

THE ETHICS OF LEGAL OUTSOURCING

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I. INTRODUCTION

As Thomas Friedman famously wrote, “The World is Flat.”¹ The development of pervasive electronic systems as a backbone of the world economy has brought nearly-instant communications, enormous data processing, transfer and storage capacities, and vast new opportunities for start-up businesses operating across borders in a global information exchange.

A significant phenomenon associated with this global information-based economy involves the “outsourcing” of business functions.² Where a discrete portion of a company’s many functions can be performed effectively by a service provider external to the company, at substantially lower cost, the company may choose to outsource that function, retaining for itself more of the core, high-value aspects of its business.

One clear illustration of the outsourcing function is the operation of call centers for customer interactions, such as reservations, purchasing and warranty/complaint processing. Higher-level functions, such as the operation of help desks, may also often be outsourced.

Although outsourcing service providers are not confined to any one country or region, such providers often operate in locations with lower prevailing wage rates, where a skilled work-force is available. Countries such as India, with good university systems, widespread use of English, robust communications and computing infrastructure, a stable political system and an increasingly entrepreneurial business culture, have flourished as centers for outsourcing. Many other countries, and many lower-cost geographical areas in the United States, have developed significant outsourcing capabilities.

The outsourcing trend has not escaped the legal sphere. Increasing costs for legal services, wider regulatory obligations (such as Sarbanes-Oxley³ disclosure requirements), and the explosive growth of electronic discovery as a major factor in corporate litigation, have all driven businesses (and law firms) to consider the outsourcing of certain functions as a means to reduce costs, while maintaining high-quality service. The ability to provide “24/7” availability, and offer rapid

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1. See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (Farrar, Straus and Giroux 2005).

2. See generally ERRAN CARMEL & PAUL TJIA, *OFFSHORING INFORMATION TECHNOLOGY: SOURCING AND OUTSOURCING TO A GLOBAL WORKFORCE* (Cambridge Univ. Press 2005).

3. See Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201-7266 (2006).

turn-around for labor-intensive projects, has created additional incentives to consider legal outsourcing. Although precise projections are difficult to develop, many analysts suggest that legal outsourcing will become a multi-billion dollar business within the next few years.⁴

The legal outsourcing trend brings with it new challenges in maintaining high standards of practice within the legal profession. Several influential ethics opinions over the past few years, including a recent pronouncement by an American Bar Association (“ABA”) ethics committee, have helped to clarify the professional responsibility issues presented by legal outsourcing. This Article outlines and summarizes the major principles that may be derived from these ethics opinions, and suggests certain “best practices” that should be associated with legal outsourcing efforts. The practice of outsourcing is evolving, and no doubt new ethics issues may arise as the trend unfolds; but these essential principles offer useful guides to spot issues and construct policies and procedures that should satisfy the essential professional obligations of lawyers involved in outsourcing.⁵

II. ROLE OF OUTSOURCING IN PROVIDING LEGAL SERVICES

To some extent, forms of outsourcing are inherent in the modern legal system. When a corporation engages a lawyer, for example, in most instances the services will be performed, in part, by several persons. The lawyer typically provides legal analysis and advice, but much of the processing of the minutiae of the matter may be provided by support staff within the firm: paralegals, secretaries, word-processing and copy staff, file clerks and others. The lawyer, moreover, may require assistance from other lawyers within the firm, to provide specialty expertise and (quite frequently) to assign tasks that require less

4. See Anthony Lin, *Legal Outsourcing to India is Growing, but Still Confronts Fundamental Issues*, NEW YORK LAW JOURNAL, Jan. 23, 2008, at 1, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1201169145823> (citing predictions that legal outsourcing to India may grow to \$4 Billion level by 2015); Rama Lakshmi, *U.S. Legal Work Booms in India*, WASH. POST, May 11, 2008, at A20, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/05/10/AR2008051002355_pf.html (“Legal process outsourcing is being called the next big thing in Indian business.”); *Crisis a Factor in Legal Outsourcing Capacity*, IP REVIEW ONLINE, Oct. 17, 2008, http://www.cpaglobal.com/ip-review-online/3155/crisis_a_factor_in_legal_outsourcing_capacity (indicating that recent economic difficulties in the United States may accelerate the trend toward legal outsourcing); Niraj Sheth & Nathan Koppel, *With Times Tight, Even Lawyers Get Outsourced*, WALL ST. J., Nov. 26, 2008, at B1, available at <http://online.wsj.com/article/SB122765161306957779.html> (citing prediction that 79,000 U.S. legal jobs will be moved offshore by 2015).

5. For general information on the ethical issues that may arise in electronic discovery, see Steven C. Bennett, *Ethics in E-Discovery, Parts 1-3*, THE E-DISCOVERY STANDARD (2006), <http://law.lexisnexis.com/litigation-news/articles/article.aspx?groupid=2oKGuUXPxVQ=&article=rxu1ACHApAY=>; Steven C. Bennett, *Ethics in E-Discovery, Part 4*, THE E-DISCOVERY STANDARD (2006), <http://law.lexisnexis.com/litigation-ews/articles/article.aspx?groupid=2oKGuUXPxVQ=&article=685+IJqJuM=>; Steven C. Bennett, *The Ethics of Electronic Discovery*, PRACTICAL LITIGATOR, Mar. 2006 at 45-57.

experience to lower-cost junior lawyers. Even without formal outsourcing, therefore, legal services are often provided by a conglomerate of personnel.

Outsourcing in low-level forms, moreover, has occurred in legal practice for years. Many law firms, for example, use outside photocopy, messenger and other basic services. And many firms use temporary secretaries and support staff, as well as “contract” attorneys for over-flow operations. Formal outsourcing of parts of legal services merely takes the pre-existing realities of the legal market to new levels.

The ABA Standing Committee on Ethics and Professional Responsibility, in its Formal Opinion, “Lawyer’s Obligations When Outsourcing Legal and Non-Legal Support Services” (“ABA Opinion”), described the trend toward increased outsourcing as “salutary.”⁶ As the ABA Committee explained, outsourcing may reduce costs for law firms and their clients.⁷ Outsourcing, moreover, may permit smaller firms to perform labor-intensive tasks (such as large-scale e-discovery processing), thus increasing the range of options available to clients in their choice among legal service providers.⁸ The ABA Committee, moreover, recognized that legal outsourcing may involve a global network of service providers, increasing competition in the market for legal support services.⁹ The ABA Committee concluded that “there is nothing unethical” about the outsourcing of portions of legal services, so long as all services are provided with the “legal knowledge, skill, thoroughness and preparation reasonably necessary” for representation, and the lawyers involved satisfy their other professional obligations.¹⁰ To determine the scope of these professional obligations, however, in the context of legal outsourcing, requires careful attention from the principal supervising lawyer.

III. UNAUTHORIZED PRACTICE OF LAW

A non-lawyer who falsely offers legal services under the guise of being a lawyer is guilty of the unauthorized practice of law.¹¹ Similarly, a lawyer cannot bait a client into believing that the lawyer will provide legal services, and then switch total responsibility for the matter to a non-lawyer.¹² And, because licensing of the practice of law is a state matter, a lawyer authorized to practice law in one state cannot, without admission to the other state’s bar, or *pro hac vice* admission for purposes of a specific matter, perform unlicensed legal

6. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 at 2 (2008).

7. *Id.*

8. *Id.*

9. *See id.*

10. *Id.* (quoting MODEL RULES OF PROF’L CONDUCT R.1.1 (2008)).

11. *See generally* STEPHEN GILLERS, REGULATION OF LAWYERS 750-52 (6th ed. 2002) (summarizing operation and history of unauthorized practice rules).

12. *See* MODEL RULES OF PROF’L CONDUCT R. 5.3 (2008).

services in a foreign jurisdiction.¹³ Nor may a lawyer encourage or abet the unauthorized practice of law by others.¹⁴

The precise contours of these rules are somewhat ill-defined.¹⁵ In the modern economy, for example, business operations and legal concerns of clients often cross state (and international) boundaries. And the fracturing of legal services into various higher and lower level components may mean that portions of legal services are performed by lawyers in multiple jurisdictions, or by support staff who lack legal training, and who are not subject to the rigors of licensing.

In the outsourcing context, several authorities have suggested that supervision of all work by a fully-qualified lawyer is “key.”¹⁶ Thus, the supervising lawyer must “independently verify” any work performed, to ensure that competent service has been provided.¹⁷ The lawyer cannot wholesale delegate the matter to an outsourcing service, and claim the work as his or her own.¹⁸ Wholesale delegation of legal work (without supervision), in the words of one recent ethics opinion, would make the lawyer the “tail” on the “dog.”¹⁹ The lawyer, moreover, must be diligent in supervision of the service provider.²⁰ Supervision must be “direct”;²¹ the lawyer must be “readily” available to answer questions concerning the work.²²

The recent ABA Opinion noted that the Model Rules of Professional Conduct (“Model Rules”) require that a lawyer who employs, retains or associates with non-lawyers must “make reasonable efforts to ensure that the

13. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (2008).

14. MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2008).

15. See GEOFFREY C. HAZARD JR. & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 273 (Stanford Univ. Press 2004) (unauthorized practice rules have “been especially vexed in the United States”).

16. See Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www.nycbar.org/Ethics/eth2006.htm>.

17. *Id.*

18. *Id.*

19. San Diego County Bar Ass'n, Ethics Op. 2007-1 (2007), available at <http://www.sdcba.org/index.cfm?Pg=ethicsopinion07-1>.

20. See Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www.nycbar.org/Ethics/eth2006.htm> (opinion suggests that communication during the course of work is essential, to ensure that vendor understands assignment). See also San Diego County Bar Ass'n, Ethics Op. 2007-1 (2007), available at <http://www.sdcba.org/index.cfm?Pg=ethicsopinion07-1> (“[T]he attorney does not aid in the unauthorized practice of law where he retains supervisory control over and responsibility for those tasks constituting the practice of law.”).

21. See Prof'l Ethics of the Fla. Bar, Ethics Op. 07-2 (2008), available at <http://www.floridabar.org/tfb/TFBETOpin.nsf/b2b76d49e9fd64a5852570050067a7af/792dd018996bf2498525749400624f7a?OpenDocument> (quoting Prof'l Ethics of the Fla. Bar, Ethics Op. 88-6 (1988), available at <http://www.floridabar.org/TFB/TFBETOpin.nsf/ca2dcdaa853ef7b885256728004f87db/90dc0b686d9976d285256b2f006ca9ed?OpenDocument>).

22. See *id.* (quoting Prof'l Ethics of the Florida Bar, Ethics Op. 89-5 (1989), available at <http://www.floridabar.org/TFB/TFBETOpin.nsf/ca2dcdaa853ef7b885256728004f87db/c4d872ab4be4c54885256b2f006ca8f3?OpenDocument>).

person's conduct is compatible with the professional obligations of the lawyer."²³ "The challenge for an outsourcing lawyer," as the ABA Committee observed, is to "ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately."²⁴ The ABA Opinion further suggested that the supervising lawyer:

- May use electronic communications to "close the gap" in distance between the supervising lawyer and the outsourcing vendor, but such communications "may not be sufficient to allow the lawyer to monitor the work of the lawyers and non-lawyers working for her in an effective manner."²⁵
- Should "consider conducting reference checks and investigating the background" of the outsourcing vendor.²⁶
- Might consider interviewing the principal lawyers, if any, involved in the project on behalf of the vendor, and also inquire into the vendor's hiring practices.²⁷
- Should consider investigating the security of the provider's premises, computer networks, and "perhaps even its recycling and refuse disposal procedures," to ensure that confidential information is kept secure.²⁸

The ABA suggested that "in some instances" it "may be prudent to pay a personal visit" to the vendor's facility, "regardless of its location or the difficulty of travel," to get a firsthand sense of the vendor's operations, for which the supervising lawyer will have ultimate responsibility.²⁹ Such a visit might permit the lawyer to review information on similar projects (in process or completed), to review work flow processes, and to meet with team leaders and their staff at the outsourcing firm.

Standards for the supervision of legal outsourcing firms probably cannot be stated in precise terms, as the form and degree of supervision required will vary depending on the character of the project. What seems clear from the ABA Opinion, however, is that the keys to effective supervision include: pre-hiring inquiry into the capabilities of the vendor, regular communication during the

23. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 at 2 (2008) (quoting MODEL RULES OF PROF'L CONDUCT R. 5.3(b) (2008)).

24. *Id.* at 3. This requirement comports with the lawyer's fundamental duty to provide competent representation to the client, and to make "reasonable efforts" to ensure that services provided by the law firm conform to standards of professional conduct. *Accord* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008).

25. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 at 3 (2008) (quoting MODEL RULES OF PROF'L CONDUCT R. 5.3(b) (2008)).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* The ABA Opinion separately raised concerns about the vendor's ability and willingness to maintain the standards of confidentiality that a U.S. client would normally expect. This Article discusses the confidentiality issue below.

course of the project, some form of quality control, and other reasonable steps to ensure that services are rendered competently to the client.³⁰ The supervising lawyer, moreover, must know enough about the subject matter of the outsourced work to judge the quality of the work.³¹

IV. CONFLICTS

A fundamental principle of professional responsibility is the duty of loyalty the attorney owes to the client.³² A lawyer generally cannot represent a client if the representation involves a conflict of interest.³³ Conflicts rules are more complicated than this simple principle suggests. Under the Model Rules, for example, a lawyer may represent a client, despite a potential conflict, where the lawyer believes that competent representation is possible, the representation is not prohibited by law, the representation does not involve assertion of a claim by one client against another client, and each affected client gives informed consent.³⁴ Due to these kinds of complexities, most U.S. law firms have rigorous systems for “conflict clearance” before any legal engagement is accepted.³⁵

The conflicts of one lawyer in a law firm may be attributed to other lawyers in the firm.³⁶ The ABA, moreover, in an earlier ethics opinion, suggested that

30. *Id.* at 2-4. *See also* Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www.nycbar.org/Ethics/eth2006.htm> (“[T]he 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.”). To some degree, “repeat players” in this area, both law firms and outsourcing vendors, may have strong incentives to develop and strictly follow “best practices” of supervision. *See* Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT’L L. 401, 428 (2007) (suggesting reputational and other consequences to U.S. law firms that fail to conduct investigations of outsourcing vendors). Less-established, more marginal firms may be tempted, however, to cut corners. The ABA opinion thus provides a vital restatement of the essential requirement that all legal services provided to a client must meet the standards of professional competence.

31. *See* San Diego County Bar Ass’n, Ethics Op. 2007-1, available at <http://www.sdcba.org/index.cfm?Pg=ethicsopinion07-1> (attorney “must be able to determine for himself or herself whether the work is competently done”). *See also* Mancina v. Mayflower Textile Serv. Co., 253 F.R.D. 354, 357 (D. Md. 2008) (emphasizing that Rule 26(g) requires the lawyer signing any discovery responses to certify that after “reasonable inquiry” the response is “complete and correct”).

32. *See* Stephen Gillers, REGULATION OF LAWYERS 78-79 (6th ed. 2002) (discussing duty of loyalty generally).

33. *See* MODEL RULES OF PROF’L CONDUCT R. 1.7(a) (2008).

34. MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(1)-(4) (2008).

35. The effectiveness of even these sophisticated conflict clearance systems has been questioned by some. *See* SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE 198 (Univ. of Michigan Press 2002) (suggesting that lawyers may develop conflicts in subtle ways, including social relationships).

36. *See* MODEL RULES OF PROF’L CONDUCT R. 1.10(a) (2008) (no lawyer in a law firm may represent a client “when any one of them practicing alone would be prohibited from doing so”). The precise application of this Rule is a matter of some subtlety. Law firms may, for example,

even a temporary lawyer in a firm may be treated as being “associated” with a law firm, where the temporary lawyer has access to confidential client information, and there is thus a “risk of improper disclosure or misuse of information relating to representation of other clients of the firm.”³⁷ Although the most recent ABA Opinion does not address the potential for conflicts arising from a law firm’s use of an outsourcing firm, the issue clearly may arise in that context. Just as an expert working for one client might divulge information about that client to a lawyer working for an adverse client,³⁸ so a contract lawyer (or non-lawyer) working for an outsourcing vendor might gain access to confidential information regarding one client and improperly divulge such information to another client.³⁹

The risk of (at least) claims of conflicts of interest, and the attendant disruption and cost for the supervising lawyer from such claims, suggests that, as part of the investigation of the background and capabilities of the outsourcing vendor, the supervising lawyer should address potential conflicts. A recent New York City Bar Association opinion suggested that the supervising lawyer should:

- Inquire as to the vendor’s “conflict-checking procedures and about how it tracks work performed for other clients.”⁴⁰
- Inquire whether the vendor is performing, or has performed, any services for parties adverse to the lawyer’s client.⁴¹
- “[P]ursue further inquiry as required.”⁴²
- Remind the vendor, “preferably in writing,” of the need to “safeguard the confidences and secrets” of the vendor’s “other current and former clients.”⁴³

A recent Florida Bar opinion further suggested that a supervising lawyer should take “extra steps” to make sure that the vendor is familiar with legal

build “Chinese Walls,” to avoid potential conflicts due to imputed knowledge of the affairs of two clients in potential conflict.

37. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 88-356 (1988). See also Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www.nycbar.org/Ethics/eth2006.htm> (suggesting that conflicts of contract attorney may be imputed to law firm, depending upon facts and circumstances).

38. See David C. Hricik, *Conflicts and Confidentiality: The Ethical and Procedural Issues Concerning Experts* (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917164.

39. See generally *id.* But see ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 88-356 (1988) (where connection between temporary lawyer and matter involving a potential conflict of interest becomes “more remote,” it should become “more appropriate” to refrain from requiring disqualification).

40. Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www.nycbar.org/Ethics/eth2006.htm>.

41. *Id.*

42. *Id.*

43. *Id.*

conflict rules.⁴⁴ Such “extra steps,” although not stated in the Florida Opinion, might include determining whether the vendor has the ability to establish “Chinese walls” between matters (where necessary), and inquiring about the vendor’s willingness to make binding representations as to the absence of conflicts in taking on the work.⁴⁵ Such steps may be supplemented, or modified, as the matter requires. Where the law firm, client and vendor have long-standing relations, for example, the supervising lawyer may have greater confidence in the vendor’s efforts to avoid conflicts of interest.

V. CONFIDENTIALITY

Another fundamental principle embodied in the attorney/client relationship is the duty of the lawyer to protect the confidences and secrets of a client.⁴⁶ The lawyer’s obligation, moreover, extends to persons providing service to the client at the lawyer’s direction. Thus, commentary to the Model Rules states: “A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”⁴⁷

The applicability of these principles to the outsourcing context seems obvious. The recent ABA Opinion, and several other opinions, suggest that the client’s “informed consent” to the activities of the vendor is a key requirement in outsourcing; since:

[N]o information protected by [Model] Rule 1.6 [concerning confidentiality] may be revealed [to anyone] without the client’s informed consent. The implied authorization [in the Rules] to share confidential information within a firm does not extend to outside entities or to individuals over whom the firm lacks effective supervision and control.⁴⁸

Beyond informing the client that an outsourcing vendor may obtain access to some of the client’s confidential information, additional practical suggestions arise in the ABA Opinion and other recent opinions:

44. See Prof’l Ethics of the Fla. Bar, Op. 07-2 (2008), available at <http://www.floridabar.org/tfb/TFBETOpin.nsf/b2b76d49e9fd64a5852570050067a7af/792dd018996bf2498525749400624f7a?OpenDocument> (citing Los Angeles County Bar Assn. Prof’l Responsibility and Ethics Comm., Op. 518, (2006), available at http://www.lacba.org/Files/Main%20Folder/Documents/%20Ethics%20%20Opinions/Files/Ethics_Opinion_518.pdf; Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www.nycbar.org/Ethics/eth2006.htm>).

45. See *id.*

46. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 6 (2008) (“[P]ublic interest is usually best served by a strict rule” regarding confidentiality).

47. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 16 (2008).

48. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 at 5 (2008) (citing MODEL RULES OF PROF’L CONDUCT R. 1.6 (a), 1.6 cmt. 5 (2008)).

- “Written confidentiality agreements” are “strongly advisable in outsourcing relationships.”⁴⁹
- The lawyer should limit the vendor’s access to information to “only the information necessary to complete the work for the particular client,” and should “provide no access to information about other clients of the firm.”⁵⁰

The extent of such precautions presumably must be commensurate with the risk of confidentiality breach involved in the vendor’s services for the client.⁵¹ Concerns for data security in telecommunications, and even the coverage of foreign laws regarding data protection, for example, may require additional inquiry by the supervising lawyer.⁵² The ABA Committee’s suggestion of a “personal visit” in some instances, to get a “firsthand sense” of the vendor’s operation, may also hold particular force where great concerns for confidentiality appear.⁵³

VI. FEES AND DISCLOSURES

Lawyers are not permitted to charge “unreasonable fees” for their services; nor may they collect “an unreasonable amount of expenses.”⁵⁴ Legal ethics also prohibit lawyers from sharing legal fees with non-lawyers; and formation of a “partnership” with a non-lawyer that includes the “practice of law” is forbidden.⁵⁵ For these purposes, as the ABA Standing Committee on Ethics concluded in 1993, third parties providing services in aid of a lawyer (such as a court reporter or a travel agent) must be treated as a non-lawyer whose fees

49. *See id.* (lawyer must “recognize and minimize the risk” of improper disclosure of confidential information by vendor). *See also* Los Angeles County Bar Ass’n Prof’l Responsibility and Ethics Comm., Op. 518, (2006), available at http://www.lacba.org/Files/Main%20Folder/Documents/%20Ethics%20%20%20Opinions/Files/Ethics_Opinion_518.pdf (“Confidential information can be disclosed to outside contractors so long as the outside contractors agree to keep the client confidences and secrets inviolate.”); Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www.nycbar.org/Ethics/eth2006.htm> (recommending “contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality”).

50. Prof’l Ethics of the Fl. Bar, Op. 07-2 (2008), available at <http://www.floridabar.org/tfb/TFBETOpin.nsf/b2b76d49e9fd64a5852570050067a7af/792dd018996bf2498525749400624f7a?OpenDocument> (lawyer should require “sufficient and specific assurances” that information, 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”).

51. *Id.*

52. *See id.* (“Risks inherent to transmittal of information.”); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 at 4 (2008) (noting risk that documents “may be susceptible to seizure” by authorities in some foreign countries, despite claims of confidentiality).

53. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 at 3 (2008).

54. MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2008) (listing eight potentially relevant factors). Factors to be considered in determining the reasonableness of fees generally include the time and labor required, the novelty and difficulty of the questions presented, the skill required to perform the legal service, and other considerations.

55. MODEL RULES OF PROF’L CONDUCT R. 5.4(a)-(b) (2008) (some limited exceptions apply).

cannot be included in the lawyer's fees.⁵⁶ In 2000, the ABA Committee extended the application of the fee rule to temporary lawyers, noting that a "surcharge" could be added to the contract lawyer's costs, but only if the total charge remains "reasonable."⁵⁷ In substance, although a lawyer cannot take a contract lawyer's work, mark it up as his or her own, and then charge a premium, a lawyer could use the contract lawyer's work as the base for the lawyer's own work, and then charge for the lawyer's services (paying the contract lawyer separately, out of the lawyer's own funds).

Predictably, the ABA Committee, in its 2008 Opinion (on outsourcing) applied the same approach as in its 2000 surcharge opinion on fees for contract lawyer services.⁵⁸ Other recent opinions, however, offer more restricted views on appropriate forms of billing for outsourced legal support services. The New York City Bar Committee, for example, held that "[a]bsent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead."⁵⁹ The Los Angeles Bar Ethics Committee took the view, under California law, that "the attorney must accurately disclose [to the client] the basis upon which *any* cost is passed on to the client."⁶⁰

56. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) ("A lawyer may not charge a client more than her disbursements for services provided by third parties . . . except to the extent that the lawyer incurs costs additional to the direct cost of the third party services.").

57. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420 (2000). The ABA Committee noted:

When costs associated with legal services of a contract lawyer are billed to the client as fees for legal services, the amount that may be charged for such services is governed by the requirement of Model Rule 1.5(a) that a lawyer's fee shall be reasonable. A surcharge to the costs may be added by the billing lawyer if the total charge represents a reasonable fee for services provided to the client. When legal services of a contract lawyer are billed to the client as an expense or cost, in the absence of any understanding to the contrary with the client, the client may be charged only the cost directly associated with the services, including expenses incurred by the billing lawyer to obtain and provide the benefit of the contract lawyer's services.

58. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 08-451 at 5 (2008) (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420 (2000)).

59. Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006), *available at* <http://www.nycbar.org/Ethics/eth2006.htm> (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993)) (stating that it is "inappropriate" to include cost of outsourcing in legal fees).

60. Los Angeles County Bar Ass'n Prof'l Responsibility and Ethics Comm., Op. 518 (2006) (emphasis added), *available at* http://www.lacba.org/Files/Main%20Folder/Documents/%20Ethics%20%20Opinions/Files/Ethics_Opinion_518.pdf (noting California requirement that client "be kept reasonably informed about significant developments relating to the representation").

These suggestions for full disclosure of fee arrangements actually echo some of the suggestions (but not requirements) outlined in the ABA surcharge opinion from 2000.⁶¹ That opinion suggested:

- “In many instances,” the fee and cost structure for a legal engagement is the subject of a formal agreement between client and lawyer. Such an agreement, “or a disclosure concerning fees and costs, may be required by the rules in some circumstances[.]”⁶²
- Although the ABA Committee found “no requirement under the rules for disclosing the identity of specific personnel assigned to a client’s matter absent client inquiry,” the Committee recognized that “client expectations, and the overall client-lawyer relationship may make such disclosure desirable.”⁶³
- The Committee opined that the “spirit” of the Rules “best is served by communications whenever the fee basis or rate structure for services provided to a regularly represented client changes.”⁶⁴

Concerns for potential client misunderstandings about fee structures for outsourcing services, coupled with concerns about client confidentiality and conflicts (discussed above), all suggest that careful discussion with a client on the nature and arrangements for outsourcing support may be the best way to uphold the lawyer’s obligation to provide the client competent and effective services.⁶⁵ The New York City Bar Association, in this regard, has opined on circumstances where disclosure may be essential:

- Where the outsourcing service will “play a significant role in the matter,” for example, where “several non-lawyers are being hired to do an important document review.”⁶⁶
- Where “client confidences and secrets must be shared.”⁶⁷
- Where “the client expects that only personnel employed by the law firm will handle the matter.”⁶⁸

61. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 00-420 (2000). The ABA Committee also noted several state ethics opinions, which “expressly or impliedly observe that it is improper to add surcharges on payments made to a contract lawyer when billed to the client as disbursements unless there is an agreement with the client or disclosure about a markup in advance of the billing.”

62. *Id.*

63. *Id.*

64. *Id.* (citing MODEL RULES OF PROF’L CONDUCT R. 1.5(b) (2008)).

65. See MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2)-(3) (2008) (a lawyer shall: “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” and “keep the client reasonably informed about the status of the matter”); MODEL RULES OF PROF’L CONDUCT R. 1.4(b) (2008) (lawyer must explain a matter to a client, “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”).

66. Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www.nycbar.org/Ethics/eth2006.htm>.

67. *Id.*

68. *Id.*

- Where outsourcing services are to be billed to the client on a basis “other than cost.”⁶⁹

In short, the client is entitled to know who is providing it legal representation, and is entitled to know the basis on which an outsourcing service may be assisting the supervising lawyer.⁷⁰

VII. SOME PARTING THOUGHTS

Basic professional ethics rules were formed in an earlier era, when the relationships between attorneys and their clients were relatively simple and predictable. The practice of law, however, is changing, and rapidly. Outsourcing of legal services is just one part of a larger wave of change, which may require concerted thinking about the adaptation of basic rules of legal ethics to a dynamic world, where the interactions between attorneys, clients and the service providers who may aid them both, can become quite complicated.⁷¹ In this dynamic environment, the best approach for the responsible lawyer is to become educated on new technologies and new methods of practice, to remain alert to potential ethical issues involved in the employment of these technologies and methods of practice, and encourage candid discussion, among attorney, client and vendor, about the best means both to serve the client’s interests, and serve the ends of justice.

69. *Id.*

70. *See id.* Accord New York State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 715 (1999), available at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=18875 (where a contract lawyer is making “strategic decisions” or performing “other work that the client would expect of the senior lawyers working on the client’s matters,” the firm should disclose the nature of the work performed, and obtain client consent); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 00-420 (2000) (“Clients are entitled to know who or what entity is representing them.”).

71. *See Qualcomm, Inc. v. Broadcom Corp.*, No. 05cv1958-B, 2008 WL 66932, at *12-13, *13 n.10 (S.D. Cal. Jan. 7, 2008) (court held that lawyers were required to advise their client to produce essential discovery materials, and were required to resign if the client refused to follow that advice). The *Qualcomm* judge criticized lawyers for misrepresenting information in their client’s possession, which had not been properly produced. Despite the warnings in *Qualcomm*, in other cases, where a client, or a vendor at the direction of the client, takes principal responsibility for conducting the collection and production of information, it may be very difficult for an outside lawyer to ensure that he or she has full knowledge of the precise discovery steps taken.