

**CONFIDENTIALITY AND THE ETHICS
OF OFFSHORE LEGAL WORK**

September 2008

In late August 2008, the American Bar Association published Formal Opinion 08-451 of its Standing Committee on Ethics and Professional Responsibility, dated August 5, 2008 (“ABA Formal Op.”), opining expressly on a “Lawyer’s Obligations When Outsourcing Legal and Nonlegal Support Services.” The ABA’s action follows the issuance of opinions by a few state and local bar associations in 2006 and 2007 about the ethics of outsourcing legal work and particularly outsourcing that work offshore. Two local bar associations have issued formal ethics opinions addressing the circumstances in which it is permissible to use offshore attorneys and legal staff to perform outsourced legal work. *See* San Diego County Bar Assoc. Ethics Op. 2007-1 (“San Diego Ethics Op.”); Assoc. of the Bar of the City of New York, Comm. On Professional and Judicial Ethics Formal Op. 2006-3 (August 2006) (“N.Y.C. Formal Op.”). In addition, in 2007, the Professional Ethics Committee of the Florida Bar issued a proposed advisory opinion on the same topic which was affirmed by the Florida Bar’s Board of Governors on July 25, 2008. *See* Professional Ethics of the Florida Bar Advisory Op. 07-2 (approved July 25, 2008) (“Fla. Op.”).

All three of the state and local authorities framed the question presented as whether the use of offshore (specifically, India based) outsourced attorneys and legal staff violates the general ethical prohibition against the unauthorized practice of law. All three of those opinions conclude that using offshore attorneys and other legal staff to perform outsourced legal work does not constitute the

APHELION LEGAL SOLUTIONS

unauthorized practice of law *provided that certain enumerated conditions are met*. The ABA Formal Op. is consistent but lists avoiding the unauthorized practice of law (and aiding and abetting unauthorized practice) as a separate, additional condition of ethically outsourcing legal work.²

In other words, the opining bar authorities have not issued blanket approval of using offshore outsourced legal work. Rather, it is the responsibility of the delegating lawyer, subject to the jurisdiction of a disciplinary bar authority, to meet the enumerated conditions and ensure that offshore legal work is conducted and used ethically. That responsibility cannot be delegated to the non-lawyer doing the legal work offshore.³ The delegating lawyer is responsible for (1) supervising and reviewing the work of the offshore staff, particularly with respect to guarding client confidentiality, (2) appropriately disclosing to the client that offshore non-lawyers performed the work, (3) ensuring that adequate procedures are in place to avoid conflicts of interest, (4) billing the work appropriately and (5) (thereby) avoiding the unauthorized practice of law and not aiding or abetting unauthorized practice.

The authorities emphasize the primary importance of meeting the first condition, namely, that the outsourced work is conducted in a manner that fully protects client confidences. For example, the N.Y.C. Formal Op. concludes that there is no general ethical prohibition against outsourcing “substantive legal support services” to offshore non-lawyers, including “legal research, drafting, due diligence, patent and trademark work, review of transactional and litigation documents and drafting contracts, pleadings, or memoranda of law.” N.Y.C. Formal Op. at 2, n.4. To use such overseas work

² ABA Formal Op. 08-451 declines to rule on that issue as an ultimate question, stating instead that the “Committee lacks the authority to express an opinion as to whether the provision of legal services by any particular lawyer, nonlawyers, or intermediary constitutes the unauthorized practice of law.” ABA Formal Op. at 6.

³ Ethics opinions, rules, regulations, and case law generally use “non-lawyer” as a term of art to refer to any person not admitted to practice law within the applicable jurisdiction and it includes not only lay persons but also non-admitted attorneys working in the jurisdiction pursuant to a temporary, contractual, or outsourcing arrangement. As used in this memorandum, “non-lawyer” likewise includes attorneys admitted to practice only in other jurisdictions, such as lawyers licensed only in India.

APHELION LEGAL SOLUTIONS

product, however, the outsourcing attorney must provide adequate supervision of the offshore work, with special attention to ensuring that client confidences are maintained, and must also meet the other conditions enumerated above. Furthermore, the N.Y.C. Formal Op. requires special consideration of the “physical separation” between the supervising lawyer in New York and the outsourced personnel in India. *Id.* at 4-5. It recommends several common sense “salutary steps” to discharge the duty to supervise outsourced work in India, including the use of contractual employment provisions to enforce the duty to protect client confidentiality and need-to-know limitations on non-lawyers’ access to client confidences and secrets. *Id.* at 5-6.

The San Diego Ethics Op. notes that an outsourcing attorney must “retain[] the duty to supervise the work performed competently, *whether that work is outsourced out-of-state or out of the country.*” San Diego Ethics Op. at 5 (emphasis added). That opinion adopts the same recommendations about discharging the duty to supervise that the N.Y.C. Formal Op. enumerates. The San Diego Bar likewise specifically warns that the “degree of supervision warranted for outsourced work [is] magnified by the work being performed in India rather than a United States jurisdiction.” The San Diego Ethics Op. therefore suggests that the responsible lawyer gain some insight into Indian legal standards and business practices about confidentiality in order better to discharge that duty. *Id.* at 6.

The Florida Opinion begins by describing the breadth of legal work that is currently being assigned to some offshore attorneys and staff, including the creation of business entities, preparation of documents and legal forms, obtaining information from clients for such forms, drafting contracts, litigation support, and legal research. *See Fla. Op.* at lines 7-15. It concludes:

APHELION LEGAL SOLUTIONS

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

Id. at lines 21-26 (emphasis added). The Fla. Op. specifically suggests, as part of the required “adequate supervision” and protection of client confidentiality, that the offshore personnel should not have access to information about any other clients of the responsible attorney or firm. *Id.* at lines 116-120. It also agrees with the N.Y.C. Bar Op. that the employment contracts with the offshore personnel should include provisions mandating the protection of client confidentiality and providing remedies for breaches. *Id.* at lines 120-24.

ABA Formal Op. 08-451 quotes Rule 1.6, comment 16 and cites the ABA's earlier Formal Op. 95-398 to remind practitioners of their duty “to 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*” (emphasis added). ABA Formal Op. at 5. By including persons subject to the outsourcing lawyer's supervision, the ABA Formal Op. encompasses offshore nonlawyers who are assisting the outsourcing lawyers among those whom the lawyer must ensure understand and abide by the usual duties of confidentiality. To fulfill this obligation, the ABA Formal Op. “strongly” advises that the parties to the outsourcing agreement embody their duties in written confidentiality agreements. *Id.* The ABA Formal Op. also states that an outsourcing lawyer should “verify” that the service provider does not also work for the outsourcing lawyer's clients' adversaries on the same or substantially related matters. *Id.*

APHELION LEGAL SOLUTIONS

By emphasizing the importance of guarding client confidentiality when legal work is outsourced overseas, the ethics opinions follow the same analysis of the general ethical rules by which many similar authorities discerned over the last decade the conditions under which legal work can be done by non-lawyers in domestic outsourcing arrangements.⁴ The ethical rules that apply to domestic outsourcing also require that the work of non-lawyers must be supervised by the primary attorney in a manner that is reasonable in the circumstances, with emphasis on ensuring that client confidences are protected. *See, e.g.,* Assoc. of the Bar of the City of New York, Comm. On Professional and Judicial Ethics Formal Op. 1995-11 (“tasks a non-lawyer may undertake under the supervision of an attorney should be more expansive than those without either supervision or legislation [specifically authorizing such work]”). The N.Y.C. Formal Op., for example, relies on Disciplinary Rules 1-104(C) and 1-104(D) -- which speak to the supervision required for all work done for New York lawyers or firms -- as the starting point to discern what type of supervision is appropriate for legal work that is done offshore.

Just prior to the publication of the opinions about offshore outsourcing of legal work, the Los Angeles County Bar Association issued an opinion on outsourcing generally. *See* Los Angeles County Bar Assoc. Professional Responsibility and Ethics Comm. Op. No. 518 (June 19, 2006) (“L.A. Bar Op.”). Although the Los Angeles Bar Association’s opinion does not expressly address offshore as opposed to domestic outsourcing, the scope and terms of the L.A. Bar Op. are broad enough to encompass the ethical use of both offshore and domestic legal services work product. But for the specific references to using Indian suppliers of outsourced legal work, the analysis of the L.A. Bar Op. is essentially identical to the analysis in the opinions of the authorities that expressly address offshoring

⁴ While a bar association’s ethical opinions may be persuasive, they generally are not binding on courts (which traditionally retain the primary authority to regulate the activities of the bar).

APHELION LEGAL SOLUTIONS

legal work to India. Indeed, the fact that the L.A. Bar does not expressly mention the underlying fact that the request it was addressing arose within an offshore arrangement is some indication that the L.A. Bar would agree with what other bars' opinions have made express, namely, that the ethics issues presented by outsourcing are essentially the same whether the work is done domestically or offshore, though confidentiality protections merit special consideration in the offshore context.

The importance of protecting client confidentiality in the context of offshore legal work is most deeply emphasized in the Fla. Op. The Florida Bar cites six specific media reports and articles about confidentiality being breached or severely threatened in situations where business work was outsourced overseas. Although the reports arose in the context of outsourced *business* rather than legal work, the Fla. Op. takes pains to note that the implications for protecting confidentiality of legal work "are likewise applicable to domestic service providers" as well as to offshore providers. The Fla. Op. concludes that the confidentiality concerns "present a heightened supervisory and auditability concern in foreign (*i.e.*, non-U.S.) jurisdictions, and should be accorded heightened scrutiny by the attorney seeking to use such services." *See Fla. Op.* at lines 139-142 & n. 1.

In light of these ethical considerations, it would be a mistake to conclude that the opining authorities have issued blanket approval of using offshore (or even domestically outsourced) legal work. Rather, in addition to meeting the other requirements listed above, lawyers must prepare to supervise offshore legal work with "heightened scrutiny," giving particular attention to guarding client confidences. Heightened scrutiny expressly includes ensuring that applicable employment agreements or contracts include terms that would discharge the duty to protect client confidences and secrets in U.S. jurisdictions. A careful practitioner will ensure that such contractual provisions are found in the entire

APHELION LEGAL SOLUTIONS

chain of employment agreements or contractual engagements from the delegating lawyer or firm to the specific persons doing the work. All of the agreements must be legally enforceable and should provide express and enforceable remedies for breach of a client's confidences.

In addition, heightened scrutiny might also include measures taken by the supervising lawyer to ensure that contractual provisions about confidentiality are not considered mere boilerplate but become practical and familiar standards of conduct that are adopted by overseas legal staff. Background checks will help ensure that applicants have not been involved in prior disclosure abuses. Prior to work being undertaken, the offshore workers should receive express and adequate training about the broad scope of a U.S. attorney's duty to protect client confidences and whether that duty differs from local standards that otherwise apply to the overseas lawyers and legal staff. Articulating the applicable standards through a binding code of employee conduct or privacy policy can also reinforce the seriousness of abiding by the confidentiality regime. Physical and electronic protection of all client information, including need-to-know limits on access to each specific client's confidential information, is essential. Finally, dedicating a portion of offshore non-lawyers' orientation and training specifically to confidentiality can be an important indicator that the delegating attorney has provided "heightened scrutiny" of offshore legal work.