ETHICAL CONSIDERATIONS IN THE OUTSOURCING OF LEGAL SERVICES[1]

In the typical outsourcing[2] arrangement, a law firm (the "Firm") hires a licensed attorney from outside the Firm (the "Outside Attorney") to perform a discrete task or work on a particular matter. The work is supervised by the Firm, which retains the attorney-client relationship with the client and remains ultimately responsible for the case.

Outsourcing has become increasingly common because of the benefits it provides to all participants. Outsourcing can provide a firm with additional, experienced attorneys to ramp up quickly on big projects, without incurring the legacy costs associated with traditional employees. The client benefits by paying less for attorneys' fees, while the firm benefits from a better financial structure. Even the American Bar Association ("ABA") has noted the benefits of outsourcing:

> The outsourcing trend is a salutary one for our globalized economy. . . . Outsourcing affords lawyers the ability to reduce their costs and often the cost to the client to the extent that the individuals or entities providing outsourced services can do so at lower rates than the lawyer's own staff. In addition, the availability of lawyers and nonlawyers to perform discrete tasks may, in some circumstances, allow for the provision of labor-intensive legal services by lawyers who do not otherwise maintain the needed human resources on an ongoing basis. A small firm might not regularly employ the lawyers and legal assistants required to handle a large, discovery-intensive litigation effectively. Outsourcing, however, can enable that law firm to represent a client in such a matter effectively and efficiently, by engaging additional lawyers to conduct depositions or to review and analyze documents . . . .

American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 08-451, August 5, 2008.

The ABA and virtually every state to have considered the issue in the past ten years has authorized of the practice of outsourcing, provided that the Rules of Professional Responsibility are satisfied. *See, e.g.*, Florida Ethics Opinion 07-2 (January 18, 2008). While the ethical issues at play in the outsourcing relationship are not particularly complicated, they must be observed properly to protect the client, the Firm, and the Outside Attorney.

The main ethical issues are (1) conflicts of interest; (2) the duty of confidentiality; (3) the duty of competence; (4) the unlicensed practice of law; (5) the duty to inform the client; and (6) the attorneys' fees.

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[1] This paper only provides an overview of information regarding legal outsourcing generally. This paper does not, nor should it be construed as, providing any legal advice, or forming any attorney-client relationship.

[2] The "outsourcing" of legal services should be distinguished from the practice of "offshoring." In an offshoring model, the firm sends work to foreign countries, such as India, for legal services to be performed at extremely discounted rates. Such offshoring arrangements can be controversial, and the quality of the services provided are often dubious, although such arrangements can be permissible when appropriate safeguards are put in place. This paper does not address "offshoring." Rather, this paper provides general information regarding the far more common and increasingly widespread practice whereby a U.S. law firm uses a licensed attorney from outside the firm as an independent contractor to perform legal work for the firm on a temporary or project basis, under the supervision of the firm.

1. Conflicts of Interest

Conflicts can arise with respect to current clients and former clients. An attorney may not represent current clients who are directly adverse to each other. R. Reg. Fla. Bar 4-1.7. Nor may an attorney represent a client whose interests are adverse to a former client in a substantially related matter, unless the former client gives informed consent. R. Reg. Fla. Bar 4-1.9. In addition, conflicts of one lawyer in a firm are imputed to the other lawyers in the firm, and imputed conflicts can arise when a lawyer's former law firm previously represented a client in a substantially related matter, and that lawyer obtained confidential information about the client. R. Reg. Fla. Bar 4-1.10.

In all of these situations, conflicts can be avoided by maintaining a standard, up-to-date list of current and former clients and diligently performing conflict checks before each new matter is undertaken. In addition, imputed conflicts can be minimized by limiting the Outside Attorney's access to the Firm's computer system, so that confidential client information is not available to the Outside Attorney. *See* ABA Formal Opinion 88-356 (stating that, "[i]f the contract attorney works on a single matter for the firm and has no access to information concerning other clients, then the contract attorney would not be deemed associated for imputed disqualification purposes"). With the proper safeguards in place, conflicts of interest can be identified easily to ensure that clients' interests are protected, and attorneys do not inadvertently run afoul of the conflict-of-interest rules.

2. The Duty of Confidentiality

Maintaining clients' confidential information is a bedrock principle of the attorney-client relationship. If it is necessary to disclose confidential information to the Outside Attorney, the Firm must obtain informed consent from the client prior to the disclosure. If confidential information is disclosed, it is incumbent upon the Outside Attorney to have safeguards in place to maintain the confidentiality of that information.

In practice, it is often unnecessary to disclose confidential information to the Outside Attorney. For example, drafting a memorandum of law on a discrete legal issue generally will not require the disclosure of confidential information to the Outside Attorney. Similarly, drafting a brief on appeal usually involves working from the record on appeal and evidence submitted to the trial court, which ordinarily is a matter of public record. Nevertheless, if the disclosure of confidential information to the Outside Attorney is necessary for the representation, then the duty of confidentiality is satisfied if the Firm obtains informed consent from the client in writing prior to disclosure, and the Outside Attorney maintains the confidentiality of that information.

3. The Duty of Competence

As always, the work must be performed competently. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. ABA Model Rule 1.1, Comment 1. The Firm remains ultimately responsible for the end work product.

Given the importance of the duty of competence, it is critical to use attorneys with the experience and skill to perform the work competently. Hiring the right Outside Attorney for outsourced legal services not only helps meet the duty of competence, but it could result in an end work product that is better than the Firm would have been able to produce without the assistance of the Outside Attorney.

4. The Unlicensed Practice of Law

Using a licensed Outside Attorney eliminates any potential issues regarding the unlicensed practice of law. However, if the services are provided by a non-attorney, or by an attorney who is not licensed in the state where the services are being performed, care must be taken to avoid the unlicensed practice of law. A lawyer may not practice law in a jurisdiction other than where the lawyer is licensed, nor may a lawyer assist another in doing so. R. Reg. Fla. Bar 4-5.5.

The Rules of Professional Conduct contemplate the temporary practice of law in another jurisdiction when the legal services are undertaken in association with a lawyer who is admitted in that jurisdiction and who actively participates in the matter. In addition, whether a person is practicing law in a particular state depends on the nature and extent of the activities that person is engaging in there. The Rules do not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises and retains responsibility for their work. *See* R. Reg. Fla. Bar 4-5.3. Similarly, a Firm can utilize the services of an Outside Attorney from another state, so long as the Firm supervises and retains ultimate responsibility for the work. *See* Florida Ethics Opinion 07-2 (January 18, 2008); San Diego County Bar Association Ethics Opinion 2007-1. Accordingly, to avoid any issues regarding aiding and abetting the unlicensed practice of law, the Firm must review the work, have the skill and experience to determine that it has been performed competently, and remain ultimately responsible for the end work product, particularly if the Outside Attorney is not licensed to practice in the state where the work is being performed.

5. Informed Consent of the Client

In 2012, the American Bar Association Commission on Ethics 20/20 revised Paragraph 6 to the comments on ABA Model Rule 1.1 (Competence) to explain that "[b]efore a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assis in the provision of legal services to a client, the lawyer should *ordinarily* obtain informed consent from the client and must reasonably believe that the other lawyer's servies will contribute to the competent and ethical representation of the client." MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt.6 (2018) (emphasis added). The Commission explained that it "was reluctant to conclude that consent is always required, because consent may not be necessary when a nonfirm lawyer is hired to perform a discrete and limited task, especially if the task does not require the disclosure of confidential information." ABA COMM'N ON ETHICS 20/20, 105C at, 5 (August 2012).

Accordingly, under the ABA Model Rules, whether informed consent is required depends on the nature of services provided in the specific circumstances. Florida follows a similar rule. *See* Florida Ethics Opinion 07-2 (January 18, 2008). The Firm must obtain informed consent for outsourced legal services if the client's confidential information is disclosed to the Outside Attorney, or if the client would view the outsourcing arrangement as material or as a significant development in the case. Client consent is probably unnecessary if no confidential information is disclosed, and the Outside Attorney is hired to perform a discrete, limited task, closely supervised by the Firm. However, there

are some states in which informed consent of the client to the outsourcing arrangement is always necessary. *See, e.g.,* Opinion 2009-6, Supreme Court of Ohio, August 14, 2009 (concluding that the informed consent of the client is always required prior to outsourcing legal services to lawyers).

It is preferable and is often a simple matter (usually through a well-drafted retainer agreement) to obtain the informed consent of the client to the outsourcing arrangement in writing, and it is essential to do so in those jurisdictions where informed consent of the client is always required. Usually, the outsourcing arrangement is viewed as a benefit when explained to the client, as the client often appreciates the savings that can be achieved through the outsourcing arrangement.

6. Attorneys' Fees

The professional services of a licensed attorney, charged as a fee, should be distinguished from services that are charged as a cost (or disbursement). If charged as a cost, the Firm can only charge the client the amount that was actually paid to the Outside Attorney, without any additional mark up. However, if the Outside Attorney's services are charged as a fee, then the ABA Model Rules indicate that the Firm may charge the client a "surcharge" to compensate for the cost of supervising the work and overhead, so long as the overall fee charged to the client is reasonable. *See* ABA Formal Opinion 00-420; ABA Formal Opinion 08-451; *see also* Opinion 2009-6, Supreme Court of Ohio, August 14, 2009 (concluding that a surcharge may be added, so long as it reasonable and communicated to the client); Association of the Bar of the City of New York, Formal Op. 200-3 (2006) (requiring informed client consent to the billing arrangement if a surcharge is to be charged). Charging a surcharge in the outsourcing relationship is virtually indistinguishable from the common practice engaged in by all law firms of paying associates less than their time is billed to the client. There are no written Florida decisions directly addressing the surcharge issue in the context of legal services provided by an attorney, although these issues have been addressed in the context of nonlawyer personnel. *See* Florida Ethics Opinion 07-2, (January 18, 2008). Prior informed written consent to any fee arrangement should be obtained from the client through a well-drafted retainer agreement.

Conclusion

In summary, the same ethical concerns that ordinarily exist in modern legal practice also apply in the context of the outsourcing arrangement. Clients should be advised and agree in writing to the outsourcing arrangement, as well as to any surcharge for the services, if applicable, as part of the retainer agreement. The Firm and the Outside Attorney should diligently perform conflict checks to avoid conflicts of interest, and the Outside Attorney should carefully maintain all confidential and privileged information. The outsourcing arrangement can be easily accomplished with a well-written retainer letter and attention to ethical considerations on the part of the Firm and the Outside Attorney.