.

While there is no case law on point(3), there is instructive case law in analogous contexts. In Gafcon, Inc. v. Ponsor & Associates (2002) 98 Cal.App.4th 1388, an insured sued an insurer's captive law firm seeking a declaration, among other things, that the insurer had engaged in the unauthorized practice of law by using the captive firm briefly to defend the insured. Both the trial court and the Court of Appeal rejected the contention. The insurer

did not “influence or interfere” with the attorney’s ability to represent the insured or direct or control the attorney’s representation in any way. (Id. at 1415.)

In further determining that the insurer had not engaged in the impermissible corporate practice of law, the Court of Appeal favorably discussed State Bar Opinion 1987-91, even while emphasizing it was not bound by State Bar Opinions. That State Bar Opinion concluded that in-house counsel does not aid an insurer in engaging in the unauthorized practice of law by representing insureds in litigation as long as, among other things, “the insurance company does not control or interfere with the exercise of professional judgment in representing insureds. . . .” (Gafcon, Inc., 98 Cal.App.4th at 1413, citing State Bar Opinion 1987-91 at *1.) The State Bar Opinion further concluded that use of salaried employee attorneys within an insurer’s law division to represent insureds does not violate the corporate practice of law “as long as [inter alia] attorneys within the law division (1) do not permit the division to ‘become a front or subterfuge for lay adjustors or others unlicensed personnel to practice law;’ [and] (2) adequately supervise nonattorney personnel working under the attorneys’ supervision. . . .” (Gafcon, Inc., 98 Cal.App.4th at 1413, quoting State Bar Opinion 1987-91. See also Orange County Bar Formal Opinion No. 94-002 (1994) (opining that a paralegal who does work of a preparatory nature, such as drafting initial estate planning documents, is not engaged in the unauthorized practice of law where the attorney supervising the paralegal maintains a "direct relationship" with the client, citing ABA Ethical Consideration 3-6.) The key issue appears to be the amount of supervision over the non-lawyer: the greater the independence of the non-lawyer in performing functions, the greater the likelihood that the non-lawyer is practicing law.

Thus, the attorney does not aid in the unauthorized practice of law where he retains supervisory control over and responsibility for those tasks constituting the practice of law. The authorities make it clear that under no circumstances may the non-California attorney “tail” wag the California attorney “dog.”(4) The California Supreme Court in Birbower specifically rejected the trial court’s implicit assumption that the New York attorneys may have been able to perform the legal work that they did in California had they simply associated California counsel into the case. There is “no statutory exception to section 6125 [that] allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar.” (Birbower, 17 Cal.4th at 126, note 3. Compare Rule of Court 983, authorizing pro hac vice admission to practice of law in California of out-of-state attorney in good standing in his jurisdiction who associates an active member of the California bar as attorney of record and subjects himself to the California Rules of Professional Conduct.)

The California lawyer in this case retained full control over the representation of the client and exercised independent judgment in reviewing the draft work performed by those who were not California attorneys. His fiduciary duties and potential liability to his corporate client for all of the legal work that was performed were undiluted by the assistance he obtained from Legalworks. In short, in the usual arrangement, and in the scenario described above in particular, the company to whom work was outsourced has assisted the California lawyer in practicing law in this state, not the other way around. And that is not prohibited.(5)

B. Did the Attorneys Have the Duty to Inform the Client of the Firm's Arrangement with Legalworks?

The only published California opinion which addresses this issue, LACBA Opinion No. 518, concludes that the use by a California lawyer of the services of non-lawyers (commonly referred to as "outsourcing") "may be a 'significant development' within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m)", and that, when it is a "significant development", rule 3-500 and Section 6068 require that the California attorney inform the client prior to utilizing the outsourcing service. Opinion 518 applies COPRAC's analysis in Formal Opinion 2004-165 (this opinion holds that the use of a contract lawyer may be a "significant development" which would require that the client be informed) to services provided by non-lawyers. Formal Opinion 2004-165, in turn, relies upon the rule established in Formal Opinion 1994-138, in which COPRAC found that the use of an outside lawyer can constitute a "significant development".

Formal Opinion 2004-165 holds that the use of a contract lawyer may be a "significant development" but acknowledges that the determination of whether the use of a contract lawyer is a "significant development" is based upon the circumstances of each case. Opinion No. 518 considers the somewhat different issue of whether the client must be informed of a decision to "outsource" the drafting of an appellate brief to a non-lawyer outsourcing company, but relies upon Formal Opinion 2004-165 to conclude similarly that "[t]he relationship with [the outsourcing company] may be a 'significant development' within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m)". Although Opinion No. 518 further states that "[i]n most instances, the filing of an appellate brief will be a 'significant development'," it does not provide specific guidance under other facts.

Although an issue may once have existed as to whether the decision to use the services of lawyers outside of the attorney's firm could constitute a "significant development" which required that the client be informed, that issue appears settled by both COPRAC Formal Opinions 1994-138 and 2004-165. Formal Opinion 1994-138, recognizes that the use of another attorney is a "significant development", but states that the determination of "whether it is a significant development" should be made by considering the following factors: (1) whether responsibility for overseeing the client's matter is being changed; (2) whether the new attorney will be performing a significant portion or aspect of the work; and (3) whether staffing of the matter has been changed from what was specifically represented to or agreed to by the client. In Formal Opinion 2004-165, COPRAC held that the determination as to whether a development is "significant" is not only a function of the three factors discussed in Formal Opinion 1994-138, but also whether the client had a "reasonable expectation under the circumstances" that a contract lawyer would be used to provide the service. To determine whether the "outsourcing" of services to non-lawyers is a "significant development," Opinion No. 518 merely extends COPRAC's analysis in "contract lawyer" cases to that factual scenario. Although the factual scenarios are different in each case, all of these decisions clearly are founded upon a recognition that the determination of whether and when to inform the client as to the use of outside services can be a "significant

event" is a function of the client's expectations with respect to the services which are to be provided by the attorney.

We agree with Opinion No. 518 that the factors addressed by COPRAC in Formal Opinion 2004-165 should not be limited to the use of outside attorneys, and will also determine whether the client must be informed when a service is "outsourced" by an attorney to a non-attorney. The analysis of Formal Opinion 2004-165 should not be limited to whether the service to be "outsourced" technically involves the practice of law; to the contrary, the duty to inform the client is determined by the client's reasonable expectation as to who will perform those services. Therefore, if the work which is to be performed by the outside service is within the client's "reasonable expectation under the circumstances" that it will be performed by the attorney, the client must be informed when the service is "outsourced". Conversely, if the service is not a service that is within the client's reasonable expectation that it will be performed by the attorney, the attorney is not necessarily required to inform the client immediately, absent other requirements compelling disclosure.

We believe that, in the absence of a specific understanding between the attorney and client to the contrary, the "reasonable expectation" of the client is that the attorney retained by the client, using the resources within the attorney's firm, will perform the work required to develop the legal theories and arguments to be presented to the trial court, and that the attorney will have a significant role in preparing correspondence and court filings.(6)

C. Did the Attorneys Violate RPC 3-110 by the Extent to which the Firm Relied on Legalworks to Provide Substantive Expertise that the Attorneys Lacked?

1. Duty of Competence

Section 6067 of the California Business & Professions Code recites the attorney's oath "to faithfully discharge the duties of an attorney at law to the best of his knowledge and ability." California Rule of Professional Conduct 3-110(A) states, “A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” Rule 3-110(B) defines acting with “competence” to mean applying “the 1) diligence, 2) learning and skill, and 3) mental, emotional and physical ability reasonably necessary for the performance of such service.”

An attorney may, consistent with the duty of competence, enlist the services of others when they are unfamiliar with the area of law at stake. Specifically, RPC 3-110(C) states, “If a 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.” (See also ABA Model Rule 1.1, Comment 1 – competent representation can be provided by associating with counsel that established competence in a particular field.)

An attorney unfamiliar with the area of law in a case must acquire the knowledge and skill necessary to act competently in the case. The attorney may acquire that knowledge and skill by learning the area of law, associating experienced counsel who already knows the law, or other means suited to the case. Failure to acquire such knowledge can be the basis for sanctions. (See CRC 227.) Overall, the duty to act competently requires an attorney to know whether they can handle a particular case and, if they are unable to do so, the attorney must choose a suitable alternative to protect the client's interests.

Retaining a firm experienced in American intellectual property litigation does not relieve the attorney from the duty to act competently. The attorney retains the duty to supervise the work performed competently, whether that work is outsourced out-of-state or out of the country.(7) An attorney's duty to act competently in a supervisory role is highlighted in the discussion section of rule 3-110, which states, "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorneys and non-attorney employees or agents." (See Crane v. State Bar (1981) 30 Cal.3d 117, 123 ("An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority;" see also ABA Model Rule 5.1(b) – "a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to insure that the other lawyer conforms to the rules of professional conduct.")

Nor does procuring work product from a firm experienced in American intellectual property litigation fulfill the attorney's duty to act competently. To satisfy that duty, an attorney must be able to determine for himself or herself whether the work under review is competently done. To make such a determination, the attorney must know enough about the subject in question to judge the quality of the work.

As noted above, there are various ways an attorney may acquire the knowledge needed to perform such a review. Whether an attorney has acquired such knowledge will, of course, depend on the facts and issues of the case at hand. An attorney may not, however, rely on a firm such as Legalworks to evaluate its own work. The duty to act competently requires informed review, not blithe reliance.

In addition to knowledge of the legal and factual issues in a case, and regardless of the attorney's level of expertise and experience in the subject matter of the assignment, the duty of competence may require an attorney to learn enough about a firm such as Legalworks to evaluate its general quality and reliability. The degree to which the duty requires such an inquiry will depend on the facts of the case. Factors relevant to (though not exhaustive of) discharging the duty could include inquiry into (a) pertinent background information about the firm (such as industry reputation), and the individuals (such as qualifications), who will perform the work; (b) references of the firm or individuals assigned to perform the work. The duty also could require that the attorney (c) interview the firm in advance; (d) request a sample of the firm's work product that is comparable to your project; (e) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and executing it to the attorney's expectations; and (f) review ethical standards with individuals who will perform work and incorporate the ethical standards into the terms of the contract with the firm. (See ABCNY Formal Op.

2006-3; Marcia Proctor, Considerations in Outsourcing Legal Work, Mich. Bar Journal, September 2005, at 24.)

In the hypothetical scenario, whether the attorney discharged his duty of competence – or even whether he was capable of discharging his duty of competence without further study before accepting the representation – turns on how "limited" his experience was in intellectual property litigation at the time of the outsourcing. There is plainly a point at which an attorney will lack sufficient understanding of a kind of legal work that he will be unable to accept the work and outsource aspects of it at all because he will be incapable of critically and independently evaluating the work product he receives. The outsourcing posited by the hypothetical may constitute "professionally consulting another lawyer reasonably believed to be competent" for purposes of RPC 3-110 only if the attorney's "limited" experience was sufficiently substantial to enable him to perform that indispensable evaluative function.

2. Responsibility for Work

In addition to bearing a duty to competently supervise the performance of the outsourced work, an attorney also retains ultimate responsibility for that work. (Vaughn v. State Bar (1972) 6 Cal.3d 847, 857; Matter of Phillips (Rev.Dept. 2001) 4 Cal.State Bar Ct. Rpt 315, 335-336; Cal. State Bar Form. Opn. 1982-68; ABA Model Rule 5.3). By retaining responsibility for the work, the supervising attorney is subject to the ABA Model Rules that hold a lawyer responsible for another lawyer's violation of professional responsibility rules where: 1) the lawyer orders or ratifies the misconduct; or where 2) the lawyer has supervisory authority over the other lawyer and knows of the conduct at the time when the consequences could have been avoided or mitigated but failed to take remedial action. (ABA Model Rule 5.1(c) & Comment 5.)(8)

3. Considerations in Supervising Work Performed Abroad

The degree of supervision warranted for outsourced work was magnified by the work being performed in India rather than a United States jurisdiction. A number of obstacles can arise when work is assigned to foreign companies. An attorney acting with competence will foresee and understand such obstacles and will weigh them against the client's interests. Some legal ethics experts, like Stephen Gillers, believe that "[t]here is no problem with offshoring, because even though the lawyer in India is not authorized by an American state to practice law, the review by American lawyers sanitizes the process." (Ellen Rosen, Corporate America Sending More Legal Work to Bombay, NY Times, March 14, 2004.) We agree only to a point. In order to satisfy the duty of competence, an attorney should have an understanding of the legal training and business practices in the jurisdiction where the work will be performed.

One factor should be considered when outsourcing work is the educational background of those persons performing the work. While an attorney in another U.S. state will have a legal educational background comparable to that of the assigning attorney, an attorney abroad may not. The necessary training to become a lawyer differs around the world. In order to

determine the applicable ethical rules, a lawyer must first determine whether the worker is a "nonlawyer" or "lawyer" within the foreign jurisdiction. In order to do so, the U.S. lawyer must know something about the requirements of lawyering where the work will be performed and the credentials of those who will actually perform the work. In cases where the attorney is supervising nonlawyers, reasonable steps must be taken to ensure that the nonlawyer's conduct meets the assigning attorney's professional obligations. (ABA Model Rule 5.3(b).) In the instant scenario, this means the lawyer should make sure that anyone who assists on the case will not expose the assigning attorney to a possible violation of the professional responsibility rules in the attorney's jurisdiction. (ABA Model Rule 5.1(b).)

Other questions the State Bar may consider in determining the adequacy of supervision of non-California lawyers include: i. whether the non-attorney be disciplined, perhaps even terminated, by the attorney for improper conduct; ii. whether the non-attorney's compensation be adjusted by the attorney for poor performance by the non-attorney; iii. whether the non-attorney has been educated and/or trained in any way by the attorney; iv. whether the attorney has the ability to review the non-attorney's work ethics and practices; v. whether the attorney regularly provides input to the non-attorney on his/her performance; and vi. whether the attorney has the ability or discretion to restrict or confine the non-attorney's areas of work or scope of responsibility. In the case of a paralegal or other employee, the answer to these questions would be yes, but for an overseas lawyer the answers would be no. Those distinctions as well, then, justify a heightened duty of supervision under the hypothetical facts.

In addition, part of acting competently in the case of outsourcing work is ensuring other duties are fulfilled as well. An additional duty of an attorney who outsources work, whether within the U.S. or abroad, is to "maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, or his or her client." (See Business & Professions Code section 6068(e).) This is especially important as the legal and ethical standards applicable to foreign lawyers may differ from those applicable to domestic lawyer, particularly with respect to client confidentiality, the attorney-client privilege, and conflicts of interests.(9) One unfortunate example of a breach of confidentiality involving an outsourced project concerns a medical transcription project that was subcontracted to India. There, the subcontractor threatened to post confidential patient records on the Internet unless the UC San Francisco Medical Center retrieved money owed to the subcontractor from a middleman. (David Lazarus, Looking Offshore: Outsourced UCSF notes highlight privacy risk. How one offshore worker sent tremor through medical system, S.F. Chron., March 28, 2004.)

Legalworks was not retained as an attorney but to provide law-related assistance. Thus, there would be an argument that the attorney-client privilege that applies in the outsourcing company's jurisdiction would be irrelevant. Instead, the applicable rule is that the attorney-client privilege is not waived for disclosure of information "reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted . . . ." (Cal. Evid. Code §912(d).) As the above example shows, it is not clear that California privilege law would apply to a threatened breach of confidentiality by the outsourcing

company. Given the uncertainty – not to mention the substantial geographical distances -- imposing a duty of heightened due diligence is warranted.

V. CONCLUSION

The Committee concludes that outsourcing does not dilute the attorney's professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged. Under the hypothetical as we have framed it, the California attorneys may satisfy their obligations to their client in the manner in which they used Legalworks, but only if they have sufficient knowledge to supervise the outsourced work properly and they make sure the outsourcing does not compromise their other duties to their clients. However, they would not satisfy their obligations to their clients unless they informed the client of Legalworks' anticipated involvement at the time they decided to use the firm to the extent stated in this hypothetical.

1. The important effect of that conclusion is that corporations, at least, may not directly contract with non-California attorneys to represent them in court in California absent pro hac vice admission of the attorney by the court. "As a general rule, it is well established in California that a corporation cannot represent itself in a court of record either in propria persona or through an officer or agent who is not an attorney." (Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd. (2002) 99 Cal.App.4th 1094, 1101, citations omitted. See also Rule of Court 965, requiring registration of non-California in-house counsel advising corporations with California contacts and prohibiting their appearance in court absent pro hac vice admission.)

2. See discussion, infra, at Section C(1) regarding the attorney's duty of competence to be able to evaluate Legalworks' work product.

3. Through a somewhat different route, we reach the same general conclusion on this point as our colleagues in the Los Angeles County Bar Association. (See LACBA Professional Responsibility and Ethics Committee Opinion No. 518 (June 19, 2006) pp. 5-6 ("LACBA Opinion"). See also, Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2006-3 (August 2006).)

4. See LACBA Opinion at p. 9: "[I]n performing services for the client, the attorney must remain ultimately responsible for any work product on behalf of the client and cannot delegate to [outsourcing] 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 non-delegable, 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." We differ only in not qualifying the conclusion that such an abdication of a non-delegable duty would constitute assisting in the unauthorized practice of law in violation of RPC 1-300.

5. We do not address the interesting and perhaps fact-specific question whether an attorney who is incompetent to evaluate the work of an outsourced contractor, even if he retains control over the matter and exercise such independent judgment as he can, would indeed violate the prohibition on assisting the contractor in the unauthorized practice of law. For a discussion of the duty of competence, see infra Section (C)(1).

6. The client's reasonable expectation does not preclude use of employees of the attorney's firm, including partners, associate attorneys and paralegals, to perform work on the case, including research and drafting of documents. It should not ordinarily preclude other attorneys of the firm from making appearances on behalf of the client.

7. We note that California Rule of Professional Conduct 1-100 (B)(3) defines the term "lawyer" to include members of the State Bar of California, attorneys licensed in other state, the District of Columbia, and United States territories, "or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof."

8. In this case, of course, the ABA Model Rule is only applicable by analogy. As set forth in part II.A above, the work was not delegated and the person doing the work was not a California attorney. That, however, imposes more of a supervisory burden on the attorney not less of one.

9. Under India's attorney-client privilege, no attorney may: "(i) disclose any communication made to him in the course of or for the purpose of his employment as such attorney, by or on behalf of his client; (ii) state the contents or condition of any document with which he has become acquainted in the course of and for the purpose of his professional employment; or (iii) disclose any advise [sic] given by him to his client in the course and for the purpose of such employment." (Indian Evidence Act of 1972, quoted at www.lexmundi.com, India.) The attorney-client privilege is more limited than in America. For example, "[a]n in-house counsel is not recognized as an 'attorney' under Indian law. Thus, professional communications between an in-house counsel and officers, directors and employees are not protected as privileged communications between an attorney and his client. . . ." (lexmuni.com, India. Compare: "In Upjohn Co. v. United States (1981) 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, the United States Supreme Court expanded the previous 'control group test' and held that all confidential communications concerning the scope of their employment between corporate employees and the corporation's in-house counsel are covered by the attorney-client privilege." Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal.App.3d 1142, 1151 holding, however, that attorney-client privilege did not apply where in-house counsel merely acted as a negotiator, gave business advice, or otherwise acted as company's business agent. (Ibid).)

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