

33 . . .if the giving of [the] advice and performance of [the] services affect
34 important rights of a person under the law, and if the reasonable protection
35 of the rights and property of those advised and served requires that the
36 persons giving such advice possess legal skill and a knowledge of the law
37 greater than that possessed by the average citizen, then the giving of such
38 advice and the performance of such services by one for another as a course
39 of conduct constitute the practice of law.
40

41 When applying this test it should be kept in mind that “the single most important concern in the
42 Court's defining and regulating the practice of law is the protection of the public from
43 incompetent, unethical, or irresponsible representation.” *The Florida Bar v. Moses*, 380 So. 2d
44 412, 417 (Fla. 1980). The Committee is not authorized to make the determination whether or not
45 the proposed activities constitute the unlicensed practice of law. It is the obligation of the
46 attorney to determine whether activities (legal work) being undertaken or assigned to others
47 might violate Rule 4-5.5 and any applicable rule of law.
48

49 Rule 4-5.3, Rules Regulating The Florida Bar, requires an attorney to directly supervise
50 nonlawyers who are employed or retained by the attorney. The rule also requires that the
51 attorney make reasonable efforts to ensure that the nonlawyers’ conduct is consistent with the
52 ethics rules. This is required regardless of whether the overseas provider is an attorney or a lay
53 paralegal. The comment to the rule states:

54
55 A lawyer must give such assistants appropriate instruction and supervision
56 concerning the ethical aspects of their employment, particularly regarding the
57 obligation not to disclose information relating to representation of the client. The
58 measures employed in supervising nonlawyers should take account of the level of
59 their legal training and the fact that they are not subject to professional discipline.
60 If an activity requires the independent judgment and participation of the lawyer, it
61 cannot be properly delegated to a nonlawyer employee.
62

63 Additionally, Florida Ethics Opinions 88-6 and 89-5 provide that nonlawyers (defined as
64 persons who are not members of The Florida Bar) may accomplish certain activities but only
65 under the "supervision" of a Florida lawyer.

66 In Florida Opinion 88-6, which discusses initial interviews that are conducted by
67 nonlawyers, this committee advised that:
68

69 the lawyer is responsible for careful, direct supervision of nonlawyer employees
70 and must make certain that (1) they clearly identify their nonlawyer status to
71 prospective clients, (2) they are used for the purpose of obtaining only factual
72 information from prospective clients, and (3) they give no legal advice concerning
73 the case itself or the representation agreement. Any questions concerning an
74 assessment of the case, the applicable law or the representation agreement would
75 have to be answered by the lawyer.
76

77 Florida Ethics Opinion 89-5 provides that a law firm may permit a paralegal or other
78 trained employee to handle a real estate closing at which no lawyer in the firm is present
79 if the following conditions are met:

- 80 1. A lawyer supervises and reviews all work done up to the closing;
- 81 2. The supervising lawyer determines that handling or attending the closing will be
82 no more than a ministerial act. Handling the closing will constitute a ministerial
83 act only if the supervising lawyer determines that the client understands the
84 closing documents in advance of the closing;
- 85 3. The clients consent to the closing being handled by a nonlawyer employee of the
86 firm. This requires that written disclosure be made to the clients that the person
87 who will handle or attend the closing is a nonlawyer and will not be able to give
88 legal advice at the closing;
- 89 4. The supervising lawyer is readily available, in person or by telephone, to provide
90 legal advice or answer legal questions should the need arise;
- 91 5. The nonlawyer employee will not give legal advice at the closing or make
92 impromptu decisions that should be made by the supervising lawyer.

93
94 The committee has specifically addressed the employment of law school graduates who
95 are admitted in other jurisdictions in Florida Opinions 73-41 and 68-49. These opinions state
96 that a law firm may employ attorneys who are not admitted to the Florida Bar only for work that
97 does not constitute the practice of law.

98
99 Attorneys who use overseas legal outsourcing companies should recognize that providing
100 adequate supervision may be difficult when dealing with employees who are in a different
101 country. Ethics opinions from other states indicate that an attorney may need to take extra steps
102 to ensure that the foreign employees are familiar with Florida's ethics rules governing conflicts

103 of interest and confidentiality. *See* Los Angeles County Bar Association Professional
104 Responsibility and Ethics Committee Opinion 518 and Association of the Bar of the City of New
105 York Committee on Professional and Judicial Ethics Formal Opinion 2006-3. This committee
106 agrees with the conclusion of Los Angeles County Bar Association Professional Responsibility
107 and Ethics Committee Opinion 518, which states that a lawyer's obligation regarding conflicts of
108 interest is as follows:

109

110 [T]he attorney should satisfy himself that no conflicts exist that would preclude
111 the representation. [Cite omitted.] The attorney must also recognize that he or
112 she could be held responsible for any conflict of interest that may be created by
113 the hiring of Company and which could arise from relationships that Company
114 develops with others during the attorney's relationship with Company.
115

116 Of particular concern is the ethical obligation of confidentiality. The inquirer states that
117 the foreign attorneys will have remote access to the firm's computer files. The committee
118 believes that the law firm should instead limit the overseas provider's access to only the
119 information necessary to complete the work for the particular client. The law firm should
120 provide no access to information about other clients of the firm. The law firm should take steps
121 such as those recommended by The Association of the Bar of the City of New York Committee
122 on Professional and Judicial Ethics Opinion 2006-3 to include "contractual provisions addressing
123 confidentiality and remedies in the event of breach, and periodic reminders regarding
124 confidentiality."

125

126 The requirement for informed consent from a client should be generally commensurate
127 with the degree of risk involved in the contemplated activity for which such consent is sought. It
128 is assumed that most information outsourced will be transmitted electronically to the legal
129 service provider. If so, an attorney must be mindful of, and receive appropriate and sufficient
130 assurances relative to, the risks inherent to digital information containing confidential
131 information. For example, assurances by the foreign provider that policies and processes are
132 *employed* to protect the data while in transit, at rest, in use, and post-provision of services should
133 be set forth in sufficient detail for the requesting attorney. Moreover, foreign data-breach and
134 identity protection laws and remedies, where such exist at all, may differ substantially in both
135 scope and coverage from U.S. Federal and State laws and regulations. In light of such differing

136 rules and regulations, an attorney should require sufficient and specific assurances (together with
137 an outline of relevant policies and processes) that the data, once used for the service requested,
138 will be irretrievably destroyed, and not sold, used, or otherwise be capable of access after the
139 provision of the contracted-for service. While the foregoing issues are likewise applicable to
140 domestic service providers, they present a heightened supervisory and auditability concern in
141 foreign (*i.e.*, non-U.S.) jurisdictions, and should be accorded heightened scrutiny by the attorney
142 seeking to use such services.¹

143

144 The committee believes that the law firm *should* obtain prior client consent to disclose
145 information that the firm reasonably believes is necessary to serve the client's interests. Rule 4-
146 1.6 (c)(1), Rules Regulating The Florida Bar. In determining whether a client should be
147 informed of the participation of the overseas provider an attorney should bear in mind factors
148 such as whether a client would reasonably expect the lawyer or law firm to personally handle the
149 matter and whether the non-lawyers will have more than a limited role in the provision of the
150 services. For example, in Opinion 88-12, we stated that a law firm's use of a temporary lawyer
151 may need to be disclosed to a client if the client would likely consider the information to be
152 material.

153

154 Additionally, in Consolidated Opinion 76-33 and 76-38, regarding billing for nonlawyer
155 personnel, the committee stated:

156

¹ See, Indian data breach hits HSBC - 28 Jun 2006 - IT Week www.itweek.co.uk/itweek/news/2159326/indian-breach-hits-hsbc, UK banks escape punishment over India data breach, www.services.silicon.com/offshoring/0,3800004877,39155588,00.htm, Indian call center under suspicion of ID breach, Cnet.com 2005-08-16 http://news.com.com/2100-1029_3-5835103.html, Florida State Data Breach Result of Inappropriate Offshoring to India, About.com 2006-04-1, <http://idtheft.about.com/b/a/256546.htm>, Outsourcing to India: Dealing with Data Theft and Misuse, Morrison & Foerster White Paper November 2006, <http://www.mofo.com/news/updates/files/update02268.html>. U.S. Firm Says Outsourcer Holding Its Data Hostage, Paul McDougall, Information Week, August 7, 2007: <http://www.informationweek.com/story/showArticle.jhtml?articleID=201204202>

157 [T]he lawyer should not in fact or effect duplicate charges for services of
158 nonlawyer personnel, and if those charges are separately itemized, the salaries of
159 such personnel employed by the lawyer should in some reasonable fashion be
160 excluded from consideration as an overhead element in fixing the lawyer's own
161 fee. If that exclusion cannot, as a practical matter, be accomplished in some
162 rational and reasonably accurate fashion, then the charges for nonlawyer time
163 should be credited against the lawyer's own fee.

164
165 As to whether knowledge and specific advance consent of the client as to such
166 uses of nonlawyer personnel, and charges therefor, are necessary, the Committee
167 majority feels that it is in some instances and is not in others. For example, it
168 would not seem appropriate for a lawyer to always have to seek the consent of the
169 client as to use of a law clerk in conducting legal research. And under EC 3-6 and
170 DR 3-104 the work delegated to nonlawyer personnel should be so much under
171 the lawyer's supervision and ultimately merged into the lawyer's own product that
172 the work will be, in effect, that of the lawyer himself, who presumably has
173 entered into a "clear agreement with his client as to the basis of the fee charges to
174 be made." EC 2-19. However, we feel that such "clear agreement" could not exist
175 in many situations where the lawyer intends to make substantial use of nonlawyer
176 personnel, and to bill directly or indirectly therefor, unless the client is informed
177 of that intention at the time the fee agreement is entered into.

178
179 Therefore, if there is a potentiality of dispute with, or of lack of clear agreement
180 with and understanding by, the client as to the basis of the lawyer's charges,
181 including the foregoing elements of nonlawyer time, whether or not the
182 nonlawyer personnel time is to be separately itemized, the lawyer's intention to so
183 use nonlawyer personnel and charge directly or indirectly therefor should be
184 discussed in advance with, and approved by, the client. This would seem
185 especially the case where substantial use is to be made of any kind of such
186 nonlawyer services. See also EC 2-19 as to explaining to clients the reasons for
187 particular fee arrangements proposed.

188
189 The Committee suggests that the potentiality of such dispute or lack of clear
190 agreement and understanding referred to in the foregoing paragraph may exist in
191 the case of work to be done by nonlawyer personnel who are employed by the
192 lawyer and who perform services of a type known by the lay public to be
193 regularly available through independent contractors, e.g., investigators. The
194 Committee feels that such potentiality especially may exist where the lawyer
195 enters into a contingent fee arrangement with the client and then separately
196 itemizes charges to the client for the time of nonlawyer personnel who are full-
197 time employees of the lawyer; the arrangement may be susceptible of
198 interpretation as involving charging the client for such nonlawyer services and at
199 the same time, in fact or effect, duplicating the charges by including the salaries
200 of such personnel as overhead and an element of the lawyer's own fee, as
201 proscribed hereinabove.
202

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

208

209 In sum, a lawyer is not prohibited from engaging the services of an overseas provider, as
210 long as the lawyer adequately addresses the above ethical obligations.