OUTSOURCING E-DISCOVERY

Outsourcing to foreign-licensed lawyers or contractors of, for example, the review of electronically stored information, may result in lower costs than using contract lawyers in America if the billing rates of the foreign-licensed lawyers or contractors are lower and these reviewers are as, or more efficient and accurate, than their American counterparts. The ethical propriety of this practice has not been directly addressed in ethics opinions but several opinions speak to the issue of outsourcing in a variety of contexts that, by analogy, offer guidance to lawyers wondering whether outsourcing of e-discovery legal work offends the rules of professional conduct.[131]

Unauthorized Practice of Law Under Model Rule 5.5

Model Rule 5.5(a) prohibits a lawyer from practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or to "assist another in doing so."

Model Rule 5.5(b) provides that a nonadmitted lawyer in a particular jurisdiction "shall not":

> *(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or*
>
> *(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.*

Model Rule 5.5(c) allows lawyers "admitted in another United States jurisdiction" and not disbarred or suspended in another jurisdiction, to provide certain legal services "on a temporary basis" in "this jurisdiction" under certain circumstances.[132]

In dealing with outsourcing, the focus of the ethics opinions has been on "assisting" another to practice law in the retaining lawyer's jurisdiction.

The Florida Bar's Professional Ethics Committee issued Proposed Advisory Opinion 07-02 (January 18, 2008),[133] but elected not to answer the question of whether outsourcing legal work, including "litigation support," "to overseas attorneys or paralegals," constitutes "assisting in the unlicensed

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[131] Links to the opinions are provided below and also in Appendix III.

[132] There are four circumstances identified in Model Rule 5.5(c). The legal services "(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." Model Rule 5.5(d) also allows a lawyer "admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction," to provide legal services "in this jurisdiction that: (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction."

[133] http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/DB3E4EDA068D9173852573530070B8D0/$FILE/07-2%20pao.pdf?OpenElement.

practice of law" prohibited by Florida RPC 4-5.5. Focusing, in defining "the practice of law," on the protection of the public from "incompetent, unethical, or irresponsible representation,"[134] the Florida Bar Ethics Committee decided that it was not "authorized" to make the determination "whether or not the proposed activities constitute the unlicensed practice of law." Rather, it told the inquiring attorney that it was up to that attorney "to determine whether activities (legal work) being undertaken or assigned to others might violate Rule 4-5.5 and any applicable rule of law."

The Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York was not as shy. In Formal Opinion 2006-3 (August 2006),[135] the Committee answered the question of whether a New York lawyer may outsource legal support services to a foreign lawyer, not admitted to practice in the United States, or to a lay person. Applying DR 3-101(A) of the Model Code of Professional Responsibility which prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law, the Committee determined that as long as the lawyer supervises the foreign lawyer's work, there is no ethical violation. To emphasize the level of supervision required, the Committee concluded:

> *The potential benefits resulting from a lawyer's delegating work to a non-lawyer cannot be denied. But at the same time, to avoid aiding the unauthorized practice of law, the lawyer must at every step shoulder complete responsibility for the non-lawyer's work. In short, 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.*

This determination is consistent with similar opinions issued by other bar association ethics committees albeit under different circumstances. For example, in Opinion 518 (June 19, 2006)[136] the Los Angeles County Bar Association determined that a lawyer who contracted with an out-of-state company to draft a brief on behalf of a client was not assisting in the violation of the California Rules of Professional Conduct "so long as the attorney remains ultimately responsible for the final work product provided to or on behalf of the client."

Similarly, in Opinion 2007-01,[137] the San Diego County Bar Association confronted the question of whether a lawyer retained to handle an intellectual property matter in which the lawyer had limited experience could ethically retain Legalworks, a firm in India, to do legal research, develop a case strategy, and prepare motions, among other tasks. Ultimately, the lawyer's summary judgment motion was granted, after which the lawyer disclosed to the client that the lawyer had used the Indian firm to do the bulk of the work. Did the lawyer aid the unauthorized practice of law? The SDCBA determined that the lawyer had not:

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[134] The Ethics Committee quoted from *The Florida Bar v. Moses*, 380 So.2d. 412, 417 (Fla. 1980) in explaining that when evaluating whether an activity represents the practice of law, "'the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation.'"

[135] http://www.nycbar.org/Ethics/eth2006.htm.

[136] http://www.lacba.org/Files/Main%20Folder/Documents/%20Ethics%20%20%20Opinions/Files/Ethics_Opinion_518.pdf.

[137] http://www.sdcba.org/ethics/ethicsopinion07-1.htm.

> *The California lawyer in this case retained full control over the representation of the client and exercised independent judgment in reviewing the draft work performed by those who were not California attorneys. His fiduciary duties and potential liability to his corporate client for all of the legal work that was performed were undiluted by the assistance he obtained from Legalworks. In short, in the usual arrangement, and in the scenario described above in particular, the company to whom work was outsourced has assisted the California lawyer in practicing law in this state, not the other way around. And that is not prohibited.*

With appropriate supervision and control, outsourcing should not violate Model Rule 5.5 or its analog in those states that have adopted it.

Duty to Supervise Under Model Rules 5.1 and 5.3

As discussed earlier, Model Rules 5.1 and 5.3(a) and (b) requires a firm or a lawyer having direct supervisory authority over a subordinate lawyer or a nonlawyer, respectively, to make reasonable efforts to ensure that that their conduct is compatible with the professional obligations of the lawyer. Under Model Rule 5.1(c), a lawyer is responsible for a subordinate lawyer's violation of the Rules of Professional Conduct and under Model Rule 5.3(c), a lawyer is responsible for the conduct of the nonlawyer that, in both cases, "would be a violation of the Rules of Professional Conduct if engaged in by a lawyer," if (1) the lawyer orders the conduct, or with the knowledge of the specific conduct, ratifies the conduct, or (2) the lawyer "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[138]

In its Proposed Advisory Opinion 07-2 (January 18, 2008), the Florida Bar Ethics Committee explained that Florida's RPC 4-5.3 applies to the conduct of "overseas providers." In an apparent effort to identify the lawyer's obligations, the Committee quoted from the comment to the Florida version of Model Rule 5.3:

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

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[138] It seems unnecessary to note that the duty to supervise presupposes the competence to supervise, as is required by Model Rule 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." See, e.g., San Diego Bar Association Ethics Opinion 2007-1 (hiring firm in India to assist in defending intellectual property case required sufficient experience in the retaining attorney to perform a critical and independent evaluation of the work product produced by the Indian firm);

In dealing with the use of Legalworks, the firm in India, the San Diego Bar Association in its Ethics Opinion 2007-1 cited to ABA Model Rule 5.1 in explaining the lawyer "also retains ultimate responsibility for that work."[139]

In analyzing the ethical propriety of outsourcing legal work overseas, the City of New York Bar Ethics Committee offered a number of suggestions to lawyers obliged to satisfy their ethical duty to supervise.

> *Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the professional résumé of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or by voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer's suitability for the particular assignment; and (d) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the non-lawyer is discharging the assignment according to the lawyer's expectations.*[140]

In short, the retaining lawyer must know with whom the lawyer is dealing and retains responsibility for the outsourced provider's work.

Avoiding Conflicts of Interest Under Model Rule 1.7

Model Rule 1.7 prohibits representation of a client if the representation involves a concurrent conflict of interest:

> *(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:*
>
> *(1) the representation of one client will be directly adverse to another client; or*
>
> *(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.*

Protecting against conflicts is another obligation of lawyers identified in the ethics opinions issued to date on the subject of outsourcing. The Florida Bar Ethics Committee relied on Opinion 518 from the

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[139] http://www.sdcba.org/ethics/ethicsopinion07-1.htm: "By retaining responsibility for the work, the supervising attorney is subject to the ABA Model Rules that hold a lawyer responsible for another lawyer's violation of professional responsibility rules where: 1) the lawyer orders or ratifies the misconduct; or where 2) the lawyer has supervisory authority over the other lawyer and knows of the conduct at the time when the consequences could have been avoided or mitigated but failed to take remedial action. (ABA Model Rule 5.1(c) & Comment 5.)"

[140] http://www.nycbar.org/Ethics/eth2006.htm.

Los Angeles County Bar Association which described the lawyer's obligation regarding conflicts of interest in retaining a nonlicensed lawyer to perform work for a client:

> *[T]he attorney should satisfy himself that no conflicts exist that would preclude the representation. [Cite omitted.] The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney's relationship with Company.*[141]

The City of New York Bar Ethics Op. 2006-3 provides similar guidance:

> *As a threshold matter, the outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients. The outsourcing New York lawyer should also ordinarily ask both the intermediary and the non-lawyer performing the legal support service whether either is performing, or has performed, services for any parties adverse to the lawyer's client. The outsourcing New York lawyer should pursue further inquiry as required, while also reminding both the intermediary and the non-lawyer, preferably in writing, of the need for them to safeguard the confidences and secrets of their other current and former clients.*

As required by the rules of professional conduct, and as explained in the City of New York Bar's Ethics Op. 2006-3, avoiding conflicts goes hand in hand with protecting confidences of the client, a subject to which I next turn.

The Duty of Confidentiality Under Model Rule 1.6

We have already discussed Model Rule 1.6. As a reminder, Rule 1.6(a) provides that a lawyer "shall not" reveal information "relating to representation of a client unless the client gives informed consent," the disclosure is "impliedly authorized in order to carry out the representation," or the disclosure is permitted by Rule 1.6(b).

The lawyer using outside contractors must ensure that the outside contractors "agree to keep client confidences and secrets inviolate." Los Angeles County Bar Ethics Op. 518, p. 14.[142] In the context of outsourcing legal work, the City of New York Bar Ethics Op. 2006-03 again offers guidance on steps to take to preserve client confidences:

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[141] Florida Bar Proposed Ethics Op. Opinion 07-2 (January 18, 2008) ,http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/DB3E4EDA068D9173852573530070B8D0/$FILE/07-2%20pao.pdf?OpenElement, quoting from Los Angeles County Bar Ethics Op. 518 (June 19, 2006) ,http://www.lacba.org/Files/Main%20Folder/Documents/%20Ethics%20%20%20Opinions/Files/Ethics_Opinion_518.pdf.

[142] Cf. Formal Opinion 2004-165 of the California State Bar Standing Committee on Professional Responsibility and Conduct (a lawyer that uses on a contract basis a court appearance service operated by lawyers must take precautions "to assure" that information "imparted to the appearing lawyer is held in confidence." https://www.lexisnexis.com/applieddiscovery/LawLibrary/CourtRulesArticles/CAstatebarop.pdf.

> *Measures that New York lawyers may take to help preserve client confidences and secrets when outsourcing overseas include restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality.*[143]

Florida Bar Proposed Advisory Ethics Op. 07-2 elaborates on possible safeguards the lawyer should employ in the context of transmission of information electronically to an overseas contractor.

> *[A]ssurances by the foreign provider that policies and processes are employed to protect the data while in transit, at rest, in use, and post-provision of services should be set forth in sufficient detail for the requesting attorney. Moreover, foreign data-breach and identity protection laws and remedies, where such exist at all, may differ substantially in both scope and coverage from U.S. Federal and State laws and regulations. In light of such differing rules and regulations, an attorney should require sufficient and specific assurances (together with an outline of relevant policies and processes) that the data, once used for the service requested, will be irretrievably destroyed, and not sold, used, or otherwise be capable of access after the provision of the contracted-for service. While the foregoing issues are likewise applicable to domestic service providers, they present a heightened supervisory and auditability concern in foreign (i.e., non-U.S.) jurisdictions, and should be accorded heightened scrutiny by the attorney seeking to use such services.*

Outsourcing overseas must be accompanied by confidentiality safeguards to protect the client, which, in turn raises the question of the client's role in deciding to outsource e-discovery work to an overseas provider.

Must a Client's Informed Consent Be Obtained Before Outsourcing E-Discovery Work?

Model Rule 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client unless the client gives "informed consent." As noted earlier, Model Rule 1.0(e) defines informed consent as denoting "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

The ethics opinions addressing outsourcing relate the obligation to obtain informed consent to the role of the outsourcing contractor and the risk involved. Florida Bar Proposed Ethics Op. 07-2 explains:

> *The requirement for informed consent from a client should be generally commensurate with the degree of risk involved in the contemplated activity for which such consent is sought.*
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> ***

[143] http://www.nycbar.org/Ethics/eth2006.htm. In its Proposed Advisory Ethics Op. 07-2, the Florida Bar Ethics Committee endorsed this part of the City of New York Bar Ethics Op. 2006-03.

> *The committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests. Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar.*[144] *In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services. For example, in Opinion 88-12, we stated that a law firm's use of a temporary lawyer may need to be disclosed to a client if the client would likely consider the information to be material.*

The City of New York Bar Ethics Op. 2006-3 also contrasted the use of temporary lawyers with the referral of work to an overseas nonlawyer contractor in offering this guidance:

> *Non-lawyers often play more limited roles in matters than contract or temporary lawyers do. Thus, there is little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to outsource legal support services overseas to a non-lawyer. But the presence of one or more additional considerations may alter the analysis: for example, if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-lawyer, in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed.*

The opinion writers were explicit if a client confidence or secret has to be disclosed: "We conclude that if the outsourcing assignment requires the lawyer to disclose client confidences or secrets to the overseas nonlawyer, then the lawyer should secure the client's informed consent in advance. In this regard, the lawyer must be mindful that different laws and traditions regarding the confidentiality of client information obtain overseas."[145]

In Ethics Opinion 2007-1, in the context of the use of Legalworks, a firm in India that assisted the lawyer in defending an intellectual property lawsuit, the San Diego County Bar Association framed

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[144] Florida's RPC 4-1.6 (a) provides in pertinent part that that a lawyer "shall not reveal information relating to representation of a client except as stated in [subdivision] … (c), …, unless the client gives informed consent." Florida's RPC 4-1.6(c)(1) then provides that, "A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed." The Florida Rules of Professional Conduct can be found at: http://www.floridabar.org/divexe/rrtfb.nsf/WContents?OpenView&Start=1&Count=30&Expand=4.

[145] The opinion writers here cited N.Y. State Opinion 762 (2003) characterizing it as determining that "a New York law firm must explain to a client represented by lawyers in foreign offices of the firm the extent to which confidentiality rules in those foreign jurisdictions provide less protection than in New York." This opinion can be found at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=13596.

the issue of client consent in terms of the expectation of the client with respect to the services provided by an attorney:

> *[T]he duty to inform the client is determined by the client's reasonable expectation as to who will perform those services. Therefore, if the work which is to be performed by the outside service 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". Conversely, if the service is not a service that is within the client's reasonable expectation that it will be performed by the attorney, the attorney is not necessarily required to inform the client immediately, absent other requirements compelling disclosure.*

Cf. Los Angeles County Bar Association Ethics Op. 518, p. 6 (in the context of the use of an out-of-state company to write a brief for the lawyer, explaining that a lawyer has a duty to keep a client informed of significant developments relating to the representation and whether the use of an outside lawyer constitutes a significant development "is based upon the circumstances of each case").[146]

The facts dictate the obligation. For example, it is unlikely that a lawyer would outsource overseas the review of electronically stored information pursuant to work product-protected protocols without involvement of the client. To even consider the option presupposes that there is a cost savings by outsourcing the work and there are sufficient numbers of files that costs, in fact, can be saved by outsourcing.[147] Typically, these are joint lawyer-client decisions.

Billing for Outsourced Services

Model Rule 1.5(a) provides that, "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." Model Rule 1(a) adds that the "factors to be considered in determining the reasonableness of a fee include the following: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional

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[146] The Los Angeles County Bar Association cited Formal Opinion 2004-165 of California's Office of Professional Responsibility and Conduct which explained that California's Rule 3-500 provides that a member of the California Bar must keep a client "reasonably informed about significant developments relating to the employment or representation." See https://www.lexisnexis.com/applieddiscovery/LawLibrary/CourtRulesArticles/CAstatebarop.pdf, p.2.

[147] No e-discovery restoration, retrieval, and review process is going to be perfect. The goal is to get it as right as one reasonably can the first time in all three respects. Within this context of reasonableness, whether there is a cost savings is not just a function of rate but also of training time, efficiency, and accuracy.

relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent." [148]

Model Rule 1.5(b) adds that the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible "shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client."

Relying on the prohibition fee-splitting with a nonlawyer in the Model Code of Professional Responsibility, in Formal Opinion 2006-03, the City of New York Bar addressed charges for outsourcing legal support services[149] to an overseas nonlawyer:

> *By definition, the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer to include the cost of outsourcing in his or her legal fees.* See *DR 3-102.*[150] *Absent 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 expenses directly associated with providing that service. ABA Formal Opinion 93-379 (1993).*

Without citing to a rule of professional conduct, the Florida Bar's Proposed Advisory Opinion 2007-2 also addressed billing under the facts presented, stating:

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

Opinion 518 of the Los Angeles County Bar Association, which addressed the retention by a lawyer of an out-of-state company to draft a brief, explains that the attorney could pay the cost of the brief

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[148] Comment [1] to Model Rule 1.5(a) explains that the factors "specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance." With respect to expenses, it adds that, "A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer."

[149] According to n.4 of the City of New York Bar's Formal Opinion 2006-3, the opinion concerns outsourcing of "'substantive legal support services, 'which includes legal research, drafting, due diligence reports, patent and trademark work, review of transactional and litigation documents, and drafting contracts, pleadings, or memoranda of law. This is distinguished from 'administrative legal support services,' which include transcription of voice files from depositions, trials and hearings; accounting support in the preparation of timesheets and billing materials; paralegal and clerical support for file management; litigation support graphics; and data entry for marketing, conflicts, and contact management."

[150] DR 3-102 provides that a lawyer shall not share legal fees with a nonlawyer.

without passing on any of the cost to the client, or may elect to pass the cost on to the client directly for payment, mark up the cost and pass it on to the client, or charge the client a flat fee.[151]

Depending upon whether outsourcing involves nonlawyers or fee splitting, the jurisdiction, and the specific facts relating to the services outsourced, it appears that a reasonableness standard governs the billing arrangement for legal services outsourced overseas, subject to any agreement between the lawyer and the client on billing for these services.

CONCLUSION

This journey through ethical issues in e-discovery has no places to rest. When you are on the e-discovery ethics track, if you lay down your guard, you will get run over. Competence is the place to start but candor is always the place to be. In between, I am also confident in saying that lawyers will face ethics issues beyond those covered here. This is particularly true in the era of multijurisdictional practice where, as is demonstrated by the multiple and differing ethics opinions on the propriety of the review of metadata, different interpretive rules based on different rules of professional conduct may be applicable in different jurisdictions creating uncertainty as to the rules to follow in jurisdictions which have not yet rendered interpretive rules.[152]

Prudent lawyers—whether in-house counsel or outside counsel—will recognize when they need e-discovery advice and will obtain and follow it. In the arena of e-discovery, where the scope of "key players" can be fluid; searches can be faulted; restoration, retrieval, and review of various types of data can be in issue; forms of production may vary; metadata may be involved; backup tapes may be implicated; potentially privileged information is costly to restore, locate, and review; electronically stored information can easily be missed or lost; and vendors have to be supervised, we all need to be prudent lawyers.

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[151] http://www.lacba.org/Files/Main%20Folder/Documents/%20Ethics%20%20%20Opinions/Files/Ethics_Opinion_518.pdf, p. 10-11. The Ethics Committee of the Los Angeles County Bar added that the attorney "must accurately disclose the basis upon which any cost is passed on to the client." *Id.*, p. 12. In Ethics Opinion 2007-1, the San Diego County Bar Association explained that the lawyer that retained Legalworks, a firm in India, to help the lawyer defend an intellectual property case had billed the client for the actual cost of the use of the firm.

[152] Model Rule 5.5 permits multiple jurisdictional practice. *See* Ethics Docket 03-07, Maryland State Bar Association, Inc. Committee On Ethics, October 2003 (since Delaware adopted the ABA's Rule 5.5, Delaware now allows out-of-state attorneys to provide legal services in Delaware on a temporary basis, so it would not be the unauthorized practice of law for a Maryland lawyer to conduct a real estate settlement involving Delaware property in Maryland for a Maryland client). The trade-off for this privilege appears in Rule 8.5 which provides that a lawyer "not admitted in this jurisdiction" is subject to the disciplinary authority of "this jurisdiction" if the lawyer provides or offers to provide "legal services" "in this jurisdiction." Rule 22 of the ABA *Model Rules for Lawyer Disciplinary Enforcement* requires a jurisdiction in which a lawyer is licensed to reciprocally enforce another jurisdiction's disciplinary decision, even if the lawyer is not admitted in that other jurisdiction, unless there are public policy reasons not to approve reciprocal discipline. As these changes are adopted by states, a lawyer that is found to be engaged in the practice of law in another state will have to consider that other state's rules of professional conduct that relate to disclosure. As of April 2008, 11 jurisdictions had adopted Model Rule 5.5 verbatim and 24 jurisdictions had adopted a similar rule, and 18 jurisdictions had adopted Rule 8.5 verbatim with 19 jurisdictions adopting a similar rule. See "Quick Guide chart on State Adoption of Rule 5.5" and the same link for Rule 8.5 at http://www.abanet.org/cpr/mjp/home.html.

