



## **ETHICAL CONSIDERATIONS IN OUTSOURCING OF LEGAL SERVICES**

### **SUBMISSIONS TO THE FLORIDA BAR PROFESSIONAL ETHICS COMMITTEE**

**Meeting in Orlando, Florida on Friday, June 29, 2007**

#### **1. Introduction**

The growth of legal outsourcing overseas by USA attorneys over the past two years has naturally prompted examination of appropriate and applicable ethical considerations. Within the last year, ethical guidelines for lawyers have been issued by at least three bar associations – the Los Angeles County Bar Association (June 2006)<sup>1</sup>, Bar of the City of New York (August 2006)<sup>2</sup> and the San Diego County Bar Association (January 2007)<sup>3</sup>. The Florida Bar is now looking into the matter. With legal outsourcing offshore (principally to India) being taken up by more and more law firms and corporate legal departments throughout USA, it is only natural that other Bar Associations are quite likely to issue their own professional ethics guidelines.

Clearly, one ought to read the three issued guidelines in full, as well as the applicable ABA Formal Comments and Rules, together with the relevant Rules of Professional Conduct of the Bar Associations, to understand in detail the various rules that apply to this subject. Broadly, the three guidelines above, which are specifically on this subject, conclude that US attorneys may ethically outsource legal support services to lawyers and non-lawyers abroad (both of whom are effectively “non-lawyers” for the US Bar Associations), provided certain basic ethical obligations are met. These ethical obligations would most likely arise even if the legal outsourcing was to another attorney within USA. The principal ethical obligations, when outsourcing legal work abroad, are:

- a. The US attorney needs to adequately supervise the non-lawyer;
- b. The US attorney needs to act competently and exercise independent judgment;
- c. The client’s confidences and secrets need to be preserved;
- d. Avoid conflicts of interest;
- e. Bill for the outsourcing work appropriately; and
- f. When and where necessary, obtain advance client consent to outsourcing.

Each of these is discussed below briefly, with a suggested list of “Recommended Considerations” established and practiced by *Ius Juris* to help ensure that the ethical obligations of USA attorneys are satisfied.

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<sup>1</sup> <http://www.lacba.org/Files/Main%20Folder/Documents/Files/Eth518%20PDF.pdf>

<sup>2</sup> [http://www.nycbar.org/Publications/reports/print\\_report.php?rid=503&searchterm=2006](http://www.nycbar.org/Publications/reports/print_report.php?rid=503&searchterm=2006)

<sup>3</sup> <http://www.sdcba.org/ethics/ethicsopinion07-1.htm>

## **2. Duty to Supervise**

### **a. Ethical Obligation**

The duty to supervise applies in two ways: one is to avoid aiding the non-lawyer in the unauthorized practice of the law, and the other is to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client. This duty is non-delegable.

### **b. Practice of Law**

Clearly, a lawyer cannot aid a non-lawyer in the unauthorized practice of the law. However, law firms and in-house legal departments rely heavily on legal assistants and other non-lawyers to help render legal services more cost-effectively and efficiently. But at the same time, the lawyer needs to supervise and take complete responsibility for the work done by these non-lawyers to avoid aiding the unauthorized practice of law.

The same principle applies when outsourcing legal work, whether within USA or abroad. The lawyer must apply professional skill and judgment in setting the scope of the non-lawyer's work, and vetting that work and ensuring its quality. The lawyer needs to exercise proper supervision of the work to ensure that the non-lawyer is not engaging in unauthorized practice of law.<sup>4</sup>

### **c. Representing Client Competently**

Proper supervision is critical in ensuring that a lawyer represents his/her client competently. The fact that the non-lawyer is based abroad means that this duty needs to be discharged more vigilantly.

Florida attorneys are required to directly supervise non-lawyers who are employed or retained by the attorneys. The Florida attorneys also have an obligation to make reasonable efforts to ensure the non-lawyers' conduct is consistent with the ethics rules. This is required regardless of whether the Legal Outsourcing Company staff providing the services are attorneys or not in their jurisdiction<sup>5</sup>. Additionally, the non-lawyers need to clearly identify their non-lawyer status when dealing with the Florida attorneys' clients and prospective clients, and give no legal advice<sup>6</sup>.

### **d. Recommended Considerations**

- i. Obtain background information about the Legal Outsourcing Company providing the outsourced services;
- ii. Obtain the resume of all the non-lawyers (including the people who are lawyers in their own jurisdictions) working on the Florida attorney's matters;
- iii. Interview and speak to the non-lawyers in advance over the telephone or web, in order to ascertain the non-lawyer's suitability for the particular assignment;
- iv. Communicate with the non-lawyer during the assignment and provide guidance as necessary, in order to ensure that the non-lawyer's work is in accordance with the lawyer's expectations;

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<sup>4</sup> Professor Stephen Gillers of NYU School of Law, a legal ethics expert, has stated that "even though the lawyer [in the foreign country] is not authorized by an American state to practice law, the review by American lawyers sanitizes the process". Professor Geoffrey Hazard, Jr. of University of Pennsylvania Law School stated that if foreign attorneys are "acting under the supervision of US lawyers, I wouldn't think it would make much difference where they are."

<sup>5</sup> Rule 4-5.3, Rules Regulating The Florida Bar.

<sup>6</sup> Professional Ethics of The Florida Bar Opinion 88-6.

- v. Ascertain what supervisory checking and quality processes are in place within the Legal Outsourcing Company to supervise and check the non-lawyer's work before it is handed over to the Florida attorney.
- vi. Advise the Legal Outsourcing Company and its relevant staff to identify themselves as non-lawyers and not give legal advice when dealing with the Florida attorney's clients or prospective clients.

### **3. Competence & Exercising Independent Judgment**

#### **a. Ethical Obligation**

The Florida attorney has a duty to act competently in any representation. He/she needs to have sufficient learning and skill, either in himself/herself or by associating with another Florida attorney. In addition, he/she must also exercise independent professional judgment on behalf of the clients at all times.

The Florida attorney must remain ultimately responsible for any work product on behalf of the client. He/she must review the work done by the Legal Outsourcing Company, and independently verify that it is accurate, relevant and complete, making revisions where necessary. He/she cannot delegate any authority over legal strategy, questions of judgment, or the final content of any work product delivered to the client or filed with the court.

#### **b. Recommended Considerations**

- i. The Recommended Considerations for "Duty to Supervise" (above) all apply.
- ii. The Florida attorney needs to have competence (learning and skill) in the work given to the Legal Outsourcing Company.
- iii. The Florida attorney ought to ascertain if the work will be done by a "lawyer" or "non-lawyer" within the foreign jurisdiction. Clearly, if the person is a non-lawyer, a higher level of supervision, care and instructions will need to be given.
- iv. The Florida attorney ought to take adequate steps to review the work product the Legal Outsourcing Company and its staff do for the Florida attorney.

### **4. Client's Confidences and Secrets**

#### **a. Ethical Obligation**

The lawyer has a duty to preserve the client's confidences and secrets. A "confidence" is generally "information protected by the attorney-client privilege under applicable law"<sup>7</sup> or "includes any information gained in the engagement which the client does not want disclosed or disclosure of which is likely to be embarrassing or detrimental to the client"<sup>8</sup>. A "secret" is "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client"<sup>9</sup>. A lawyer is required to exercise reasonable care to prevent his/her employees and anyone else he/she engages from disclosing or using confidences or secrets of clients.

Attorney-client privilege extends to the work product created by the Legal Outsourcing Company, where the purpose is to aid the US attorney in giving legal advice to the client.<sup>10</sup>

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<sup>7</sup> New York Code of Professional Responsibility: DR 4-101

<sup>8</sup> California State Bar Formal Opinion No. 1993-133

<sup>9</sup> New York Code of Professional Responsibility: DR 4-101(A)

<sup>10</sup> United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961)

**b. Recommended Considerations**

- i. Restrict access to confidences and secrets, or, give access to only those confidences and secrets as are necessary for the non-lawyer to perform the task given;
- ii. The Florida attorney needs to enquire about the security measures (technological and physical) the Legal Outsourcing Company takes to protect confidential information;
- iii. Have contractual provisions addressing confidentiality and remedies in the event of breach;
- iv. Give periodic reminders regarding confidentiality;
- v. Engage a Legal Outsourcing Company that has a valid, substantive and registered corporate presence in USA, quite apart from having its offices and staff in India.

**4. Conflicts Check**

**a. Ethical Obligation**

A US law firm is generally required to maintain contemporaneous records of prior engagements and to have a system for checking proposed engagements against current and prior engagements. A law firm is also generally required to add information about the prior engagements of lawyers who join the firm. This latter requirement does not generally apply to non-lawyers joining a law firm, although there could be exceptions to that under special circumstances.

**b. Recommended Considerations**

- i. The lawyer ought to ask the Legal Outsourcing Company about its conflict checking procedures;
- ii. The lawyer ought to also ask the Legal Outsourcing Company, and the non-lawyer(s) performing the legal support services, whether either is performing or has performed, services for any parties adverse to the lawyer's client;
- iii. Restrict access to confidences and secrets, or, give access to only those confidences and secrets as are necessary for the non-lawyer to perform the task given;
- iv. The lawyer should pursue further inquiry as required;
- v. The lawyer should from time to time remind the Legal Outsourcing Company and its relevant staff of the need for them to safeguard the confidences and secrets of their current and former clients;

**5. Billing Appropriately & Financial Arrangements**

**a. Ethical Consideration**

The US attorney may elect to pay the Legal Outsourcing Company for the cost of the work done without passing any of the cost to the client, or pass the cost directly on to the client, or mark up the cost and pass the marked up cost to the client, or charge the client a flat fee.

The US attorney must accurately disclose to the client, in the retainer agreement, the basis upon which any cost is passed on to the client. Apart from the three issued guidelines, there are also the ABA Formal Opinions<sup>11</sup> to consider here, as well as The Florida Bar Consolidated Opinion for Florida attorneys<sup>12</sup>.

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<sup>11</sup> ABA Formal Opinions 88-356, 93-379, and 00-420

<sup>12</sup> The Florida Bar Consolidated Opinion 76-33 and 76-38 regarding billing for non-lawyers.

Consequently, if the US attorney bills the client for the cost of the outsourced legal services as a disbursement, the charge can only be for the actual cost of the services, with, in our submission, a reasonable overhead for managing the outsourcing relationship. This overhead can be the time spent in delegating, supervising and reviewing the work done by the Legal Outsourcing Company. The basis of such costs needs to be communicated to the client.

If the US attorney does not bill the client directly for these costs, but includes them in his/her legal services, we submit he/she could charge a premium , as long as the US attorney vouches for the work product as his/her own and the overall fees are reasonable. The US attorney in this case would be using the Legal Outsourcing Company's work product as assisting him/her to give legal advice to his/her client. He/she reviews such work product to formulate the legal advice to the client.

In a contingent fee case, it would not appear prudent to charge separately for the work done by the Legal Outsourcing Company, but rather that the fee be part of the standard fee paid to the Florida attorney.

**b. Recommended Considerations**

- i. The US attorney must disclose to the client the basis upon which the client is expected to pay for any legal work outsourced. This can be in the retainer agreement with the client.

**6. Advance Client Consent to Outsourcing**

**a. Ethical Consideration**

The lawyer's obligations here are akin to where a contract or temporary lawyer is used. The obligation to disclose legal outsourcing of a client's matter to the client depends upon whether:

- i. client confidences and secrets will be disclosed to the non-lawyer,
- ii. the degree of involvement of the non-lawyer in the matter,
- iii. the significance of the work done by the non-lawyer,
- iv. whether responsibility for overseeing the client's matter is being changed, and
- v. whether the client has a reasonable expectation that only personnel hired by the law firm will handle the matter.

The Los Angeles Bar Association guidelines couches this obligation in terms of "significant development", in that a client needs to be advised of these, and whether outsourcing of part of the client's matter is a "significant development" would depend on the factors listed above. If, for example, the non-lawyer makes strategic decisions or performs other work that the client would expect of the senior lawyers working on client matters, then this should be disclosed to the client and the client's consent obtained.

**b. Recommended Considerations**

- i. Use the factors cited above to determine if it is necessary to seek a client's informed consent to outsource legal support work abroad.

## **7. Conclusions**

Legal Outsourcing produces significant cost and time savings, together with greater efficiencies and improved client service. These can far outweigh the obligations that arise as a result of this relationship, and which obligations need to be met. These obligations are, by and large, an extension of the obligations that already have existed for employing junior attorneys, paralegals and other staff members in a firm, or engaging a contract or temporary lawyer.

A well-structured relationship with an appropriate Legal Outsourcing Company will provide significant benefits to the US attorney.

A US attorney ought to be able to outsource legal support services abroad as long as the ethical guidelines above are adequately addressed.