PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 07-2
January 18, 2008

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

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

RPC: 4-1.6, 4-5.3, 4-5.5,
OPINIONS: 68-49, 73-41, 76-33, 76-38, 88-6, 88-12, 89-5; Los Angeles County Bar Association 518, City of New York Bar Association 2006-3
CASES: *Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980); *Florida Bar v. Sperry*, 140 So. 2d 587 (Fla. 1962)

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

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

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

Rule 4-5.5, Rules Regulating The Florida Bar, prohibits an attorney from assisting in the unlicensed practice of law. In *Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), judg. vacated on other grounds, 373 U.S. 379 (1963) the Court found that setting forth a broad definition of the practice of law was "nigh onto impossible" and instead developed the following test to determine whether an activity is the practice of law:

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

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

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

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

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

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

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

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

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

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

Attorneys who use overseas legal outsourcing companies should recognize that providing adequate supervision may be difficult when dealing with employees who are in a different country. Ethics opinions from other states indicate that an attorney may need to take extra steps to ensure that the foreign employees are familiar with Florida's ethics rules governing conflicts of interest and confidentiality. *See* Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518 and Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2006-3. This committee agrees with the conclusion of Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518, which states that a lawyer's obligation regarding conflicts of interest is as follows:

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

Of particular concern is the ethical obligation of confidentiality. The inquirer states that the foreign attorneys will have remote access to the firm's computer files. The committee believes that the law firm should instead limit the overseas provider's access to only the information necessary to complete the work for the particular client. The law firm should provide no access to information about other clients of the firm. The law firm should take steps

such as those recommended by The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Opinion 2006-3 to include "contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality."

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

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

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

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

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

> [T]he lawyer should not in fact or effect duplicate charges for services of nonlawyer personnel, and if those charges are separately itemized, the salaries of such personnel employed by the lawyer should in some reasonable fashion be excluded from consideration as an overhead element in fixing the lawyer's own fee. If that exclusion cannot, as a practical matter, be accomplished in some rational and reasonably accurate fashion, then the charges for nonlawyer time should be credited against the lawyer's own fee.
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> As to whether knowledge and specific advance consent of the client as to such uses of nonlawyer personnel, and charges therefor, are necessary, the Committee majority feels that it is in some instances and is not in others. For example, it would not seem appropriate for a lawyer to always have to seek the consent of the client as to use of a law clerk in conducting legal research. And under EC 3-6 and DR 3-104 the work delegated to nonlawyer personnel should be so much under the lawyer's supervision and ultimately merged into the lawyer's own product that the work will be, in effect, that of the lawyer himself, who presumably has entered into a "clear agreement with his client as to the basis of the fee charges to be made." EC 2-19. However, we feel that such "clear agreement" could not exist in many situations where the lawyer intends to make substantial use of nonlawyer personnel, and to bill directly or indirectly therefor, unless the client is informed of that intention at the time the fee agreement is entered into.
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> Therefore, if there is a potentiality of dispute with, or of lack of clear agreement with and understanding by, the client as to the basis of the lawyer's charges, including the foregoing elements of nonlawyer time, whether or not the nonlawyer personnel time is to be separately itemized, the lawyer's intention to so use nonlawyer personnel and charge directly or indirectly therefor should be discussed in advance with, and approved by, the client. This would seem especially the case where substantial use is to be made of any kind of such nonlawyer services. See also EC 2-19 as to explaining to clients the reasons for particular fee arrangements proposed.
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> The Committee suggests that the potentiality of such dispute or lack of clear agreement and understanding referred to in the foregoing paragraph may exist in the case of work to be done by nonlawyer personnel who are employed by the lawyer and who perform services of a type known by the lay public to be

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

The law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third party provider.

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