

Practical and Ethical Considerations of Legal Outsourcing

Originally Presented at:
Harry Phillips American Inn of Court
The University Club of Nashville
Nashville, Tennessee
February 20, 2007

Last Updated:
September 2008
Includes discussion on
ABA Formal Op. 08-451 (2008)
(Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services)

LEXADIGM

www.lexadigm.com

Disclaimer: Lexadigm Solutions LLC is not a law firm and is not engaged in the practice of law. The information contained in this memorandum is for informational purposes only and shall not be considered as a legal opinion or legal advice. This memorandum shall not substitute the recipient's independent obligation to ensure compliance with the laws of the United States and other countries.

Copyright 2007 - 2008 by Lexadigm Solutions LLC. All rights reserved.

Executive Summary

The American Bar Association Standing Committee on Ethics and Professional Responsibility issued long awaited Formal Opinion No. 08-451 (Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services) on August 5, 2008. In its opinion, the ABA embraced legal outsourcing by acknowledging that it is "a salutary one for our globalized economy." The ABA rightfully noted that "[o]utsourcing 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 legal services can do so at lower cost than the lawyer's own staff," thereby allowing a lawyer to more "effectively and efficiently" represent clients. The ABA concluded that there is nothing unethical about legal outsourcing, provided that certain ethical standards are maintained. The ethics standards the ABA identifies in Formal Opinion 08-451 are consistent with previous opinions issued by other local and state bar agencies on this matter and with other ethics opinions on similar on-shore services. All these items are covered in great length in this white paper on Practical and Ethical Considerations of Legal Outsourcing.

Lexadigm originally assembled this white paper in February 2007 and first presented it at the Harry Phillips American Inn of Court, in Nashville, Tennessee on February 20, 2007. This white paper was subsequently updated in September 2008 to incorporate all events since the last edition, including but not limited to ABA Formal Op. 08-451 and ethics opinions by the Florida and North Carolina State Bars on this matter. The ABA Opinion on this issue is a milestone in breaking barriers to the legal outsourcing trend, which is already rapidly gaining acceptance in the United States and other developed countries. The ABA Opinion generally covers the ethical considerations to take into account when outsourcing legal work overseas, but it does not provide much detail on how to go about meeting those considerations and other practical considerations around outsourcing. This white paper comprehensively covers all such considerations and provides lawyers with guidance on how to comply with such considerations.

About Lexadigm

Founded in 2004, Lexadigm is a legal and intellectual property support service company with offices in the United States and India. By using highly skilled teams of professionals in the United States and India, Lexadigm delivers high quality intellectual property, contract drafting and review, e-discovery and research services to corporations and law firms around the world, while reducing cost and enhancing quality. To learn more about Lexadigm please visit us at www.lexadigm.com.

I. Introduction

Outsourcing consists of distributing work traditionally handled within a company or firm to an outside contractor for performance.¹ The recent trend in legal outsourcing is to send work historically performed by law firms in the United States to other countries such as India.² Generally, tasks that are being outsourced abroad are similar to the work being performed by paralegals and legal assistants in the United States.³ Such tasks are typically called “commodity work” which can include document review, legal research, patent applications, contract drafting, litigation support services and paralegal services.⁴ One of the major concerns in outsourcing of legal work to countries like India is the application of the strict ethical requirements of the legal profession in the United States. These requirements not only mandate that legal advice can be given only by lawyers licensed to practice in the United States but also limit to a great extent the type of work that can be performed by foreign educated and foreign trained lawyers not licensed to practice in the United States.

The first section of this paper discusses the ethical issues relating to outsourcing legal work. Subsequently, this paper discusses how legal outsourcing generally operates. We also explore why India is a suitable destination for legal outsourcing, the kinds of services that are suitable to outsource, and issues of which to be cautious when outsourcing. Finally, the paper examines the work flow processes of one legal outsourcing firm, Lexadigm Solutions LLC, as a case study to better articulate the process of legal outsourcing to India.

II. Ethical Considerations When Outsourcing Legal Work Overseas

Outsourcing of legal support services overseas to foreign attorneys (i.e. non-lawyers) is ethically permissible provided the lawyer (A) preserves the client’s confidences and secrets, (B) avoids conflicts of interests, (C) appropriately supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer’s work contributes to the lawyer’s competent presentation of the client, (D) bills the client appropriately for outsourcing, and (E) when necessary, obtains advance client consent.⁵

A. Maintain Confidentiality and Security of Client Information

Current ethics rules, such as Model Rule 1.6,^{*} impose a duty on a lawyer to preserve “the information relating to the representation of a client unless the client gives informed

^{*} Many jurisdictions have adopted versions of Model Rule 1.6 that retain the Mode Code’s formulation, protecting clients’ “confidences and secrets,” as apposed to “information relating to the representation.” *Compare* Michigan Rules of Prof. Cond. Rule 1.6(a) (protecting clients “confidences and secrets”), *with* Tenn. Sup. Ct. R. 8, RPC 1.6(a) (protecting “information relating to representation”). “‘Confidence’ refers to information protected by the client-lawyer privilege under applicable law, and ‘secret’ refers to 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.” MI Rules of Prof. Cond. Rule 1.6(a). “Information relating to the representation” appears to have a broader scope of protection than “confidences” (i.e. information protected under attorney-client privilege, including under attorney-work product doctrine) and “secrets,” and would include any information relating to the representation and not limited to confidences and secrets. *See* Mod. Rules of Prof. Cond. Rule 1.6, Comment [3] (stating [t]he confidentiality rule...applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”)

consent.”⁶ A lawyer may make such disclosures as “impliedly authorized in order to carry out the representation.”⁷ This “implied authorization” of Rule 1.6(a) to share client confidences with other attorneys, temporary attorneys and non-attorneys within the firm does not extend to outside entities or to individuals.⁸ Therefore, before disclosing client confidences to outside entities and individuals (including legal outsourcing companies), a lawyer must obtain client’s informed consent.⁹ When outsourcing legal work overseas, however, the attorney’s responsibility to ensure that client confidences are maintained must be reconciled with the need to fully articulate appropriate information and considerations necessary for the firm performing the outsourced work to complete its task. Lawyers should take the following considerations into account to ensure confidentiality when outsourcing:

1. Since the law on confidentiality can vary in other countries, the attorney outsourcing legal work overseas must ensure that his or her retainer agreement with the service provider explicitly creates an obligation on the part of the service provider to maintain confidences and take adequate measures to ensure that the confidentiality is actually maintained to the level of the attorney’s jurisdiction.
2. Strictly limit the service provider’s access to confidential information. For instance, for document review services, documents should be hosted on third-party servers that are secured and provide limited access to the personnel working on the matter. Furthermore, access to information should be limited by providing explicit provisions in the retainer agreement requiring the outsourcer to appropriately destroy client documents at the end of the engagement.
3. Ensure that the outsourcing company has a strong U.S. presence and can be held accountable in the United States in the event major issues arise with the quality and content of the outsourced work product. The retainer agreement should explicitly establish the venue and jurisdiction for any claims within the United States and select a particular state for the choice of law provision.
4. Ensure that all work is serviced by the service provider under close supervision of managers who are attorneys licensed to practice law in the United States and are physically located in the United States. This is beneficial for multiple reasons. It ensures quality of work product that the attorney is accustomed to seeing. Also, since the ethics rules in the United States impose similar professional responsibility standards on members of the bar when they are practicing law or engaged in a business, the managers (i.e. U.S. attorneys) also have an ethical responsibility to ensure compliance with all ethical standards.¹⁰
5. Before retaining the outsource service provider, the attorney should inquire as to the measures taken by the service provider to ensure security of the information. The foreign attorneys and professionals retained by the service provider must be adequately trained and contractually obligated to maintain confidences, the service provider should undertake adequate technological and physical measures

to ensure confidentiality, and should aggressively enforce its confidentiality policy.

6. The service provider should be reminded throughout the process that it is working as an agent of the retaining attorney and that all communications are therefore protected under the attorney-client privilege and the attorney work-product doctrine, as well as the strict provisions of the retainer agreement with the outsourcing firm.[†]

B. Avoid Conflict of Interest

Modern ethics rules seek to maintain a lawyer's loyalty and independent judgment in relation to each client. Mod. Rules of Prof. Cond. Rule 1.7 prohibits a lawyer from representing a client if the representation of that client will be directly adverse to another client or may be materially limited by the lawyer's responsibility to another client or to a third person or by the lawyer's own interests, unless the lawyer reasonably believes that there will be no adverse effect and the client consents after consultation. Mod. Rules of Prof. Cond. Rule 1.8 sets forth the transactions prohibited by the conflict of interest rules. Rule 1.9 forbids a lawyer from representing a client whose interests are adverse to a former client of the lawyer. Furthermore, Rule 1.10[‡] imputes the disqualification of one lawyer to an entire law firm.

[†] All communications between a client and an attorney for the purpose of seeking legal advice are protected under the attorney-client privilege. *U.S. v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002); *Broessel v. Triad Guar. Ins. Corp.* 238 F.R.D. 215, 218 (D. Ky. 2006). Attorney-client privilege applies to confidential information given by an attorney to any other witness, insurer, paralegal or non-lawyer where the purpose is to aid the requesting attorney in giving legal advice to the client. *See, e.g., United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (holding that attorney-client privilege extended to an accountant when the accountant acted at the direction of the lawyer to provide information for the client); *Owens v. First Family Financial Services, Inc.*, 379 F.Supp.2d 840, 848 (S.D. Miss. 2005) (holding that attorney-client privilege applies with equal force to paralegals who works on behalf of a lawyer representing a client); *In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 661 (3d Cir. 2003) (holding that attorney-client privilege applies to non lawyers who are employed to assist a lawyer in the performance of any professional legal services). Furthermore, any notes, working papers, memoranda or similar materials prepared by an attorney in anticipation of litigation are protected from discovery under the attorney work-product doctrine. *Conoco Inc. v. U.S. Dept. of Justice*, 687 F.2d 724, 729, n.3 (3d Cir. 1982); *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 259-260 (D. Ill. 2000). All documents prepared by or for the attorney are within the qualified immunity given to work product, so long as they are prepared in anticipation of litigation. *See, e.g., United States v. Aldman*, 134 F.3d 1194 (2d Cir. 1998); *United States v. El Paso Co.* 682 F.2d 550 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984); *Wal-Mart Stores, Inc. v. Dickinson*, 29 S.W.3d 796 (Ky. 2000) (holding that work product prepared by a paralegal for the attorney in anticipation of litigation is protected under the work-product doctrine); *Citizens Progressive Alliance v. U.S. Bureau of Indian Affairs*, 241 F.Supp.2d 1342, 1358 (D. N.M. 2002) (holding that attorney work-product privilege extends to the attorney's agents).

[‡] Mod. Rules of Prof. Cond. Rule 1.10 provides:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

The American Bar Association Standing Committee on Ethics and Professional Responsibility (“Committee”) addressed the issue of conflicts of interest pertaining to retaining temporary lawyers who work for multiple law firms in ABA Formal Op. 88-356, when it analyzed a situation analogous to providing outsourced legal services to multiple law firms and legal departments. The Committee noted that the restrictions in Rules 1.7 and 1.9 are applicable to the temporary attorneys.¹¹ In other words, under Rule 1.7, in the absence of the client’s consent and subject to certain other conditions laid out in the rule, a temporary lawyer cannot simultaneously work on matters for clients of the different firms if representation of each were directly adverse to the other.¹² Similarly, in the absence of informed consent of the former client and subject to other conditions stated in the rule, Rule 1.9 would restrict a temporary lawyer who worked on a matter for a client of one firm subsequently from working for a client of another firm on same or substantially related matter in which that client’s interests are materially adverse to the interests of the client of the first firm.¹³

On the issue of imputed disqualification which arises in situations where a temporary lawyer performs work for two law firms with conflicting clients, the Committee noted where the temporary lawyer while working at the first firm did not have access to or acquired confidential information of the first firm’s conflicting client and did not directly work on the matter, the temporary lawyer and the temporary lawyer’s subsequent employer are not disqualified from representing a client with a direct conflict with a client of the first firm. The Committee reasoned that “as the direct connection between the temporary lawyer and the work on matters involving conflicts of interest between clients of two firms become more remote, it becomes more appropriate not to apply Rule 1.10 to disqualifying a firm from representation of its clients or to prohibit the employment of the temporary lawyer.”¹⁴ The Committee further noted that in order to avoid the risk of imputed disqualification that might arise when retaining temporary lawyers who work with multiple law firms:

[the] firms should, to the extent practicable, screen each temporary lawyer from all information relating to clients for which the temporary lawyer does no work. All law firms employing temporary lawyers also should maintain a complete and accurate record of all matters on which each temporary lawyer works. A temporary lawyer working with several law firms should make every effort to avoid exposure within those firms to any information relating to clients on whose matters the temporary lawyer is not working. Since a temporary lawyer has a coequal interest in avoiding future imputed disqualification, the temporary lawyer should also maintain a record of clients and matters worked on.¹⁵

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Attorneys must take the following considerations into account when outsourcing work to avoid conflicts of interests:

1. Inquire into the conflict checking procedures in place at the service provider and how it tracks work performed for other clients. Ascertain whether the outsource service provider maintains a complete and accurate record of all matters for which work is outsourced and the particular overseas employees who have worked on each client matter.
2. Limit the exposure that the foreign attorneys will have to the client's confidential materials to only those necessary to complete the actual assignment. Avoid exposing the foreign attorneys to any information on any other client on which the foreign attorneys are not working.
3. Maintain accurate records of clients and matters on which the foreign attorneys have worked. Also, maintain a record of any confidential information provided to the outside service provider to assist you with distinguishing information covered by attorney-client privilege from information obtained by the foreign attorneys from third-parties and thus not necessarily confidential.
4. Avoid any appearance of the foreign attorneys being "associated with" or "associated in" your firm. This is necessary to avoid the risk of your imputed disqualification based on any work that an outside provider may have done for a firm representing a client with a direct conflict against your client.¹⁶ As discussed above, "as the direct connection between the temporary lawyer and the work on matters involving conflicts of interest between clients of two firms become more remote, it becomes more appropriate not to apply Rule 1.10 to disqualifying a firm from representation of its clients or to prohibit the employment of the temporary lawyer."¹⁷ Therefore, it is advisable to be transparent about the independent relationship between your firm and the outside provider when communicating with the client, and avoid representing the independent service provider as an associate.

Of course, attorneys should avoid using a particular outsourcing solution immediately if an actual conflict of interest arises, unless and until consent to the use of such provider can be obtained from the appropriate parties affected.

C. Duty to Adequately Supervise and Oversee

A lawyer has a duty to adequately supervise subordinate attorneys and non-lawyers who work for the lawyer. The requisite degree of supervision consists of what is reasonable under the circumstances, taking into account factors such as experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.¹⁸ When delegating work to a non-lawyer assistant, a lawyer should ensure that the lawyer (i) understands the assistant's abilities, limitations and training, and limits the assistant's responsibilities

accordingly; (ii) educates and trains the assistant with respect to the applicable ethical standards; (iii) monitors and supervises the assistant to prevent any violation of ethical standards; (iv) continually monitors and supervises the assistant's work; (v) assures that the assistant does not engage in the unauthorized practice of law; (vi) assumes responsibility for the improper conduct of the assistant; and (vii) limits the assistant's direct contact with the client.¹⁹ Moreover, "the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality."²⁰ Proper supervision is also important to ensure that the lawyer represents the client competently.²¹

Some considerations to take into account to discharge the duty of adequate supervision and oversight when outsourcing work include the following:

1. Obtain background information about the lawyers employed by the outsourcing service provider who will be working on assignments. Such background information should assist you in ascertaining the professional skills and experience level of the personnel to be deployed on your assignments.
2. In order to ascertain the professional skills and experience level of the service provider, also inquire whether the service provider has completed projects in the past which are similar to your needs, and whether they could provide writing samples and/or references.
3. Review the work flow processes of the service provider to determine the level of internal review and oversight utilized by the service provider before work product is returned to you from the foreign attorneys. Ensure that your work product will be ultimately managed and reviewed by a manager or a team leader who is an experienced U.S. attorney.
4. Avoid permitting your professional skills and judgment to be substituted for those of the service provider and set the appropriate scope for service provider's work early in the engagement. Subsequently, take adequate measures to inspect the non-lawyer's work and to ensure its quality.
5. Start slow in developing a relationship with the service provider and test their capabilities by initially giving them smaller and controlled projects. Delegate more responsibility to the service provider only after you have tested the quality of the work product and are certain that the service provider can deliver up to your expectations.
6. Always ensure that the attorney reviewing the service provider's work product in your firm or legal department knows enough about the subject matter to independently make a determination of the quality of service provider's work product.

Ultimately, the attorney referring work to an outsourcing firm is responsible for the product produced on behalf of his or her client, and should utilize the same supervisory standards that such attorney would employ when overseeing the work of any paralegal, law clerk or associate within the attorney's own firm.

D. Billing for Outside Legal Support Services

A lawyer cannot share legal fees with non-lawyers.²² A lawyer shall not practice law in a jurisdiction in which the lawyer is not licensed or assist another person to engage in unauthorized practice of law.²³ Rule 1.5(e) limits a lawyer's ability to share legal fees with another lawyer not a member of the lawyer's firm, when division is proportionate to services performed by each lawyer or each lawyer assumes joint responsibility for representation and the client provides informed consent in advance to such representation and fee sharing. Furthermore, the total fee charged by the lawyer shall be reasonable.²⁴ The lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished.²⁵

In ABA Formal Op. 93-379, while addressing the billing of expenses and disbursements in the context of goods or services of *non-lawyers*, the Committee noted that "[a] lawyer may not charge a client more than her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses, except to the extent that the lawyer incurs costs additional to the direct cost of the third-party services."²⁶ In its Formal Op. 00-420, the ABA extended the above stated application of Formal Op. 93-379 to temporary lawyers as well.²⁷ Furthermore, in its Formal Op. 08-451, the ABA applied the same principle to outsourced legal services.²⁸ Therefore, when a lawyer bills a client for services of non-lawyers or temporary/contract lawyers as an expense (or disbursement), the lawyer shall not charge more than the lawyer's disbursement for the services provided, plus any reasonable overhead cost related to managing the third-party (service provider) relationship.²⁹ Conversely, substantial authority exists permitting a law firm to charge a premium over temporary lawyer's services when such services are billed as a part of the legal services, provided that the lawyer vouches for the work of the temporary attorney and the total charges are reasonable.³⁰ Regardless of whether the costs associated with temporary lawyers/non-lawyers are charged as a disbursement or are included in the fees for legal services, attorneys are obligated to disclose the basis on which the client is expected to incur such costs in the retainer agreement.³¹

Consistent with the foregoing obligations, when a lawyer bills the client for the cost of outsourced legal support services as a direct expense (or disbursement), the lawyer can only charge the client for the actual cost of such services plus the firm's reasonable overhead involved with managing the outsourcing relationship. Such reasonable overhead, amongst other things, could include fees associated with the time spent by the firm in delegating the work to the outside service provider and for supervising and reviewing their work product, provided that the basis of such costs are communicated to the client. However, if the cost of such services are not directly billed to the client but are included in the attorney's legal services, the attorney could charge a premium, provided that the attorney vouches for the work of the overseas attorney as his or her own work and the total fees charged are reasonable. In such a situation, the attorney is using the outside service provider's work product in assisting

the attorney in rendering legal advice to the client, but applies the additional “value-added” service of analyzing such work product and drawing legal conclusions that is then translated into advice or other work product for the client. In either event, the attorney must disclose to the client the basis on which the client is expected to incur such costs.

E. Duty to Disclose to the Client in Advance About Outsourcing Legal Services and Obtaining Client’s Consent

Under current ethics rules, a lawyer must advise the client as to who or what entity is representing the client.³² Under Rules 1.2(a) and 1.4, the lawyer must consult with the client and communicate to the client as to the means by which the client’s objectives are to be pursued. Furthermore, Rule 1.5(b) obligates a lawyer to communicate to the client, in writing, before or within a reasonable time after being retained, the scope of representation and the basis or rate of the fee and expenses for which the client will be responsible.

The local bars and state agencies conflict as to whether a lawyer is required to disclose use of temporary attorneys or non-attorneys to the client and obtain advance consent. The American Bar Association and most local and state bars seem to follow the approach that a lawyer would have a duty to obtain advance client consent before outsourcing legal support work to temporary lawyers (and non-lawyers) under any of the following conditions: (a) where the non-lawyer will play a *significant* role in the matter, (b) where client confidences and secrets must be shared with the non-lawyer, (c) where the client expects that only personnel employed by the law firm will handle the matter, or (d) where non-lawyers are to be directly billed to the client.³³ However, a few local bars and state agencies have taken a position that that use of contract or temporary lawyers must always be disclosed to the client.³⁴

Therefore, in the jurisdictions that follow the ABA’s approach, a lawyer is not required to disclose to the client the use of outside attorney on such client’s matter, except where the outside attorney would play a significant role without direct supervision by the retaining lawyer, client confidences are to be disclosed to the outside attorney, the client expects personnel only hired by the law firm to work on the matters, or where the temporary lawyer’s services are to be directly billed to the client.[§] In jurisdictions which decline to follow the ABA’s approach, disclosure is mandatory. An abundance of caution, therefore, suggests that an attorney should obtain a client’s consent before outsourcing legal support work overseas to avoid violating ethical standards as well as from a client relations standpoint.³⁵

[§] Model Rule of Prof. Cond. Rule 1.2(a) was amended in 2002 to add the following language: “A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the presentation.” This provision is parallel to a provision in Rule 1.6(a) permitting disclosure of client information when “impliedly authorized in order to carry out the representation.” This provision was added to avoid an implication that a lawyer must always consult with the client to obtain authority. ABA Report of the House of Delegates, No. 401 (Aug. 2001), Model Rule 1.2, Reporter’s Explanation of Changes. However, in the ABA Formal Op. 08-451, the Committee clarified that the implied authorization to share client information protected under Rule 1.6 with lawyers and non-lawyers within the firm (including temporary attorneys working in close proximity with the retaining attorney) does not extend to outside entities or individuals over which the firm lacks effective supervision and control. ABA Formal Op. 08-451, p. 5.

III. How Does Legal Outsourcing Work?

A. Choosing an Off-shore Destination – Why India?

India constitutes a suitable and preferable destination for outsourcing legal work because the Indian legal system is similar to the legal system in the United States and attorneys in India are trained in similar manner as their U.S. counterparts. India, like the United States, is a former British colony and has adopted the British common law system. Like the United States, the current legal system in India has grown out of the British legal system and often refers to the British law on issues on which the Indian law is silent. Like the United States, lawyers in India undergo three to five years of post-secondary legal education focused on the Indian common law system. English being the official language of the country, Indian lawyers speak and write in English. Furthermore, India, like the United States is a constitutional democracy with similar political system. For these reasons, the Indian attorneys are well equipped and competent to handle U.S. legal work.

Attorneys in India, on an average, are paid one-third of their U.S. counterparts' compensation. Furthermore, Indian attorneys who are employed in the private sector are not likely to expect health insurance coverage, any retirement plans, disability benefits, or life insurance as a part of their benefits package. And if any such benefits are provided to attorneys in India, the cost of providing such benefits is generally much lower than in the United States. Given the cost disparities between India and the United States, the resulting cost savings of outsourcing legal work to India could be anywhere between 50 percent and 70 percent of the cost of maintaining comparable staff to perform such work in the U.S.

Furthermore, there exists a 10 to 13 hour time difference between India and the United States, which can prove helpful in managing the work flow. This time difference allows a requesting attorney to submit an urgent matter for production by an Indian outsourcing firm overnight, because attorneys in India are able work on the matter during their normal day-time business hours, allowing the requesting attorney to receive the finished work product on his or her desk the next morning. The requesting attorney can then revisit the work product at their convenience during their day and yet be able to request follow-up work, if necessary, over the following night. Therefore, using a combination of U.S. and Indian attorneys can ensure that pressing matters receive attention around the clock, adding to efficiency and client service.

B. What Kinds of Services Can Be Outsourced Effectively?

Two kinds of services typically are outsourced. One includes quantitative, low-skill legal tasks, such as indexing and objective coding, database creation and maintenance, and legal transcription. The other includes qualitative, skill-intensive legal tasks such as due diligence reports, multi-state surveys of law, patent and trademark work, review of transactional and litigation documents, contract drafting, legal research, and document drafting. The quantitative, low-skill tasks are not something unique to the legal profession and have been outsourced to cost-saving countries, such as India, for a very long time by other sectors, including the financial, healthcare, and software and information technology industries. Low-skill legal services constitute an obvious extension of the services provided to other sectors and

are typically provided by the same service providers who cater to multiple other sectors. Low-skill services generally are not performed by attorneys. Outsourcing of highly skill-intensive legal services, however, is a more recent phenomenon that has been attracting attention and growing in popularity over the past few years. Any effective delivery of such highly skill-intensive services requires excellent legal training and competency. Since the cost savings are substantial, the demand for such outsourced services is expected to further grow provided the quality is maintained.**

As discussed above, since the foreign attorneys rendering legal outsourced services do not practice law but work in a subordinate capacity to the attorneys using such services, the attorneys utilizing outsourced services, amongst other things, have an ethical obligation to continuously supervise the subordinate attorneys and review their work product. The need to supervise is further heightened as the legal services outsourced become more demanding in terms of the required skill level. Because the attorney outsourcing work is ultimately responsible for the work product of the overseas workers, it is important to identify in advance the projects that are suitable to outsource. Initially, the attorney should limit outsourcing of work that is within the outsourcing attorney's scope of expertise or that of his or her firm or legal department. Such a limitation will ensure that the requesting attorney is comfortable reviewing the work product and can properly check it for accuracy before it is relied upon. You should only outsource work that is not within your scope of expertise after developing a high level of confidence in the quality of work product produced by the overseas team. However, you should never outsource work that you or an attorney within your firm or legal department who would be reviewing the work is not competent in the underlying area of law to sufficiently and independently determine the quality of work.

Suitability for outsource can also vary depending upon project needs. Highly fact-intensive matters that would require the overseas lawyer to become familiar with every minute detail of the matter may not be most suitable projects for outsourcing. You may risk the overseas attorney not being familiar with some material fact(s) when working on the matter, or it may not be feasible to spend the time on apprising them of the salient facts in light of the time it would take to complete the project locally. For instance, preparation of documents relating to mergers and acquisitions, employment agreements for executives, and joint venture agreements may not be most suitable to outsource. Similarly, it may not be suitable to utilize overseas attorneys in drafting fact-intensive pleadings where the attorney retaining the overseas attorney has personally interviewed the client and is most familiar with the underlying facts of the case. Other than fact-intensive matters, cases that require active negotiations or good local political connections may be better off handled by local personnel. Since the overseas attorneys are not practicing law, the requesting attorney must refrain from shifting the decision-making roles, such as rendering legal opinion or advice, to the overseas attorneys. Therefore, it is not advisable to substitute the requesting attorney's legal opinion with that of the overseas

** According to Forrester Research, the annual worldwide spending on legal services is \$250 billion, out of which the U.S. accounts for \$170 billion. The "*offshoreable*" legal-services market is about 65% of the total market in revenue terms, which further amounts to a market potential of globally-deliverable services of \$111 billion out of the \$170 billion total U.S. legal services market. By even the most conservative numbers, the legal outsourcing market is expected to reach at least \$3-4 billion by 2015. This would still represent phenomenal growth when compared to the current, nascent legal outsourcing market which falls below \$100 million and largely consists of multinational corporations outsourcing their legal work under captive settings.

attorney. Rather, the requesting attorney should limit the overseas attorney's role to providing the resources (i.e., research and intelligence) necessary for the requesting attorney to render an informed opinion.

On the other hand, projects that are most suitable to be outsourced involve multi-jurisdictional legal research, contract drafting, drafting objective and persuasive legal memoranda, due diligence reports, e-discovery / litigation support, and intellectual property services (such as patent, trademark, or copyright searches, review, drafting, and portfolio management). The parameters of these projects are well defined and so self-contained such that they may be adequately handled in a back-office setting. For instance, outsourcing can provide a very cost-effective and manageable solution to complex and highly document-intensive litigation, where successfully managing the volume of documents can materially affect the outcome. The parties are struggling with time and personnel constraints, in addition to cost constraints. Documents can easily be reduced to an electronic format and hosted over databases that are readily accessible across the globe. In fact, more and more corporations now host their documents in an electronic format as a routine. The overseas attorneys, familiar with the U.S. laws, can add significant value in the document discovery process in reviewing the documents produced in response to the discovery requests by the opposing side and ascertaining their client's document production obligations. The overseas attorneys can also intensively review the documents and spot issues or highlight factual support for or against a position. In this process, the overseas attorneys can also be used to synthesize and/or code the documents as per certain pre-defined parameters. Apart from litigation support, outsourcing can be very effective for legal research, especially where the requesting attorneys find themselves subject to time, personnel, and resource constraints. The overseas attorneys can provide objective (i.e., predictive) or persuasive memoranda of law on single or multiple issues for or against certain position in the desired jurisdiction.

C. Precautions to Take When Outsourcing

Any delegation of work to an outside provider (whether on-shore or off-shore) can contain a level of risk of which one must be aware and should appropriately mitigate. Some of the risks involved with outsourcing of legal work that attorneys should consider include the following:

1. *Malpractice and Ethical Issues* – As discussed above, the service providers rendering outsourced legal support services are not engaged in the practice of law but work under subordinate capacity to the hiring attorney. Therefore, the attorney retaining such services must be aware of the malpractice risks and act accordingly. To mitigate the malpractice risks, the attorney utilizing the outsourced services should avoid shifting any decision-making role to the outside service provider (which must also be avoided due to ethical considerations). Furthermore, as discussed in detail above, the attorney utilizing the outsourced services should ensure that the highest ethical standards are maintained when outsourcing legal support work. For instance, the attorney must undertake reasonable supervision and oversight which would minimize the risk of any errors, thus avoiding malpractice issues. Moreover, before sharing

any client confidential information with an outside service provider, the attorney must undertake reasonable due diligence to ensure that there is no unreasonable risk of breach of client confidences when outsourcing, apprise the client accordingly, and obtain prior informed consent from the client before outsourcing. The attorney should never let his or her professional independent judgment be compromised by that of the overseas service provider. Whether or not to outsource could also involve a risk-benefit analysis in which the cost savings resulting from outsourcing should be balanced against what is at stake in the underlying legal matter. It is advisable to include the client when performing such risk-benefit analysis. Apart from such considerations, the attorney outsourcing legal services should review their malpractice insurance agreement to determine whether such agreement contains any restrictions against outsourcing imposed by the insurance provider.

2. *Attrition and Resulting Potential Conflict of Interests* – As overseas employees migrate from one service provider to another, they may have worked on certain conflicting matters or gained certain confidential information on a particular client while working with their former employer, which may be directly conflicting to the client supported by the new service provider (i.e., the attorney's new employer). Such a situation could give rise to a conflict of interest, even where the U.S. attorney retaining an overseas employee is not directly retaining the overseas employee, but is working through the overseas employee's employer – i.e. the outsourced service provider. To avoid potential conflict of interests in such situations, when selecting an outsourced service provider, an attorney must inquire the outside service provider's policies on handling such conflicts. To mitigate such risks, the service provider must have adequate systems in place to maintain a record of every matter on which each overseas employee has worked and limit the overseas employee's exposure to confidential information only to those matters with which the overseas employee is directly involved. Adequate measures should also exist to terminate access to confidential information upon completion of the matter and to safely destroy the confidential materials that remain in the service provider's possession. The service provider must maintain an extensive conflicts check database, run conflict checks prior to undertaking any project, and decline representation in case of a conflict. The service provider must also adequately train its employees on the conflicts check procedures. Proper procedures should exist to communicate with overseas employees in the event that the overseas employees might have a conflict from their previous, outside engagements. In the unlikely event that such a conflict is not apparent during initial conflict check before the service provider is retained, the service provider should utilize procedures to decline their assistance in the event such a conflict later becomes apparent.
3. *Cultural Gaps* – Cultural differences between the United States and India could cause differences in communication styles and inter-personal relationships. For instance, unlike the Western flattened and casual organizational structure, individual empowerment and proactive decision-making, the management style

in India focuses on classification of the work force and the need for respecting order, structure and hierarchy. Consequently, attorneys in India may be indirect, complex and subtle with their speech and work product. The writing style of Indian attorneys may also be more flowery, indirect and verbose. These cultural gaps are not an issue when the attorney retaining outside support services is serviced by a provider who also retains professionals in the United States (as managers), who are available to communicate with the retaining attorneys, and manage the work flow, including supervising and reviewing the work product from overseas attorneys, and following up with the clients (retaining attorneys). These managers should also spend a considerable time training overseas employees to communicate in a more direct and active style that U.S. attorneys are accustomed to seeing.

4. *Quality of Work Product* – A related risk to cultural gap is the gap between the perception and reality with respect to the expected work product from overseas attorneys. This can occur when outsourcing legal work overseas, and the requesting attorneys are not careful about clearly communicating expectations to the overseas attorneys, especially their subjective preferences, or when the scope of the desired assistance is not well defined. The gap between perception and reality of work product can also be caused by the above-discussed cultural gaps. Such problems are mitigated by employing service providers who use a combination of on-shore and off-shore teams to deliver the services. The service provider’s local (i.e., U.S.-based) personnel should be experienced attorneys (managers) that play a material role in bridging the gap between the client’s expectations and realities. Such local managers should be able to work with the requesting attorneys in identifying service needs. The local managers also should work with the overseas attorneys to ensure that the requesting attorneys’ expectations have been satisfactorily met. Since the requesting attorneys’ needs can be ongoing and continuous, the managers should be available for subsequent consultation.
5. *Export Control Issues* – Certain export regulations exist that might restrict export of specific sensitive ideas and technologies overseas.^{††} Though export

^{††} The U.S. export controls are regulated by two regulatory frameworks, one, by the Directorate of Defense Trade Controls (“DTC”) and other, by the Bureau of Industry and Security (“BIS”). See Paul F. McQuade & Natalia W. Geren, *How to Ensure That Your Off-Shore Preparation of US Patent Applications Does Not Run Afoul of US Export Controls*, 18 INTELL. PROP. & TECH. L.J. 1, 2 (2006). The DTC is charged with controlling the export and temporary import of defense articles and defense services covered by the United States Munitions List. It is responsible for compliance with and enforcement of the International Traffic in Arms Regulations (“ITAR”), that is, 22 C.F.R. Parts 120-130. The BIS, on the other hand, regulates export of sensitive goods and technologies, export control, antiboycott and public safety laws, cooperation and assistance with other countries on export control and strategic trade issues, international arms control agreements and monitoring of viability of U.S. defense industrial base for U.S. national and homeland security needs. See <http://www.bis.doc.gov/about/index.htm> It is responsible for compliance with and enforcement of the Export Administration Regulations (“EAR”), that is, 15 C.F.R. Parts 730-774. The EAR regulates export and re-export of most commercial items. Only a small percentage of exports and re-exports from the United States require a license from the BIS. See 15 CFR § 730.7; 15 CFR § 734.3(c) (“‘Items subject to EAR’ consist of items listed on the Commerce Control List (CCL) in part 774 of the EAR and all other items which meet the definition of that

control regulations usually do not prohibit outsourcing legal support work, they could constitute an issue if the documents to be exported include certain restricted, sensitive ideas that are not in the public domain. Also, export control restrictions can be applicable when exporting intellectual property work – especially ideas not yet in the public domain. All parties involved in the export process (including the requesting attorney and the service provider) must comply with the export control regulations. When outsourcing legal work, you should be aware of such restrictions and act accordingly in case you are dealing with sensitive documents or ideas, export of which may be restricted. When selecting an outside service provider, you should determine the service provider’s familiarity with such issues.

6. *Uninterrupted Delivery of Legal Support Services* – Since outsourcing can involve a considerable amount of upfront investment, in terms of time and other resources to locate and develop a relationship with an outside service provider, the requesting attorney should be careful when selecting a service provider to ascertain the length of time the service provider has been in the business and look for the signals of stability with the service provider’s business going forward. This is especially important for requesting law firms or corporate legal departments who are looking at a long-term solution to their support needs and are relying on the service provider to consistently deliver during such times. Since legal outsourcing is a rather new phenomenon and has a promising growth prospectus, this sector is expected to experience rapid entry of competitors, especially from overseas. Rapid entry of competitors may also be expected to bring a high risk that many new service providers will exit the market because any effective global delivery of legal support services requires an experienced global team of on-shore and off-shore professionals, which can take time to build. Therefore, the law firm or corporate legal department selecting an outsourced service provider should inquire into the length of time the service provider has been in business and the current demand for the particular service required to assess the long-term viability of the firm. Given the nascent stage of this sector, a time frame of being in the business for two to three years could be a suitable benchmark because a company which has been in business rendering such support services for a few years is more likely to have trained personnel that are competent to handle such matters, and the fact that such an entity has survived the first few crucial years of being a business improves the chances that such firm will be competitive and successful in the long-term.

The significant time and cost savings associated with outsourcing legal work, and the improved client service that can result from such efficiencies, can significantly out-weigh the obligations

term.”). The license requirements depend upon an item’s technical characteristics, the country of destination, the end-user, and the end-use. See 15 CFR Part 732. The commodities/technologies regulated by BIS are often referred to as “dual-use” – i.e. items that have both commercial and military or proliferation applications. However, purely commercial items without an obvious military use could also be subject to the EAR, depending upon whether they could have some military or proliferation use. The control purposes of the EAR regulations are mainly national security and non-proliferation. See 15 CFR § 730.6.

and other considerations of referring attorneys once a relationship is established with a proper outsourcing firm.

D. A Case Study – Lexadigm

Lexadigm provides legal research and litigation support services, document review (transactional and litigation setting), contract drafting and management, intellectual property services (including patent, trademark, and copyright support), and factual and business information research services to all sizes of law firms and corporations. Lexadigm has been in the business since early part of 2004, longer than any other third party service provider of highly skill-intensive legal outsourced services. Lexadigm maintains offices in the United States and India and utilizes global teams of attorneys and engineers in the United States and India to service clients. Each global team is managed by licensed U.S. attorneys with extensive experience in their fields. All team members graduate from top professional institutions, have extensive work experience and undergo rigorous training.

Requesting attorneys interact directly with the U.S.-based managers. Upon receipt of each project, Lexadigm performs conflict checks. Lexadigm strictly avoids any question of conflict of interest by declining employment if it has provided services to opposing counsel on the same case. Lexadigm maintains and regularly updates an extensive conflict-check database. All employees overseas are also trained in the conflict check procedures, to avoid situations where an employee could have a potential conflict due to a prior relationship. The conflict checks database also records every matter on which each employee works.

To maintain security and confidentiality of the client information, all client information and work product is maintained by Lexadigm on U.S.-based, highly-secure servers. Access to the servers varies according to the level of the employee. Also, access to confidential information is limited to those company personnel who directly work on the matter and only during the period work on the matter is underway. Upon completion of the matters, all documents are appropriately destroyed. All facilities where confidential information is processed restrict access to only authorized personnel by employing electronic and physical security measures. Extensive background checks are performed on all employees before they are hired. All employees are trained in the confidentiality and security procedures to prevent any inadvertent disclosures. Additionally, all employees are contractually bound to maintain confidentiality and security. Lexadigm's engagement with its clients (in most cases, attorneys) occurs in the United States. The standard terms and conditions include a confidentiality provision, and choice of law and forum are by default Michigan. Often, litigation support and document review clients host their documents on a third-party server and provide limited access to the Lexadigm personnel during the course of Lexadigm's assistance on the matter.

Because Lexadigm is not engaged in the practice of law and does not render legal advice, the attorneys requesting its services are constantly reminded that the scope of Lexadigm's assistance is limited to providing support services and cannot be substituted for the attorney's own professional judgment. Furthermore, Lexadigm limits its service offerings to licensed attorneys, unless the research assistance is needed in a non-legal matter (such as for publications) or on factual issues (e.g., business information or other financial research).

Lexadigm's U.S.-based attorneys (managers) work closely with attorneys requesting Lexadigm's services in determining the scope of Lexadigm's assistance. The U.S.-based managers also remain fully involved from inception through completion of the projects and are always available to clients for follow-up. All work product is completed under direct supervision and review of the managers. This ensures that the requesting attorneys are getting the highest work quality to which they are accustomed.

Lexadigm follows a three-prong approach to maintain quality of the work product: selective recruitment, rigorous training and close oversight and review. Lexadigm is very selective about its recruitment practices and only recruits professionals who graduate from top professional institutions, have extensive work experience, and excellent English speaking and writing skills. High standards of recruitment are supplemented with extensive training. All Lexadigm professionals undergo a rigorous training program designed to cultivate each employee's ability to be creative and consistently deliver the highest level of work quality under time constraints. Finally, all work product is subject to very close oversight and review by senior and experienced members of the team servicing a project, and subsequently, by the U.S.-based managers.

By using a combination of highly skilled and experienced teams of attorneys and engineers in the United States and India, Lexadigm delivers high quality and low-cost support services to law firms and corporations in a manner and setting consistent with attorneys' ethical obligations to their clients and practical considerations of cost-effectively and efficiently managing workload.

¹ Marcia L. Proctor, *Transactional Law: Considerations in Outsourcing Legal Work*, 84 Mich. B.J. 20 (Sept. 2005).

² *Id.* at 22.

³ Alison M. Kadzik, *The Current Trend to Outsource Legal Work Abroad and The Ethical Issues Related to Such Practices*, 19 Geo. J. Legal Ethics 731, 733 (2006).

⁴ *Id.*

⁵ ABA Formal Op. 08-451 (2008) (discussing outsourcing of legal services overseas); N.Y.C. Bar Assoc. Formal Op. 2006-03 (2006) (discussing outsourcing of legal support services overseas); San Diego County Bar Assoc. Op. 2007-1 (2007) (when outsourcing legal support services overseas, an attorney must have sufficient knowledge to supervise the outsourced work properly and must make sure the outsourcing does not compromise attorney's other duties to the client); NC State Bar, Formal Ethics Op. 12 (2007) (same); *see* LA County Bar Assoc. Op. 518 (2006) (stating that an attorney in a civil case may contract an out-of-state company to draft a brief provided that attorney is competent to review the work, remains responsible for the final work product of the out-of-state company, does not charge the client any extra unconscionable fee, maintains and preserves client's confidences and secrets, and sees to it that there are no conflict of interest between the client and the contracting entity); TN Eth. Op. 85-F-99, 1985 WL 285088, at *2 (1985) (stating that "[t]here is no impropriety in a law firm leasing non-lawyer staff personnel from a third party lessor/employer, provided the law firm exercises reasonable care to prevent the leased personnel from disclosing or using the confidences or secrets of a client."); N.Y. State Op. 721 (1999) (noting that a lawyer may use services of outside legal research firm staffed by non-lawyers); Florida Ethics Op. 07-2 (2008) (same).

⁶ Mod. Rules of Prof. Cond. Rule 1.6(a) (2003).

⁷ *Id.*

-
- ⁸ ABA Formal Op. 08-451 (2008) at 5; NC State Bar, Formal Ethics Op. 12.
- ⁹ *See* Sec. II(E), *infra*. (for a detailed discussion on the requirement to obtain informed consent from the client).
- ¹⁰ Mod. Rules of Prof. Cond. Preamble, ¶ 5 (stating that under the ethics rules, “a lawyer’s conduct should conform to the requirements of the law, both in professional service to the clients and in the lawyer’s business or personal affairs”); Mod. Rules of Prof. Cond. Rule 8.4(a) (stating that it is professional misconduct for a lawyer to “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another”).
- ¹¹ ABA Formal Op. 88-356.
- ¹² *Id.*
- ¹³ *Id.*
- ¹⁴ ABA Formal Comment 88-356.
- ¹⁵ ABA Formal Op. 88-356; NY State Op. 774 (2004) (noting that it is advisable for a law firm to check conflicts when hiring a non-lawyer, especially when the non-lawyer may be expected to have learned confidences or secrets of a client’s adversary).
- ¹⁶ Mod. Rules of Prof. Cond. Rule 1.10(a) (stating that [w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm”).
- ¹⁷ ABA Formal Op. 88-356.
- ¹⁸ Mod. Rules of Prof. Cond. Rules 5.1, 5.2, and 5.3; ABA Formal Op. 08-451, at 2 – 3; NC State Bar, Formal Ethics Op. 12; Florida Ethics Op. 07-2.
- ¹⁹ Colorado Bar Assoc. Ethics Op. 61 (1982, Amended 1995).
- ²⁰ N.Y.C. Bar. Assoc. Op. 2006-3; L.A. County Bar Assoc. Op. 518, at 8-9 (“[T]he attorney must review the brief or other work product provided by [the contract attorney] and independently verify that it is accurate, relevant, and competent, and the attorney must review the brief, if necessary, before submitting it to the ... court.”); San Diego County Bar Assoc. Op. 2007-1, at 5-6 (to avoid unauthorized practice of law, the lawyer must retain full control over the representation of the client and exercise independent professional judgment in reviewing the draft work performed by non-lawyers).
- ²¹ Mod. Rules of Prof. Cond. Rule 1.1; ABA Op. 08-451, at 2 (“There is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided the outsourcing lawyer renders legal services to the client with the ‘legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,’ as required by Rule 1.1....[This rule] does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.”); San Diego County Bar Assoc. Op. 2007-1 (concluding that an attorney outsourcing legal support work must have sufficient knowledge of the subject matter to properly supervise the outsourced work); NC State Bar, Formal Ethics Op. 12 (same).
- ²² Mod. Rules of Prof. Cond. Rule 5.4(a).
- ²³ Mod. Rules of Prof. Cond. Rule 5.5.
- ²⁴ Mod. Rules of Prof. Cond. Rule 1.5(a).
- ²⁵ Mod. Rules of Prof. Cond. Rule 1.4(a)(2).
- ²⁶ ABA Formal Op. 93-379, p. 1.
- ²⁷ ABA Formal Op. 00-420, at 3.

-
- ²⁸ ABA Formal Op. 08-451, at 6.
- ²⁹ ABA Formal Op. 08-451, at 6 (when a lawyer bills a client for outsourced legal services as a disbursement, then the lawyer may only charge the client for direct cost of such services and any reasonable overhead); N.Y.C. Bar Assoc. Op. 2006-3 (opining that lawyers can bill the client for the outsourced legal services provided the lawyer only charges for the direct cost of services and any reasonable overhead expense); LA County Bar Assoc. Op. 518 (stating that a lawyer must accurately disclose the basis of any cost that is passed on to the client, including any mark-up); Calif. State Bar Assoc. Formal Op. 2004-165 (stating that a lawyer should include the services of a non-lawyer as disbursement in a written fee agreement with a client); Florida Ethics Op. 07-2 (a lawyer may charge the client for actual cost of the overseas provider, unless the charge would normally be covered as overhead).
- ³⁰ ABA Formal Op. 00-420 (stating that when costs associated with legal services of a contract attorney are billed to the client as fees for legal services, the lawyer may charge a premium on the fees provided that lawyer vouches for the work of the contract attorney and the total charges are reasonable); ABA Formal Op. 88-356 (stating that where law firm simply pays the temporary lawyer reasonable compensation for the services performed for the firm and does not charge the payments thereafter to the client as a disbursement, the firm is not obligated to reveal the compensation arrangement with the temporary lawyer to the client); ABA Formal Op. 08-451 (same); Alaska Bar Assoc. Ethics Op. 96-1, at 1 (stating that “a law firm may charge clients for contract legal services at a rate higher than the law firm’s actual cost for the services so long as the total charge to the client is reasonable”); Calif. State Bar Assoc. Formal Op. 1994-138, at 4-5 (stating that a law firm can charge the client a premium on contract legal services so long as the total charge to the client is reasonable and the rates are specified in the contract); Virginia Legal Ethics Op. 1712 (1998) (a law firm can charge a premium on contract legal services); D.C. Bar Legal Ethics Comm. Op. 284 (1998) (a lawyer may bill the client for the services of a temporary lawyer at any reasonable rate mutually agreed by the lawyer and client, provided any disbursements associated with hiring temporary attorney are billed at cost or an agreed upon markup); Colorado Bar Assoc. Ethics Op. 1712 (1998) (allowing markup on fee for temporary lawyer’s time). *C.f.* Md. Bar Assoc. Ethics Comm. Op. 92-19 at 3 (1992) (stating it “feels that the law firm may not bill the client for any amount greater than that which it actually paid” to an outside research service, but failed to give any reason or authority for its assertion).
- ³¹ Mod. Rules of Prof. Cond. Rule 1.5(b); ABA Formal Op. 93-379, at 3 (stating that “[a]t the outset of the representation the lawyer should make disclosure of the basis for the fee and any other charges to the client”).
- ³² Mod. Rules of Prof. Cond. Rule 7.5(d) (prohibiting lawyers from implying that they practice in a partnership or other organization when there is not a fact).
- ³³ N.Y.C. Bar Assoc. Op. 2006-3; ABA Formal Op. 88-356, at 10 (stating “[w]here the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a temporary lawyer will work on the client’s matter will not be ordinarily have to be disclosed to the client.”); ABA Formal Op. 08-451, at 5 (further commenting that: “[W]here the relationship between the firm and the individual performing the services is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without client’s informed consent.”); Florida Ethics Op. 07-2 (“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.”); Calif. State Bar Assoc. Formal Op. 1994-138 (stating that an attorney must inform the client about an outside lawyer’s involvement when outside lawyer’s involvement is significant. Factors taken into consideration when determining whether a non-lawyer is playing a “significant” role in the matter are: “(i) whether responsibility for overseeing the client’s matter is being changed; (ii) whether a [non-attorney] will be performing a significant portion or aspect of the work; or (iii) whether the staffing of the matter has changed from what was specifically represented to or agreed with the client.”); LA County Bar Assoc. Formal Op. 518, at 7-8 (applying the “significant role” standard laid down by the state bar); NY State Op. 715 (1999) (there is no need to disclose participation of a temporary lawyer when the temporary lawyer’s participation is limited to legal research or tangential matters, but disclosure is necessary if the contract attorney will make strategic decisions or perform significant work on the matters); Alaska Bar Assoc. Ethics Op. 96-1 at 2 (same); NY State Op. 721, at 8 (1999) (stating that “[i]f the lawyer would have to disclose confidences and secrets of the client [to the third-party service provider] in

connection with commissioning the research or briefs, the attorney should tell the ...client what confidential client information the attorney will provide and obtain the client's consent."); LA County Bar Assoc. Formal Op. 473 (1994) (noting that disclosure is required to the client where the expectation of the client is that the retained attorney alone will be acting as attorney for the client); Virginia Legal Ethics Op. 1712 (1998) (stating that disclosure to the client is not required if the contract attorney would work under the direct supervision of the lawyer in the firm); D.C. Bar Legal Ethics Comm. Op. 284 (1998) (stating that "a lawyer should advise the client and obtain consent from the client whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations."); Colorado Bar Assoc. Ethics Op. 1712 (1998) (same); IL Adv. Op. 98-02, 1998 WL 604440 (1998) (commenting that payment to an independent or temporary lawyer on an hourly basis does not require disclosure to a client if there is close supervision).

³⁴ NC State Bar, Formal Ethics Op. 12 ("[T]he lawyer has an ethical obligation to disclose the use of foreign, or other, assistants and to obtain the client's written informed consent to the outsourcing."); *Oliver v. Board of Governors, Kentucky Bar Assoc.*, 779 S.W.2d 212, 216 (Ky. 1989) (recommending "disclosure to the client of the firm's intention, whether at the commencement or during the course of representation, to use a temporary attorney service on the client's case, in any capacity, in order to allow the client to make an intelligent decision whether or not to consent to such an arrangement" (emphasis added)); Ohio Bd. of Commissioners on Grievances and Discipline Op. No. 90-23, 1990 WL 640499 (1990) (stating that "there is a duty under DR 5-107(A)(1) to disclose to the client the temporary nature of the relationship in order to accept compensation for legal services"); New Hampshire Bar Assoc. Ethics Comm. Formal Op. 1989-90/9 (1990).

³⁵ Md. Bar Assoc. Ethics Op. 92-19 at 3 (1991) (noting that even though a law firm is not required to disclose use of contract legal research services, it is advisable to do so); San Diego County Bar Assoc. Op. 2007-1 at 8 ("[I]f the work which is to be performed by the outside service provider 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.' ... [I]n absence of a specific understanding between the attorney and client to the contract, 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 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.").