

**June 2010 WSBA *Bar News Ethics & the Law* Column**

**Outsourcing:  
Here and There**

**By Mark J. Fucile  
Fucile & Reising LLP**

Law firms have been outsourcing both legal and business functions for a long time. Contract lawyers and paralegals are ready examples of the former and computer network and photocopy services are equally ready examples of the latter. Guidance about our duties when we outsource has also been available for a long time. Both the ABA and the WSBA have issued ethics opinions over the years discussing various aspects of outsourcing. The RPCs address the broader concept of lawyers' supervisory duties as have both the Washington Supreme Court and Washington's federal district courts in, respectively, disciplinary and disqualification cases.

More recently outsourcing in the legal profession has taken a new twist with the technical ability to outsource to foreign countries as in a variety of other fields such as software development and "call centers." The same quest for economic efficiency that motivated earlier rounds of outsourcing domestically appears to be driving the current movement overseas. The difference, of course, is that both selection and supervision can be more difficult when outside contractors are across the world rather than across town. The ABA issued an ethics opinion in August 2008 on outsourcing that takes the threads of its earlier advice on the subject and weaves them into the international context. In this

column, we'll look at the ethical aspects of outsourcing in both its traditional and newer forms. Whether outsourcing across town or across the globe, key areas from the ethics perspective include the duties of competency, supervision, confidentiality and accurate billing.

**Competency.** RPC 1.1 requires lawyers to provide competent representation to their clients. Outsourcing differs from co-counsel relationships where a client retains more than one firm to handle a matter and, depending on the arrangements involved, the firms may only be responsible for the discrete tasks for which they were assigned. By contrast, when a lawyer chooses to outsource a portion of the lawyer's work, the lawyer remains responsible for its performance. (See *Tegman v. Accident & Medical Investigations, Inc.*, 107 Wn. App. 868, 876, 30 P.3d 8 (2001), *rev'd on other grounds*, 150 Wn.2d 102, 75 P.3d 497 (2003).) Therefore, it is critical for a firm to undertake "due diligence" to ensure that the provider of the outsourced services can perform them with the requisite skill.

Another element of competent selection involves checking conflicts to avoid disqualification. Depending on such variables as the degree of association with your firm, the nature of the work and confidential information shared, conflicts created by the outsource provider may be imputed to your firm. (See *First Small Business Investment Co. of California v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 738 P.2d 263 (1987) (analyzing disqualification of associated

firms through shared information).) It is important to remember that Washington cases have also examined staff conflicts in determining firm disqualification. (See, e.g., *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055 (W.D. Wash. 1999); *Daines v. Alcatel, S.A.*, 194 F.R.D. 678 (E.D. Wash. 2000).)

**Supervision.** Proper supervision lies at the heart of a lawyer's responsibility for outsourced services regardless of whether the service provider is a lawyer or a nonlawyer. RPC 5.1(b) requires a "lawyer having direct supervisory authority over another lawyer . . . [to] make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." RPC 5.3(b), in turn, requires a "lawyer having direct supervisory authority over . . . [a] nonlawyer . . . [to] make reasonable efforts to ensure that the person[']s conduct is compatible with the professional obligations of the lawyer[.]"

ABA Formal Ethics Opinion 88-356 (1988) interpreted RPC 5.1(b) as applying to domestic contract lawyers and ABA Formal Ethics Opinion 08-451(2008) did the same in the international context. RPC 5.3 applies the supervisory duty over retained nonlawyers more explicitly by framing the obligation as applying to any "nonlawyer employed or retained by or associated with a lawyer[.]" The WSBA RPC Committee has applied RPC 5.3(b) in recent informal ethics opinions involving both domestically outsourced legal services (Informal Ethics Op. 2201 (2009) (independent paralegal)) and business services (Informal Ethics op. 2193 (2008) (advertising distribution)). Depending on the

circumstances, non-U.S. lawyers who are undertaking outsourced legal work on U.S. law (as opposed to the law of their home country) may be considered “nonlawyers” (like law clerks) for purposes of supervisory duties and, therefore, the more explicit provisions of RPC 5.3(b) may apply.

The practical difficulty of supervising foreign service providers is discussed at length in ABA Formal Ethics Opinion 08-451. The practical difficulty is also highlighted by several Washington disciplinary and disqualification cases invoking the supervisory duty over nonlawyer staff members who were employed directly by the firms involved and who worked in the same offices as their supervisors. *In re Trejo*, 163 Wn.2d 701, 185 P.3d 1160 (2008), for example, concerned a solo practitioner disciplined under RPC 5.3(b) for failing to supervise his assistant who stole client funds. *In re Vanderbeek*, 153 Wn.2d 64, 101 P.3d 88 (2004), also involved a solo practitioner disciplined under RPC 5.3(b) for failing to supervise an office manager who sent clients inaccurate bills. In *Richards v. Jain*, 168 F. Supp.2d 1195 (W.D. Wash. 2001), a firm was disqualified for its handling of an opponent’s privileged information and, in doing so, the court’s opinion focused on a paralegal’s role and the firm’s failure to supervise the paralegal under RPC 5.3(b).

**Confidentiality.** Comments 16 and 17 to the confidentiality rule, RPC 1.6, are entitled: “Acting Competently to Preserve Confidentiality.” Comment 16 puts the accent on competence: “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." Comment 17, in turn, shifts the accent to confidentiality: "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients." ABA Formal Ethics Opinion 95-398 (1995), which deals with domestically outsourced computer network services, echoes these duties and couples them with the duty of supervision: "Under Rule 5.3, a lawyer retaining such an outside service provider is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of confidential information." ABA Formal Ethics Opinion 08-451 emphasizes this duty in the foreign outsourcing context and notes that the legal structures in some foreign countries may not accord the same expectation of privacy provided by U.S. law.

Both ABA Formal Ethics Opinion 88-356, which focuses on domestic outsourcing, and its more recent counterpart, Formal Ethics Opinion 08-451 focusing on foreign outsourcing, grapple with the question of whether advance client consent is necessary before sharing confidential information with an outside service provider. The former assumes that domestic outsourcing often involves close supervision of the outside service provider and concludes that

advance consent is not normally required. The latter assumes that foreign outsourcing will usually involve less direct supervision and, therefore, advance client consent is necessary. Both opinions, however, are expressly predicated on those contrasting assumptions and both leave open the converse depending on the level of supervision in individual circumstances.

**Accurate Billing.** RPC 1.5 governs fees and the Supreme Court has made plain that resulting bills must accurately reflect both time (*In re Dann*, 136 Wn.2d 67, 960 P.2d 416 (1998)) and expenses (*In re Haskell*, 136 Wn.2d 300, 962 P.2d 813 (1998)). ABA Formal Ethics Opinion 93-379 (1993) and WSBA Informal Ethics Opinion 2120 (2006) both address billing for outside nonlawyer services and ABA Formal Ethics Opinion 00-420 (2000) and *In re Marshall*, 160 Wn.2d 317, 335, 157 P.3d 859 (2007), do the same for contract lawyer services. All stress the fundamental requisites for both billing in accord with the attorney-client fee agreement and for billing accurately.

Of particular note, generally no “mark up” is permitted on outside services that are merely passed through to the client. ABA Formal Ethics Opinions 00-420 and 08-451 find that if a contract lawyer is integrated into a firm to such an extent that the lawyer is in practical effect a “contract” associate, then a “surcharge” is permissible on that lawyer’s time in the same way that profit is included in “employee” associate billing rates. Whether the outsourcing is

domestic or foreign, however, firms need to carefully assess the nature of the relationship before adding a surcharge without prior client consent.

### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.