

5-1-2007

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Keith Woffinden

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Recommended Citation

Keith Woffinden, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 BYU L. Rev. 483 (2007).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2007/iss2/5>

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Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3

I. INTRODUCTION

Outsourcing¹ work from American companies to foreign workers is not a new phenomenon in the United States.² The “first wave” of outsourcing to foreign countries hit the American economy in the late 1980s.³ From 1987 to 1997, outsourcing of manufacturing, industrial, and other “blue-collar” jobs to foreign countries, such as China, South Korea, Malaysia, and Taiwan, rapidly increased.⁴ As jobs left for off-shore destinations, the American work-force gradually shifted to a service-oriented economy focused on “white-collar” employment.⁵

However, in recent years, even these white-collar jobs have begun to move overseas in a process known as the “new wave” of

1. The term “outsourcing” refers to the practice of hiring an outside third party to perform work that a company has traditionally performed itself. *See, e.g.*, Geoffrey M. Howard & Andrew Tran, *Building a Bigger Sword: Current Trends That May Slash Electronic Data Management Costs in Litigation and Beyond*, 733 PLI LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 329, 351 (2005) (“The term ‘outsourcing’ refers to the practice of paying a third-party vendor to do some aspect of a company’s work.”); Maria L. Proctor, *Considerations in Outsourcing Legal Work*, MICH. B.J., Sept. 2005, at 20, 20 (“‘Outsourcing’ is sending work traditionally handled inside a company or firm to an outside contractor for performance.”).

2. Ernest Schaal, *Outsourcing of U.S. Lawyers: Ethical and Business Aspects*, BOTTOM LINE (State Bar of California Law Practice Management and Technology Section), June 2004, at 1, 1 (“Outsourcing of jobs overseas is not a recent phenomenon. As early as the 1970s and 1980s manufacturing jobs moved overseas . . .”).

3. Mark B. Baker, *“The Technology Dog Ate My Job”: The Dog-Eat-Dog World of Offshore Labor Outsourcing*, 16 FLA. J. INT’L L. 807, 810 (2004).

4. *Id.*

5. *Id.*; Brian O’Neill, *Outsourcing Legal Work to India: The Giant Sucking Sound from the East*, AM. JURIST, Nov. 1, 2005, available at <http://media.www.americanjurist.net/media/storage/paper654/news/2005/11/01/ViewpointsAndPerspectives/Outsourcing.Legal.Work.To.India-1046952.shtml> (explaining the emphasis on the service industry within the United States, which makes up between seventy and seventy-five percent of the economy, and the underlying belief that the service industry was “immune” to outsourcing because of the difficulty of shipping those jobs overseas).

outsourcing.⁶ Increased technology, globalized foreign economies, and access to Internet resources have made service-oriented jobs subject to replacement by less expensive foreign labor.⁷ In recent years, companies have outsourced a wide variety of services to foreign employers, including software engineering, technical support, tax preparation, and even medical imaging diagnostics.⁸ As a result, Americans have grown accustomed to calling a technical support center and hearing a foreign receptionist greet them on the line.⁹ Forrester Research estimates that American companies will outsource over 200,000 service jobs each year, totaling 3.3 million jobs by the year 2015.¹⁰ Other studies estimate that revenue utilized for outsourcing from the United States now falls between \$100 billion and \$200 billion.¹¹

In the latest wave of outsourcing, a new trend has begun to emerge: U.S. companies and law firms have begun outsourcing domestic legal work to foreign attorneys.¹² Although in its infancy, the practice of sending legal work abroad is beginning to grow.¹³

6. Baker, *supra* note 3, at 811.

7. *Id.*

8. Zachary J. Bossenbroek & Puneet Mohey, *Should Your Legal Department Join the Outsourcing Craze?*, ACC DOCKET, Oct. 2004, at 46, 50 (“Even x-rays of some U.S. patients are now being reviewed by radiologists in India.”); Daniel Brook, *Made in India: Are Your Lawyers in New York or New Delhi?*, LEGAL AFFAIRS, May–June 2005, at 10, 11 (“[I]t has become commonplace to outsource call centers for customer service and diagnostic offices for medical imaging”); K. William Gibson, *Ask Bill*, L. PRAC., June 2006, at 10, 10 (“[C]omputer companies and banks have used call centers in India and other countries for several years. In addition, hospitals routinely send MRIs and CT scans offshore to be read overnight and the results are waiting for the doctors when they come to work in the morning.”); Karl Schoenberger, *U.S. Companies Consider Sending Legal Work Overseas*, SAN JOSE MERCURY NEWS, Jan. 2, 2005, at 1 (naming software engineering and tax-preparation as kinds of white-collar jobs that companies have outsourced in recent years).

9. O’Neill, *supra* note 5 (explaining how Americans have become accustomed to dealing with receptionists from India when calling customer service centers).

10. Baker, *supra* note 3, at 812 (citing Ashok Deo Bardham & Cynthia A. Kroll, *The New Wave of Outsourcing*, Fisher Center Reports, Paper No. 1103, at 7 (2003)).

11. Douglas R. Richmond, *Outsourcing Legal Work . . . Do Professional Liability and Responsibility Go Along?*, COUNSEL, Feb. 2005, at 5, 5.

12. Krysten Crawford, *Outsourcing the Lawyers: Add Attorney to the Growing List of White-Collar Jobs Being Shipped Overseas. How Far Will it Go?*, CNN/MONEY, Oct. 15, 2004, http://money.cnn.com/2004/10/14/news/economy/lawyer_outsourcing (“A number of U.S. companies, including members of the Fortune 500 and some of the country’s largest law firms, are now embracing the idea of outsourcing routine legal work to India, South Korea, Australia and other locales with far lower labor costs.”).

13. U.S. INT’L TRADE COMM., RECENT TRENDS IN U.S. SERVICES TRADE 7-5 (2006).

Indeed, outsourcing legal work has the potential to reduce the cost of domestic legal services and provide increased access to the legal system while maintaining a high quality legal product.

However, to this point, the legal community has remained relatively quiet regarding the ethical implications of U.S. attorneys utilizing foreign labor to accomplish their domestic legal work at a discounted price.¹⁴ Despite the relative lack of on-point ethics opinions, outsourcing legal work to foreign countries raises a number of important ethical issues regarding a domestic attorney's duties, which include prohibiting the unauthorized practice of law, supervising the work and ethics of subordinate lawyers and non-lawyers, maintaining client confidentiality, avoiding conflicts of interest, adopting reasonable billing procedures, and consulting reasonably with the client. The question that remains then is, what steps, if any, do domestic attorneys have to take to fulfill these ethical duties when outsourcing legal work to foreign attorneys?¹⁵

In August 2006, the New York City Committee on Professional and Judicial Ethics ("the Committee") released a formal ethics opinion specifically addressing the ethical implications of legal outsourcing to foreign attorneys¹⁶—the first concrete ethical guidance that any state or local bar has given practitioners regarding how to ethically outsource legal work to foreign countries. This Comment analyzes the New York opinion and concludes that although the Committee enumerated solutions to the main ethical concerns of outsourcing legal work, it failed in a few material respects in its analysis and logic. Specifically, this Comment addresses the failures in the areas of the unauthorized practice of law, adequate supervision, client confidentiality, conflicts of interest, billing, and consent. The purpose of this analysis is to assist future bar associations in issuing their own opinions and, thus, aid practicing attorneys in adopting ethical procedures for outsourcing legal work.

14. See Darshana T. Lele, *Private Firm: Outsourcing of Legal Work Is Growing, But There's Still Little Ethics Guidance*, 21 ABA/BNA LAW. MANUAL ON PROF. CONDUCT 316, June 15, 2005.

15. Mark L. Tuft, *Techno Ethics: Getting Temporary Legal Help Online*, GPSOLO, Dec. 2004, available at <http://www.abanet.org/genpractice/magazine/2004/dec/technoethics.html> ("As with most technological advances, getting temporary legal help online is permissible as long as the ethical and legal consequences are sufficiently understood and properly managed.").

16. New York City Bar Assoc. Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006) [hereinafter NYC Opinion 2006-3].

Part II of this Comment provides a brief summary of the history of outsourcing legal work, the benefits and drawbacks of outsourcing, and a background of the ethical issues implicated when domestic attorneys use foreign labor to assist in legal work. Part III summarizes the ethical guidance the New York City Committee on Professional and Judicial Ethics provided to New York lawyers regarding outsourcing legal work. Part IV analyzes the Committee's opinion relating to the unauthorized practice of law, supervision of foreign lawyers and non-lawyers, client confidentiality, conflicts of interest, billing, and client consent. Following the analysis of the Committee's opinion, this Comment ends with a brief conclusion in Part V.

II. CONTEXT AND BACKGROUND

A. Legal Outsourcing

1. History of outsourcing legal work

Although American companies and firms have long utilized outside domestic lawyers in performing legal work,¹⁷ in-house counsel and law firms began outsourcing their high cost legal labor to foreign attorneys just over a decade ago.¹⁸ In 1995, Dallas-based Bickel & Brewer began the foreign outsourcing trend by opening a supporting office in Hyderabad, India.¹⁹ Six years later, General

17. Mark L. Tuft, *Offshoring of Legal Services: An Ethical Perspective on Outsourcing Abroad*, 717 PLI LITIG. & ADMIN. PRAC. COURSE HANDBOOK SERIES 97, 99 (2005) (explaining how law firms have referred work to other domestic law firms and utilized domestic temporary and contract lawyers to reduce costs); George W. Russell, *In-House or Outsourced? The Future of Corporate Counsel*, ASIALAW, July-Aug. 2005, at 19, 22 ("To be sure, domestic outsourcing has existed in the US almost as long as there have been law firms."). DuPont has actively utilized domestic outsourcing in completing its in-house legal work, saving "an estimated \$8.8 million in legal fees in 2002 alone." Bossenbroek & Mohey, *supra* note 8, at 50 (citing Renee Deger, *Legal-Work Outsourcing Cuts Costs; DuPont's Pitch to In-house Counsel: Save Millions by Sending Legal Work to Companies Other Than Law Firms*, N.J. L.J., Nov. 17, 2003).

18. Howard & Tran, *supra* note 1, at 352 ("While lawyers and technical consultants may not like to consider themselves 'labor' in the (recent) traditional sense, lawyers in foreign countries may be just as capable of undertaking a time consuming privilege or substantive document review as a team of junior associates at a large firm."); Proctor, *supra* note 1, at 22 ("The most recent outsourcing wave is to send work traditionally performed by United States law firms to other countries.").

19. Brook, *supra* note 8, at 11.

Electric opened a legal division in its India office.²⁰ Although it closed in 2003, General Electric reported that the use of its Indian legal division resulted in an approximate savings of nearly \$2 million in its two years of operation.²¹ Not long after General Electric's venture into India, Andrew Corp., an Illinois-based company, utilized New Zealand lawyers to process patent applications,²² General Mills utilized Australian and Canadian attorneys for their intellectual property work, and Accenture, a Bermuda corporation, opened a legal division on an island off the coast of Madagascar.²³ Although firms have experimented with outsourcing legal work to a wide variety of countries,²⁴ American corporations have recently focused on sending their legal work to India.²⁵

2. Legal outsourcing today

Outsourcing is still “in its infancy,” and a large number of firms have not attempted to send legal work abroad.²⁶ However, some Fortune 500 companies and Am. Law. 100 firms—including, Microsoft, American Express, Oracle, Cisco, Morgan Stanley, West Publishing, DuPont, United Technologies, Bayer AG, Allen & Overy, and Baker & McKenzie—have begun to utilize foreign

20. *Id.*

21. Cathleen Flahardy, *Overhyped, Underused, Overrated: The Truth About Legal Offshoring*, INSIDE COUNS., July 2005, available at http://www.insidecounsel.com/issues/insidecounsel/15_164/features/106-1.html (outlining General Electric's use of its legal team in India); Ellen L. Rosen, *Corporate America Sending More Legal Work to Bombay*, N.Y. TIMES, Mar. 14, 2004, at 10-1.

22. Jennifer Fried, *Law Departments Cut Costs by Sending Work Abroad*, N.Y. L.J., Jan. 22, 2004, at 5 (outlining Andrew Corp.'s use of Baldwin Shelston Waters, a Wellington, New Zealand firm, to assist on patent application work); Rosen, *supra* note 21.

23. Flahardy, *supra* note 21.

24. Bossenbroek & Mohey, *supra* note 8, at 52 (“Although India offers a strong destination to outsource legal work, other countries such as Australia, New Zealand, Singapore, or Ireland are additional outsourcing destinations.”); see also Crawford, *supra* note 12 (naming India, South Korea, and Australia as possible destinations for outsourcing legal work). Because the focus of outsourcing over the past few years has occurred in India, many of the statistics and examples in this comment will focus on outsourcing to Indian attorneys.

25. Russell, *supra* note 17, at 22 (outlining the use of other countries in outsourcing, but concluding that “the cost savings associated with such outsourcing pale in comparison with those available in India”).

26. Flahardy, *supra* note 21; see also Brook, *supra* note 8, at 12 (explaining outsourcing's popularity among corporate legal departments, but its lagging popularity among law firms).

lawyers to assist them with American legal problems.²⁷ This phenomenon is not restricted to large corporations and firms; even some small- and medium-sized companies have begun to outsource legal work to India to increase profitability.²⁸ A 2004 survey found that 1.8% of legal officers were outsourcing legal work to foreign countries.²⁹ Another study estimated that approximately 12,000 legal jobs were sent offshore in 2004.³⁰ Mindcrest Inc., a company providing legal work in India, estimates that its business has doubled every year since beginning the company in 2001.³¹ Some experts anticipated that the market for outsourced legal work would reach \$163 billion in 2006.³² It appears that even though legal outsourcing in the United States is in early stages of development, it is quickly developing into a lucrative enterprise.

27. Eric Bellman & Nathan Koppel, *More U.S. Legal Work Moves to India's Low-Cost Lawyers*, WALL ST. J., Sept. 28, 2005, at B1 (explaining how DuPont has utilized Indian lawyers in drafting patent applications); Helen Coster, *Briefed in Bangalore: Legal Services Are Moving Offshore—Will India's Lawyers Help Reshape the U.S. Legal Market?*, AM. LAW., Nov. 1, 2004, at 98, available at <http://www.law.com/jsp/article.jsp?id=1098907069708> (describing how Microsoft and other Fortune 500 companies have utilized Indian employees to perform legal work); Howard & Tran, *supra* note 1, at 352 (describing how General Electric, Microsoft, and Cisco have sought Indian legal aid); Tom Ramstack, *Law Firms Send Case Work Overseas To Boost Efficiency*, WASH. TIMES, Sept. 26, 2005, at C14 (listing United Technologies, Oracle, and Bayer AG as corporations outsourcing legal work); Russell, *supra* note 17, at 19 (explaining that Microsoft, American Express, and Morgan Stanley have outsourced legal work to India); Schaal, *supra* note 2, at 1 (citing Neal St. Anthony, *On Business: Outsourcing Hits Legal Services*, STAR TRIB. (Minneapolis, Minn.), Jan. 16, 2004) (outlining how West Publishing has opened an Indian office to perform interpretation and classification of American unpublished decisions). Joy London and Ron Friedmann also maintain an up-to-date list of entities outsourcing legal work to India. See Joy London & Ron Friedmann, *Outsourced Legal Services*, <http://www.prismlegal.com/index.php?option=content&task=view&id=88&Itemid=70> (last visited Feb. 19, 2007) (listing American Express, General Electric, General Mills, Microsoft, Morgan Stanley, Allen & Overy, and Baker & McKenzie, among others).

28. Tuft, *supra* note 17, at 99 (explaining that the benefits of outsourcing benefit not only large firms, but local firms and individual practitioners); see also U.S. INT'L TRADE COMM., *supra* note 13, at 7-6 ("The practice of outsourcing legal services is becoming particularly popular with small- and medium-sized firms with limited resources, as it allows them to compete with larger or more specialized law firms.").

29. Russell, *supra* note 17, at 20.

30. Ann Sherman, *Should Small Firms Get on Board With Outsourcing?*, LAW.COM SMALL FIRM BUS., Sept. 12, 2005, available at <http://www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=1126256712489>.

31. Crawford, *supra* note 12.

32. Brook, *supra* note 8, at 10.

Law firms may approach outsourcing in a number of different forms: clients may independently retain foreign attorneys to work in conjunction with a domestic firm, law firms may directly hire foreign attorneys to assist them in their legal work, law firms may pay a third party vendor to provide foreign legal services, or law firms may open an office in a foreign jurisdiction staffed with foreign attorneys.³³ Generally, corporations either utilize a vendor to provide legal services or open a foreign legal branch of their own.³⁴ Regardless of the form of outsourcing, an American lawyer normally oversees the foreign attorney's work through a system of review.³⁵ Vendors of foreign legal work provide different services and may have different specialties; however, most will work for either a fixed hourly rate or charge a flat fee on a per project basis.³⁶

American corporations and firms currently outsource a wide variety of legal work to foreign lawyers. Some legal work could be considered "back-office" work that a paralegal could perform, such as databasing documents, checking for compliance with regulations, word processing, or organizing large volumes of evidence.³⁷ Foreign attorneys also perform legal "commodity" work³⁸ that may traditionally fall within the scope of a junior associate's tasks—drafting contracts, preparing litigation documents, preparing patent applications, conducting prior art research, reviewing documents, preparing divorce papers, performing legal research, drafting legal memoranda, and even drafting legal briefs.³⁹

33. Tuft, *supra* note 17, at 100–02 (identifying and explaining four general models of outsourcing: client outsourcing, law firm outsourcing, intermediary outsourcing, and ancillary outsourcing).

34. Bossenbroek & Mohey, *supra* note 8, at 62–63 (describing the two general models companies choose to utilize: either a third-party vendor or a "captive in-house legal unit").

35. Flahardy, *supra* note 21 ("An American-trained lawyer, either in the U.S. or onsite at the offshore facility, often oversees the work to ensure the lawyers abroad are doing it accurately.").

36. Coster, *supra* note 27, at 99 (outlining the fees, structures, and specialties of various foreign legal service vendors, including Atlas Legal Research, Intellevate, Lawwave.com, Lexadigm-Solutions, OfficeTiger, and Quislex).

37. Gibson, *supra* note 8, at 10–11; O'Neill, *supra* note 5.

38. Alison M. Kadzik, *The Current Trend To Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 GEO. J. LEGAL ETHICS 731, 733 (2006) (stating that commodity work includes document review, legal research, patent applications, and contract drafting (quoting Flahardy, *supra* note 21)).

39. Geanne Rosenberg, *Offshore Legal Work Continues to Make Gains: Ethics and Malpractice Are Among the Key Issues That May Arise in Outsourcing*, NAT'L L.J., May 17, 2004, at S3 (stating Indian lawyers perform work including legal research, drafting legal

The type of legal services offered by Indian attorneys can vary depending on the outsourcing company; some vendors will only perform basic legal tasks while others offer to perform legal research and writing projects “no matter how complex.”⁴⁰ Those companies targeting “high-end” legal work purport to carry out “legal rocket science,” including “work that highly placed attorneys at top law firms would do.”⁴¹ According to one vendor, “[t]hese tasks include legal research on complex cases, drafting legal memos to be used by lawyers and corporate legal departments, and drafting legal briefs that often appear before judges in the US.”⁴² In fact, Lexadigm, a provider of legal services in India, “recently drafted its first brief for a U.S. Supreme Court case, involving the application to a tax dispute of the Fifth Amendment’s due process clause.”⁴³ Although “low-end” or “commodity” legal work constitutes the majority of material outsourced to foreign attorneys, some vendors claim that they can do all work “[s]hort of anything where you have to physically be there or sign on the dotted line”⁴⁴

3. What is fueling the fire? Benefits and drawbacks of outsourcing legal work

The main reasons for outsourcing legal work, like any other type of outsourcing, are “cost-savings, convenience, and efficiency.”⁴⁵ The rates for foreign attorneys are significantly less than rates for

memos and briefs, discovery work, assembling facts, and patent and trademark work); U.S. INT’L TRADE COMM., *supra* note 13, at 7-5 to 7-6; Gibson, *supra* note 8, at 10–11 (listing legal services that Indian companies perform, including, contract drafting, legal research, drafting of memoranda and briefs, intellectual property work, patent applications, and research and drafting of real estate documents); Mary B. Guthrie, *Executive Director’s Report*, WYO. LAW., Dec. 2005, at 6, 7 (citing Bellman & Koppel, *supra* note 27) (outlining work performed by some vendors to include activities from divorce papers to legal research).

40. Sherman, *supra* note 30 (contrasting two vendors, one which will not draft contracts from scratch, another which will draft entire appellate briefs from scratch); *see also* Coster, *supra* note 27, at 98 (outlining the types of services provided by a variety of different vendors).

41. Russell, *supra* note 17, at 22 (quoting Rocky Dhir, founder of Atlas Legal Research).

42. *Id.*

43. Brook, *supra* note 8, at 11. Although Lexadigm drafted the brief, the American attorney will ultimately take responsibility, “as if the draft had been written by one of its own associates.” *Id.*

44. Bellman & Koppel, *supra* note 27 (quoting Sanjay Kamlani, co-chief executive officer of Pangea3, a New York-based legal outsourcing firm).

45. Kadzik, *supra* note 38, at 731.

junior associates in America, and foreign attorneys often do not expect the same costly benefits or amenities.⁴⁶ Although reported cost savings vary,⁴⁷ some practitioners claim savings as high as fifty percent from using foreign attorneys.⁴⁸ Those who utilize Indian attorneys also claim that they receive the cost benefits without a loss in quality because Indian attorneys are well educated, India has a common law system, and all legal training and work in India is already performed in English.⁴⁹ Indeed, some companies claim “that the quality or technical capability [of foreign lawyers] may rival or be even better than in the U.S.”⁵⁰ American firms and companies also increase their efficiency by outsourcing legal work. “[O]utsourcing may be a way for a law firm to expedite work, or to simply accomplish tasks that would otherwise go undone because of time constraints or the higher-priority workloads of the firm’s lawyers and legal assistants.”⁵¹ With regards to convenience, because of the time difference between the United States and India, American attorneys can have someone working on their projects “around the clock.”⁵² Although foreign attorneys may work on projects on the other side

46. *Id.* (stating that employees from India charge an average of \$40 an hour, whereas United States attorneys charge an average of \$120 an hour for comparable tasks); *see also* Bellman & Koppel, *supra* note 27 (explaining that cost savings go beyond lower salaries because Indian lawyers do not require “perks like big offices and personal assistants”); Bossenbroek & Mohey, *supra* note 8, at 52 (“Indian attorneys working in private companies are not likely to expect health insurance coverage, any retirement plans, short- and long-term disability benefits, life insurance, or any long-term care insurance, as part of their benefits package.”); Rosen, *supra* note 21 (reporting that an Indian attorney can perform a complex patent application for \$4000 to \$5000, whereas an American attorney would charge \$11,000); Coster, *supra* note 27, at 99 (reporting that outsourcing legal work results in spending “one-third to one-half” of the cost of hiring a full-time associate); Crawford, *supra* note 12 (noting that foreign lawyers can accomplish work for \$20 to \$70 dollars an hour, when an American lawyer would charge close to \$200); Sherman, *supra* note 30 (reporting that an average attorney in India makes approximately \$12,000 a year, compared to \$65,000 for an average American first-year associate).

47. Jill Schachner Chanan, *Moving to Mumbai: More Firms Are Outsourcing Support Services to India. Will Legal Work Be Next?*, A.B.A. J., Apr. 2004, at 28, 28 (reporting that cost savings can reach up to one-third the total cost of legal fees).

48. Rosen, *supra* note 21 (“Some companies say they can reduce certain legal costs by as much as 50 percent, and receive work that rivals what they can obtain in the United States.”).

49. Bellman & Koppel, *supra* note 27; Bossenbroek & Mohey, *supra* note 8, at 52.

50. Fried, *supra* note 22, at 6 (quoting Robert Ruyak, managing partner of Howrey Simon Arnold & White).

51. Richmond, *supra* note 11, at 5.

52. Bossenbroek & Mohey, *supra* note 8, at 52.

of the globe, technology makes costs associated with communication and transfer of information negligible.⁵³

Despite these benefits, outsourcing legal work does have its drawbacks, many of which fly in the face of the benefits proclaimed by proponents of legal outsourcing. Many practicing attorneys doubt the capabilities of foreign lawyers, including those in India.⁵⁴ Although they may be trained in a common-law system, an Indian education may not train a lawyer in the intricacies of American law, requiring American firms to expend time and money on additional training.⁵⁵ Even though Indian attorneys speak English, the formality of the Indian style of English can differ from the style utilized by a domestic attorney.⁵⁶ The cost savings outsourcing proponents flaunt may not account for the increased risk or the additional training costs firms and corporations face from utilizing attorneys trained in a different legal regime, with a different form of English, performing their work thousands of miles away.⁵⁷ Similarly, because American attorneys are required to take time to review the work of foreign attorneys, the cost savings and efficiency benefits may not materialize.⁵⁸ The difficulty in managing, training, and supervising attorneys also places limits on the type of work that an attorney can send overseas.⁵⁹ Although a difference in time may allow foreign

53. Rosenberg, *supra* note 39, at S3.

54. Flahardy, *supra* note 21 (stating that many domestic lawyers claim that “foreign attorneys’ knowledge of the law isn’t comparable to that of their American counterparts”); Fried, *supra* note 22, at 5 (“Despite the proliferation of cheaper offshore alternatives, many Americans remain skeptical about the quality of work done by foreign lawyers.”).

55. Schaal, *supra* note 2, at 14 (explaining that because the Indian system is based on British common law, not American common law, outsourcing companies must provide additional training).

56. Brook, *supra* note 8, at 12 (noting that the Indian writing style is more formal than American English, as evidenced by a jaywalking sign in India which states “Jaywalking is Injurious to Your Health”); Rosenberg, *supra* note 39, at S4 (noting that many law firms have a concern with finding Indian lawyers with good writing skills).

57. Flahardy, *supra* note 21 (“To represent clients to the best of their abilities, lawyers need to understand the clients’ affairs. That could prove challenging from a great distance.”); Sherman, *supra* note 30 (noting that in patent law, “[t]he risk of error is not worth the savings”).

58. Molly McDonough, *IP Goes Indian*, ABA J. E-REP., Apr. 23, 2004, at 6, 6 (noting that savings may need to reach fifty percent before outsourcing becomes profitable); Coster, *supra* note 27, at 98 (“[L]awyers question the wisdom of outsourcing, citing the time needed to review the work done by Indian professionals or to manage the flow of information.”).

59. Flahardy, *supra* note 21 (“[B]ecause most legal work can’t be reduced into a formula, legal departments are limited in what work they can send overseas.”).

attorneys to work while Americans sleep, communication and supervision become increasingly difficult for the same reason.⁶⁰

In addition, some corporations and law firms have avoided outsourcing legal work because outsourcing in general has become such a volatile political issue; even discussing outsourcing can stir extreme feelings from the public, employees, or labor unions.⁶¹ For example, in his 2004 presidential campaign, John Kerry famously characterized business owners who ship jobs overseas as “Benedict Arnold CEOs.”⁶² In that same spirit, during President Bush’s 2004 bid for reelection, his economic advisor addressed the advantages of foreign outsourcing and “was swiftly rebuked by a chorus of politicians ranging from Sen. Hillary Rodham Clinton . . . to Republican House Speaker Dennis Hastert.”⁶³ Such public and political hostility to the concept of outsourcing can pose a significant barrier to American corporations and law firms considering legal outsourcing.⁶⁴

A number of additional considerations prevent domestic firms and businesses from joining the outsourcing craze. Lawyers point to security,⁶⁵ liability,⁶⁶ high turnover rates among foreign attorneys,⁶⁷ and unanswered ethics questions⁶⁸ as issues that have discouraged them from outsourcing legal work. Thus, although a number of

60. Bossenbroek & Mohey, *supra* note 8, at 51 (“This time differential can prove to be a disadvantage when a U.S.-based attorney needs to discuss a project with the Indian attorney during the U.S. counsel’s work day.”); McDonough, *supra* note 58, at 6 (noting the difficulty of communication due to the time difference between America and India).

61. Baker, *supra* note 3, at 818–19 (reviewing public and political opposition to foreign outsourcing).

62. Daniel Griswold, *Outsourcing: Campaign Politics or Facts?*, 8 BRIEFLY . . . PERSP. ON LEGIS., REG., & LITIG., no. 10, at 1 (Oct. 2004) (“‘Outsourcing’ to other countries has become a political football in this year’s election season.”).

63. *Id.*

64. Flahardy, *supra* note 21 (explaining that companies have remained quiet about outsourcing, in part, because of John Kerry’s negative focus on outsourcing in the 2004 presidential campaign).

65. Coster, *supra* note 27, at 99; Russell, *supra* note 17, at 20.

66. Flahardy, *supra* note 21 (“[C]ompanies often want a big-name law firm to stand behind their legal work. . . . [A] company is asking for trouble if there is no one to hold accountable in the event something goes wrong.”).

67. Bossenbroek & Mohey, *supra* note 8, at 58 (“Rampant turnover of personnel is another potential risk in using foreign legal outsourcing firms, at least to a corporation’s captive outsourcing unit. The last thing you want is to train a group of highly educated attorneys, only to have them be lured away by another firm.”).

68. Rosenberg, *supra* note 39, at S3; Schaal, *supra* note 2, at 14–15.

benefits exist for outsourcing legal work, drawbacks also exist which have kept some businesses and firms from entering the fray.

4. *Future of legal outsourcing*

The ultimate question is what effect the 200,000 annual law graduates⁶⁹ from India will have on the American legal system. One government investigation reports that from 2004 to 2009, America will outsource eight percent of its legal work, seventy-five percent of those jobs going to India.⁷⁰ Forrester Research predicts that by 2008, 29,000 legal jobs will be sent overseas,⁷¹ and by 2015 that number will increase to 40,000, resulting in a loss of approximately \$4.3 billion dollars in legal wages.⁷² According to some estimates, twenty to fifty percent of American legal jobs could eventually be moved overseas.⁷³

While these numbers may paint a gloomy picture for the future of American lawyers, most practitioners and commentators agree that although the amount of commodity work sent overseas may continue to grow,⁷⁴ the high-end, “core” legal work⁷⁵ will not be “moving wholesale from New York to New Delhi anytime soon.”⁷⁶ That said, outsourcing may have a significant impact on parts of the United States legal landscape in the not too distant future.⁷⁷ With

69. Bellman & Koppel, *supra* note 27 (“More than 200,000 Indians graduate from law school there every year—five times as many as in the U.S.—creating an enormous pool of talent to tap.”).

70. *Keeping Current: Associate Management*, PARTNER’S REP., Nov. 2004, at 7, 7.

71. O’Neill, *supra* note 5 (“Forrester Research predicts that the numbers will increase dramatically to 29,000 in 2008, with most of the growth being to India.”).

72. Flahardy, *supra* note 21.

73. Bossenbroek & Mohey, *supra* note 8, at 66 (citing Rosenberg, *supra* note 39).

74. See Howard & Tran, *supra* note 1, at 353 (“‘Commodity’ legal work is bound for substantial growth in the next decade.”).

75. McDonough, *supra* note 58, at 6 (“What we’ve learned is that it’s a good thing for certain types of work that is batch mode, with limited materials It’s never going to cut into our core, higher-end, value-added stuff.” (quoting Steve Lundberg, partner at Schwegman, Lundberg, Woessner & Kluth)); see also Crawford, *supra* note 12 (“[It is] highly unlikely that the most lucrative work that lawyers do—such as trials and advice on mergers or public stock offerings—will ever leave U.S. shores.”).

76. Russell, *supra* note 17, at 19.

77. *Id.* at 20 (noting that once a few big companies begin outsourcing rapid change in corporate legal work could result); see also Brook, *supra* note 8 at 12 (“In theory, at least, it would take only one big firm looking for a competitive advantage to start a bidding war that could change the cost of buying legal advice in the U.S.”); Bellman & Koppel, *supra* note 27

more commodity and low-end legal work moving to foreign countries, American lawyers could find themselves in a more managerial or supervisory role than ever before.⁷⁸ The compensation structure for commodity work, often performed by low-level associates, will adjust to the new supply of low-cost legal labor,⁷⁹ which may affect the profitability of some law firms focused on patent prosecution or contract drafting⁸⁰ and may increase the financial risk associated with gaining a legal education.⁸¹ In short, although outsourcing does not appear to threaten the heart of American legal work, it could have a drastic effect on the appearance of many of its appendages.

B. Introduction to Professional Responsibility and Outsourcing

One of the major obstacles to the growing trend of outsourcing legal work is compliance with the ethical and licensing requirements the American legal profession demands of its lawyers. Indeed, some commentators have stated that the licensing requirements are the main barrier stopping a wholesale exodus of American legal jobs to foreign countries,⁸² and a number of corporations and firms have cited ethical responsibilities as one of their main concerns in experimenting with outsourcing their legal work.⁸³ Accordingly, a review of the relevant ethics rules is necessary to understand New York City's formal ethical guidance for outsourcing.⁸⁴

(“Indeed, outsourcing could ultimately change the way legal work is done in Western countries.”).

78. Guthrie, *supra* note 39, at 7.

79. Joel A. Rose, *Midsized Firms: Key Trends Affecting Competitiveness and Profitability*, ACCT. & FIN. PLAN. FOR L. FIRMS, Jan. 2005, at 1.

80. Fried, *supra* note 22, at 5.

81. Richard A. Matasar, *The Rise and Fall of American Legal Education*, 49 N.Y.L. SCH. L. REV. 465, 474 n.5 (2004) (listing outsourcing as one of the factors making “the future returns on a legal education investment much more risky”); O’Neill, *supra* note 5 (“Do You Hear that Loud Sucking Sound? That isn’t NAFTA; it is the value of the \$120,000 legal education going down the toilet.”).

82. See Crawford, *supra* note 12 (“Nevertheless, the licensing rules make it highly unlikely that the most lucrative work that lawyers do—such as trials and advice on mergers or public stock offerings—will ever leave U.S. shores.”).

83. Rosenberg, *supra* note 39, at S3; Schaal, *supra* note 2, at 14–15.

84. This Comment does not purport to discuss all the ethical implications of outsourcing legal work to foreign countries. Indeed, possibly every rule and canon of the ethical rules is implicated in some manner. Accordingly, the author limited the discussion here to those areas practitioners and commentators have agreed constitute the most significant

I. Major ethical issues raised

Commentators have noted a number of ethical issues that outsourcing corporations and firms need to consider, including the unauthorized practice of law, adequate supervision, client confidentiality, conflicts of interest, appropriate billing, and client consent.⁸⁵

a. Unauthorized practice of law. The Model Rules of Professional Conduct state that “[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”⁸⁶ Most states have specific ethical rules prohibiting the practice of law by an unlicensed lawyer or non-lawyer.⁸⁷ The rationale behind the prohibition on practicing law by unlicensed individuals is “the need of the public for integrity and competence of those who undertake to render legal services.”⁸⁸

The definition of “practice of law” varies by jurisdiction.⁸⁹ For example, in New York, there is no strict definition of the practice of law, but the Code contains the following statement:

obstacles to outsourcing legal work and those issues directly addressed by the most recent New York City ethics opinion on the topic.

85. Tuft, *supra* note 17, at 102–14 (discussing ethical issues regarding unauthorized practice of law, supervisory responsibilities, fee and fee arrangements, disclosures to the client, confidentiality, and conflicts of interest as related to outsourcing legal work to foreign countries).

86. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002), available at http://www.abanet.org/cpr/mrpc/rule_5_5.html; see also N.Y. State Bar Ass'n, THE LAWYER'S CODE OF PROF'L RESPONSIBILITY (2002) [hereinafter NY LAWYER'S CODE] DR 3-101 (“A lawyer shall not aid a non-lawyer in the unauthorized practice of law.”).

87. See, e.g., NY LAWYER'S CODE, *supra* note 86, DR 3-101.

88. *Id.* EC 3-2; see also *id.* EC 1-2 (“The public should be protected from those who are not qualified to be lawyers by reason of deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law.”).

89. Tuft, *supra* note 17, at 104 (“The definition of what constitutes the practice of law varies from jurisdiction to jurisdiction. . . . Typical ‘back office’ services, such as record keeping and information technology, would generally not be considered the practice of law. However, legal research, brief writing and preparation of legal documents may well be considered the practice of law depending on the jurisdiction.”). The definition of the unauthorized practice of law varies from state to state. See ABA CTR. FOR PROF'L RESPONSIBILITY, STANDING COMM. ON LAWYERS' RESPONSIBILITY FOR CLIENT PROT., 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE (1996) (summarizing the results of a survey regarding state definitions of unauthorized practice of law); ABA STANDING COMM. ON CLIENT PROT., INTRODUCTION, 2004 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES (2004) (outlining the various definitions of the unauthorized

Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client . . .⁹⁰

However, even if work falls within a jurisdictional definition of “practice of law,” most states recognize that attorneys can delegate work to some non-legal assistants such as paralegals; if a licensed attorney supervises, reviews, and approves the work, it becomes authorized.⁹¹ It is unclear whether the type of work outsourced to foreign attorneys constitutes the “practice of law” and what level of supervision attorneys must provide.⁹²

b. Adequate supervision. The Model Rules of Professional Conduct place a duty on every attorney to “provide competent representation” to clients and represent clients with “reasonable diligence.”⁹³ Thus, despite utilizing subordinate lawyers or non-lawyers, an attorney still has a duty to supervise those attorneys to ensure adequate representation of the client. The Model Rules place

practice of law and summarizing the results of a nationwide survey regarding the origins, terms, and enforcement of the unauthorized practice of law).

90. NY LAWYER’S CODE, *supra* note 86, EC 3-5.

91. *See, e.g., id.* EC 3-6 (“A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.”); MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 2 (“This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.”).

92. It should be noted that the ABA has adopted a Model Rule for Temporary Practice by Foreign Lawyers. ABA Comm. on Multijurisdictional Prac., Report 201J to the House of Delegates, Aug. 2002, <https://www.abanet.org/cpr/mjp/201j.doc>. However, this model rule only applies on a temporary basis when foreign attorneys become involved in a matter within a domestic jurisdiction “in association” with a domestic lawyer who is admitted to practice, when the matter is “reasonably related” to a foreign matter with which the foreign attorney is involved, when a client resides in a foreign jurisdiction, or when a matter is governed by non-U.S. law. *Id.* This model rule does not appear to affect the status of a foreign attorney working in a permanent fashion on a wide variety of domestic legal matters; however, an in-depth evaluation of outsourcing under this Model Rule requires analysis that falls outside of the scope of this Comment, as New York, and most other jurisdictions, have not as yet adopted the rule.

93. MODEL RULES OF PROF’L CONDUCT R. 1.1, 1.3; *see also* NY LAWYER’S CODE, *supra* note 86, EC 6-1, DR 6-101.

an additional duty on lawyers having direct supervisory authority over another lawyer or a non-lawyer to “make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the [supervising] lawyer.”⁹⁴ Thus, a lawyer supervising another lawyer or non-lawyer takes responsibility for activities that the supervising attorney knows about, directs, or ratifies.⁹⁵

In New York, this supervisory duty extends to activities a lawyer should have known about through the “exercise of reasonable management or supervisory authority.”⁹⁶ Although foreign attorneys do not have to conform to the New York Code, the New York rules require “a New York firm to supervise lawyers licensed in foreign countries to ensure that their conduct does not limit the ability of the firm and its New York lawyers to comply with the New York Code.”⁹⁷ In relation to outsourcing legal work, it is unclear what responsibilities a supervisory attorney will have over the ethical conduct of a lawyer located thousands of miles away who has no independent duty to follow American ethical guidelines.⁹⁸

94. MODEL RULES OF PROF’L CONDUCT R. 5.1 ; *see also* NY LAWYER’S CODE, *supra* note 86, DR 1-104(c) (“A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.”).

95. MODEL RULES OF PROF’L CONDUCT R. 5.1, 5.3.

96. NY LAWYER’S CODE, *supra* note 86, DR 1-104(d) (“A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if: (1) The lawyer orders, or directs the specific conduct, or, with knowledge of the specific conduct, ratifies it; or (2) The lawyer is a partner in the law firm in which the other lawyer practices or the non-lawyer is employed, or has supervisory authority over the other lawyer or the non-lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct”); *see also id.* EC 1-8 (2002). (“A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of nonlawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm. Such measures may include informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior lawyer or special committee, and continuing legal education in professional ethics.”).

97. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 762, at 3 (2003).

98. Tuft, *supra* note 17, at 106 (“A U.S. lawyer directly employing foreign legal counsel would have a duty to supervise and monitor the work of the foreign lawyer The difficulty lies in instituting measures that give reasonable assurance that foreign lawyers will conform to the rules of professional conduct.”).

c. Client confidentiality. A lawyer has an ethical responsibility “not [to] reveal information relating to the representation of a client unless the client gives informed consent.”⁹⁹ In New York, this obligation extends to all the client’s “confidences” and “secrets.”¹⁰⁰ That said, lawyers are generally authorized to share confidential information relating to legal work with other agencies and employees in order to represent their clients effectively, so long as reasonable care is taken to ensure that the employees do not disseminate confidential information.¹⁰¹ However, many foreign countries do not have the same confidentiality requirements or customs that exist in the United States.¹⁰² Based on the Model Rules alone, it is uncertain what a domestic attorney must do to fulfill the ethical duty to protect client confidences when sending information to a foreign country. It is particularly unclear whether sharing information with a foreign attorney falls under the general exception for sharing information to effectively represent a client and under what circumstances an attorney must gain informed consent from the client to transfer confidential information.

d. Conflicts of interest. Every lawyer has a duty to identify and resolve conflicts between the interests of present and past clients of

99. MODEL RULES OF PROF'L CONDUCT R. 1.6; NY LAWYER'S CODE, *supra* note 86, DR 4-101.

100. NY LAWYER'S CODE, *supra* note 86, DR 4-101. “‘Confidence’ refers to information protected by the attorney-client privilege under applicable law, and ‘secret’ refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” *Id.* DR 4-101(a).

101. *See, e.g., id.* EC 4-2 (“The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information . . . when necessary to perform the lawyer’s professional employment It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training employees so that the sanctity of all confidences and secrets of clients may be preserved.”).

102. Proctor, *supra* note 1, at 22 (“In some cultures, it may be common to display the amount of money one has, to brag about important business ventures, or share work information with coworkers and family. These cultures may not appreciate or realize that revealing information about a matter can be embarrassing or detrimental.”); *see also* N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 762, at 7 (2003) (stating 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).

the firm.¹⁰³ In New York, this duty includes a requirement to “keep records of prior engagements . . . [and] have a policy implementing a system by which proposed engagements are checked against current and previous engagements”¹⁰⁴

Under the Model Rules, a lawyer or firm can be disqualified from representing certain clients as a result of conflicting interests. For example, a lawyer cannot represent a client where the client’s interests are “directly adverse to another client,” where the representation would limit the lawyer’s ability to represent another client, or where a firm has gained confidential information regarding the matter through former representation.¹⁰⁵ Hiring temporary lawyers or entering into contractual relationships with non-lawyers can also give rise to imputed disqualification; meaning, that the Model Rules bar law firms from representing clients where a conflict of interest arises after hiring a temporary lawyer or a contractual non-lawyer.¹⁰⁶

As a number of different firms utilize the same third party vendor or foreign attorney to perform legal research or similar tasks, conflicts of interest will inevitably arise. It is uncertain what steps domestic firms must take to fulfill their ethical responsibilities regarding conflicts of interest with foreign attorneys, especially, what they must do to avoid imputed disqualification when outsourcing legal work.

e. Billing. A lawyer cannot charge an unreasonable or excessive fee for legal work.¹⁰⁷ Additionally, the American Bar Association (ABA) distinguishes billing for legal services and billing for a general disbursement. Generally, a bill for legal services can include a surcharge, whereas a bill for a disbursement—such as costs of court

103. MODEL RULES OF PROF’L CONDUCT R. 1.7, 1.9, 1.10; *see also* NY LAWYER’S CODE, *supra* note 86, DR 5-105, 5-108.

104. NY LAWYER’S CODE, *supra* note 86, DR 5-105(e).

105. MODEL RULES OF PROF’L CONDUCT R. 1.7, 1.9, 1.10.

106. NY LAWYER’S CODE, *supra* note 86, EC 1-18 (“Depending upon the extent and nature of the relationship between the lawyer or law firm . . . and the non-legal professional or non-legal professional service firm . . . it may be appropriate to treat the parties to a contractual relationship . . . as a single law firm If the parties to the relationship are treated as a single law firm, the principal effects would be that conflicts of interest are imputed as between them . . . and that the law firm would be required to maintain systems for determining whether such conflicts exist”).

107. MODEL RULES OF PROF’L CONDUCT R. 1.5(a); *see also* NY LAWYER’S CODE, *supra* note 86, EC 2-17, 2-18, 2-19, DR 2-106.

reporters or travel agents—can only reflect the direct cost of the services.¹⁰⁸ In the context of outsourcing legal work, it remains unclear whether an attorney may mark up the cost of legal work performed by a foreign attorney or if such conduct would constitute an unreasonable fee for a general disbursement.

Additionally, attorneys are prohibited from sharing legal fees with non-lawyers unless the division is proportional to the work performed, the client agrees to the arrangement, and the fee is reasonable.¹⁰⁹ However, it is undecided whether paying a third party vendor for work performed on a project would constitute “sharing of legal fees,” and thus, whether a lawyer must obtain client consent before paying a foreign lawyer for the work performed on a given matter.

f. Consent. In addition to the consent that might be required to bill clients for work performed by foreign attorneys, lawyers also have a separate duty to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”¹¹⁰ As an appendage to this duty, clients are also entitled to know what entity represents them in a legal matter.¹¹¹ That said, the ABA has stated that a lawyer may not have to disclose the involvement of a subordinate attorney when the reasonable expectations of the client would not require it.¹¹² Accordingly, it remains unclear whether a lawyer has an ethical duty to inform the client that a portion of their legal work may be outsourced to a foreign attorney.

108. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420 (2000) (stating that a lawyer can add a surcharge to a bill for legal services, whereas a bill for disbursement or expenses must be limited to the actual cost); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993).

109. MODEL RULES OF PROF'L CONDUCT R. 1.5(e); *see also* NY LAWYER'S CODE, *supra* note 86, DR 3-102.

110. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2); *see also* NY LAWYER'S CODE, *supra* note 86, EC 2-22 (“Without the consent of the client, a lawyer should not associate in a particular matter another lawyer outside the lawyer’s firm.”).

111. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988) (“Rule 7.5(d) . . . articulates the underlying policy that a client is entitled to know who or what entity is representing the client.”).

112. *Id.*

2. Formal ethics guidance, or the lack thereof

Based on the rapidly increasing practice of outsourcing legal work and the range of ethical issues implicated by outsourcing to foreign attorneys, one would expect that a number of bar associations would address the issue to help corporations and law firms adopt ethical solutions.¹¹³ As one commentator noted, “[t]here is . . . considerable need for guidance in this area.”¹¹⁴ However, to this point the ABA has generally taken a wait-and-see approach.¹¹⁵ As a result, “[s]o far, there is not much on the subject in case law and ethics opinions”¹¹⁶ and “[t]here are no formal standards.”¹¹⁷

There are a number of potentially analogous formal ethics opinions relating to hiring temporary attorneys, employing contract attorneys, and other types of domestic outsourcing,¹¹⁸ however, as of August 2006, no federal, state, or local bar association had issued a formal opinion relating directly to the ethical implications of outsourcing domestic legal work to foreign countries. Thus, New York City Formal Ethics Opinion 2006-3 (“Opinion 2006-3”) truly constitutes the first authoritative ethical guidance available to help practicing attorneys understand and incorporate ethical principles into the practice of outsourcing legal work.

III. NEW YORK CITY FORMAL ETHICS OPINION 2006-3

Opinion 2006-3, issued in August 2006 by the New York City Bar Committee on Professional and Judicial Ethics, addresses whether “a New York lawyer [may] ethically outsource legal support services overseas when the person providing those services is (a) a foreign lawyer not admitted to practice in New York or in any other

113. One commentator actually suggests “that the Model Rules be amended to provide supervision for the firms and lawyers that decide to outsource.” Kadzik, *supra* note 38, at 739.

114. Richmond, *supra* note 11, at 5.

115. Ramstack, *supra* note 27 (“American Bar Association officials say they know law firms outsource work to foreign countries, but they have not seen problems arise from it. ‘We have not either endorsed it or opposed it.’” (quoting Nancy Slonim, ABA deputy director for policy communications)).

116. Lele, *supra* note 14, at 316 (summarizing statements by Douglas R. Richmond, moderator of a round table discussion on the subject).

117. Rosenberg, *supra* note 39, at S4 (quoting Thomas B. Morgan, professor of professional responsibility at George Washington University Law School).

118. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420 (2000); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988).

U.S. jurisdiction or (b) a layperson,” and “[i]f so, what ethical considerations must the New York lawyer address?”¹¹⁹ The Committee’s opinion considers six main issues in its ethical analysis: the unauthorized practice of law, competent representation and supervision, client confidentiality, conflicts of interest, billing, and client consent.¹²⁰ This Part summarizes the Committee’s analysis and conclusions in each of these areas. It is important to note that before embarking on any ethical analysis, the opinion concludes that foreign lawyers not admitted to practice in New York are considered “non-lawyers” under the New York Code.¹²¹ This conclusion pervades the analysis of the opinion and its conclusions.

A. Unauthorized Practice of Law

The Committee’s analysis of the ethical implications of outsourcing begins with the lawyer’s duty to avoid aiding the unauthorized practice of law.¹²² After citing to the relevant rules and general rationale behind the ethical rules, the Committee notes that “the last 30 years have witnessed a dramatic increase in the extent to which law firms and corporate law departments have come to rely on legal assistants and other non-lawyers to help render legal services more efficiently.”¹²³ That said, “supervising the non-lawyer is key to the lawyer’s avoiding a violation” of the ethical rules regarding the unauthorized practice of law.¹²⁴

The Committee cites to a number of ethics opinions relating to the supervision required when lawyers outsource work to domestic firms staffed with non-lawyers. First, the opinion cites to a New York City opinion which states that “the tasks a non-lawyer may undertake under the supervision of an attorney should be more expansive than those without . . . supervision.”¹²⁵ Next, the opinion cites to a New York State opinion advising lawyers that they could ethically use outside research agencies by “considering in advance the work that will be done and reviewing after the fact what in fact

119. NYC Opinion 2006-3, *supra* note 16, at 1.

120. *Id.* at 2.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 3.

125. Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 1995-11 (1995), *quoted in* NYC Opinion 2006-3, *supra* note 16, at 3.

occurred, assuring its soundness.”¹²⁶ The opinion does not state whether legal work sent to other foreign countries constitutes the practice of law, nor does the opinion state that supervision removes outsourced legal work from falling within the definition of the unauthorized practice of law.¹²⁷

The opinion quotes New York and California opinions relating to the supervision required for legal memoranda and briefs prepared by outside legal research agencies.¹²⁸ These opinions state that “non-lawyers may research questions of law and draft documents of all kinds, including process, affidavits, pleadings, briefs and other legal papers as long as the work is performed *under the supervision* of an admitted lawyer”¹²⁹ and that “the attorney must review the brief or other work provided by [the non-lawyer] and independently verify that it is accurate, relevant, and complete, and the attorney must revise the brief, if necessary, before submitting it to the . . . court.”¹³⁰

Based on these sources, the Committee concludes that in order to meet the duty to avoid the unauthorized practice of law, a “lawyer must at every step shoulder complete responsibility for the non-lawyer’s work[,] . . . set the appropriate scope for the non-lawyer’s work and then vet the non-lawyer’s work and ensure its quality.”¹³¹

B. Competent Representation and Supervision

After citing to the relevant ethics canons and rules, Opinion 2006-3 notes that “the New York lawyer must be both vigilant and creative in discharging the duty to supervise.”¹³² The Committee lists four steps necessary to fulfill the ethical responsibilities regarding supervision and representation:

- (a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the professional

126. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 721, at 7 (1999), *quoted in* NYC Opinion 2006-3, *supra* note 16, at 3.

127. *See* NYC Opinion 2006-3, *supra* note 16, at 2–4.

128. *Id.* at 3–4.

129. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 721, at 6 (1999), *quoted in* NYC Opinion 2006-3, *supra* note 16, at 3.

130. L.A. County Bar Assoc. Prof’l Responsibility and Ethics Comm., Op. 518, at 8–9 (2006), *quoted in* NYC Opinion 2006-3, *supra* note 16, at 3, *available at* <http://www.lacba.org/Files/Main%20Folder/Documents/Files/Eth518%20PDF.pdf>.

131. NYC Opinion 2006-3, *supra* note 16, at 5.

132. *Id.* at 4–5.

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.¹³³

While recognizing that "each situation is different," the Committee concluded that an outsourcing lawyer could fulfill the ethical requirements regarding competent representation and supervision by following these four steps.¹³⁴

C. Client Confidentiality

In addressing the lawyer's duty to preserve client confidences and secrets, the Committee refers to a New York City ethics opinion relating to supervising domestic non-lawyers, noting that "the transient nature of lay personnel is cause for heightened attention to the maintenance of confidentiality. . . . Lawyers should be attentive to these issues and should sensitize their non-lawyer staff to the pitfalls, developing mechanisms for prompt detection of . . . breach of confidentiality problems."¹³⁵

The Committee concludes that "if the outsourcing assignment requires the lawyer to disclose client confidences or secrets to the overseas non-lawyer, then the lawyer should secure the client's informed consent in advance."¹³⁶ The opinion also notes that in securing a client's consent a lawyer should take care to advise the client regarding the different confidentiality laws and customs of the foreign jurisdiction.¹³⁷

133. *Id.* at 5.

134. *Id.*

135. Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 1995-11 (1995), *quoted in* NYC Opinion 2006-3, *supra* note 16, at 5-6.

136. NYC Opinion 2006-3, *supra* note 16, at 6.

137. *Id.*

The opinion gives practicing lawyers some specific steps to take, in addition to obtaining informed consent, to preserve confidentiality when outsourcing legal work, including “restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality.”¹³⁸

D. Conflicts of Interest

The opinion cites two New York State Bar opinions explaining the duty to avoid conflicts of interest, to maintain records as part of a conflicts-checking system, and to update those records when hiring attorneys.¹³⁹ The Committee notes that the obligation to update records and avoid conflicts generally does not apply to hiring non-lawyers; however, “there are circumstances under which it is nonetheless advisable for a law firm to check conflicts when hiring a non-lawyer, such as when the non-lawyer may be expected to have learned confidences or secrets of a client’s adversary.”¹⁴⁰

As a result, the Committee gives a few measures for domestic lawyers to undertake to meet their duty regarding conflicts of interest. It advises attorneys to ask the foreign lawyer and vendor about their procedures for checking conflicts of interest, ask the foreign lawyer and vendor if they have performed work for any adverse parties, and “pursue further inquiry as required.”¹⁴¹

E. Billing

The section describing a lawyer’s duty to bill consists of only three sentences.¹⁴² The Committee states that “[b]y definition, the non-lawyer performing support legal services overseas is not performing legal services” and therefore, it is “inappropriate for the New York lawyer to include the cost of outsourcing in his or her legal fees.”¹⁴³ The Committee also limits the amount that an attorney can ethically charge for foreign services to “the direct cost

138. *Id.*

139. *See id.* (citing N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 774 (2004) and N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 720 (1999)).

140. *Id.*

141. *Id.*

142. *Id.* at 7.

143. *Id.*

associated with outsourcing, plus a reasonable allocation of overhead expenses.”¹⁴⁴

F. Client Consent

In analyzing a lawyer’s duty to obtain consent regarding the outsourcing arrangement, the Committee analogizes to ethics opinions regarding the use of temporary or contract lawyers.¹⁴⁵ In these situations, New York opinions have generally required lawyers “to make full disclosure in advance to the client of the temporary lawyer’s participation in the law firm’s rendering of services to the client, and . . . obtain the client’s consent to that participation.”¹⁴⁶

However, in 1999, the Committee on Professional Ethics of the New York State Bar Association adopted a more “nuanced approach,”¹⁴⁷ which incorporated a number of different factors in determining whether a lawyer had met ethical obligations of consulting with a client regarding the use of a temporary lawyer.¹⁴⁸ These factors included whether the lawyer would share client confidences and secrets, the amount of involvement of the contract lawyer, and the “significance” of the work performed by the temporary attorney.¹⁴⁹ Specifically, the New York State opinion noted that “participation by a lawyer whose work is limited to legal research or tangential matters would not need to be disclosed,” whereas if a temporary attorney “makes strategic decisions or performs 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 by the Contract Lawyer and obtain client consent.”¹⁵⁰

The New York City Committee extends this nuanced approach for temporary lawyers to foreign attorneys, reasoning that “[n]on-lawyers often play more limited roles in matters than contract or

144. *Id.*

145. *Id.*

146. *Id.* (quoting Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 1989-2 (1989)).

147. *Id.*

148. *Id.* (citing N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 715 (1999)).

149. *Id.* (citing N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 715 (1999)).

150. *Id.* (quoting N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 715 (1999)) (alteration in original).

temporary lawyers do.”¹⁵¹ Thus, they recommend that a law firm does not need to “reflexively inform a client every time that the lawyer intends to outsource legal support services overseas.”¹⁵² Rather, the Committee sets out a number of factors, similar to the New York State factors for contract attorneys, to apply when deciding when a lawyer needs to inform clients.¹⁵³ These factors include whether the lawyer plays a significant role in the matter,¹⁵⁴ whether the lawyer will share client confidences or secrets,¹⁵⁵ whether the client would expect that only firm employees will manage their matter, and whether the lawyer plans on billing foreign attorneys in a matter other than cost.¹⁵⁶

IV. ANALYSIS

Although Opinion 2006-3 addressed the main ethical concerns associated with outsourcing legal work to foreign attorneys, the Committee left a number of unanswered questions and gave some questionable ethical guidance for attorneys outsourcing legal work to foreign countries. Specifically, the opinion fails to answer the following questions: whether foreign attorneys participate in the practice of law and how the public would be harmed if foreign attorneys did practice law; whether measures beyond communication are needed to supervise foreign attorneys; whether informed consent prior to every transfer of information is actually necessary; whether a firm can maintain confidentiality by applying the confidentiality rules for temporary lawyers; and whether foreign attorneys actually do perform legal services and how that reality might affect billing procedures. This Part will discuss each of the unresolved issues and ethical shortcomings in turn.

151. *Id.*

152. *Id.* at 7–8.

153. *Id.* at 8.

154. The opinion provides an example of what constitutes significant involvement: “[S]everal non-lawyers are being hired to do an important document review.” *Id.* at 8.

155. As noted earlier, the New York City Bar requires a lawyer to inform the client when sharing client confidences or secrets. *See supra* Part II.B.1.c and note 101.

156. The opinion notes that billing a foreign attorney in a manner other than cost would require informed consent. NYC Opinion 2006-3, *supra* note 16, at 8.

A. Foreign Attorneys: Lay Persons, Non-lawyers, Temporary Lawyers, or Paralegals?

At the outset of Opinion 2006-3, the Committee notes that, under New York ethical rules, foreign attorneys fall within the category of “non-lawyers.”¹⁵⁷ However, the Committee failed to explain that all “[l]awyers who are not admitted to practice in New York have the status of non-lawyers in New York.”¹⁵⁸ Thus, lay persons, temporary and contract lawyers licensed in other states, paralegals, and other legal assistants all fall within the category of “non-lawyer.” The problem with the mischaracterization is that a lawyer has different ethical responsibilities when dealing with each of these groups. These differences create a logical difficulty throughout the ethics opinion because the Committee analogizes foreign attorneys to lay persons, non-lawyers, temporary lawyers, and paralegals without explaining the similarities and differences between the classifications or explaining its choice to analogize to certain groups in some situations while refusing to do so in others. Although foreign attorneys may compare to any one of these categories in a given situation, a bar must recognize the differences and explain why it chooses to use a certain comparison.¹⁵⁹ The importance of these differences becomes apparent throughout the subsequent discussions of each ethical issue.

157. *Id.* at 2.

158. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 721, at 6 (1999).

159. Kadzik, *supra* note 38, at 736 (“Outsourcing raises ethical issues with providing adequate supervision because it is difficult for a supervising lawyer to maintain satisfactory supervision over an employee working in another country. It is unlikely that the supervising lawyer will have direct contact with the overseas employee, therefore it is important that the supervising lawyer clearly explain all U.S. ethical rules and ensure that the employee is in compliance with those rules.”); Carole J. Buckner, *The Ethics of “Temporary” Lawyering*, ORANGE COUNTY LAW., May 2006, at 56, 56 (“The same ethical considerations discussed above in connection with contract lawyers also apply when outsourcing work to foreign lawyers.”); Coster, *supra* note 27, at 99–100 (“Orrick also hires temporary, or contract, lawyers. The difference . . . is the hands-on way that Orrick manages and integrates these lawyers. ‘We’ll put a group of contract attorneys with Orrick lawyers in a room with eight computer terminals . . . someone will often have a question, like ‘I see this here. Is this important?’ and they can ask a supervising attorney. But if I have a contract attorney who is by himself, in India, what do they do with that question? Maybe he can send an e-mail and get a reply a day later. But quite naturally you would think that they would say it’s not important and move on. And I want that question immediately answered.”(quoting Hopkins Guy, IP partner at Orrick, Herrington & Sutcliffe)).

B. Unauthorized Practice of Law

Although the opinion's ultimate conclusions regarding the unauthorized practice of law were correct, the Committee's opinion failed in two major respects: (1) it did not state whether work performed by foreign attorneys falls within the definition of the practice of law and (2) it did not explain the dangers to the public from outsourcing work to foreign attorneys.

1. Are foreign lawyers practicing law?

Opinion 2006-3 focuses on the fact that domestic attorneys fulfill their ethical responsibilities of assuring that non-lawyers do not participate in the unauthorized practice of law by taking responsibility for and supervising work performed by foreign attorneys. However, the opinion fails to address if work performed by foreign attorneys constitutes the practice of law. Indeed, many foreign vendors claim they "do not practice law"¹⁶⁰ and their work does not "require a law license to perform."¹⁶¹

These assertions by foreign attorneys are significant: if their work does not constitute the practice of law, then domestic attorneys would not need to supervise their conduct to "sanitize[]" it.¹⁶² In fact, if the work performed by foreign attorneys does not constitute law practice, then a law firm or individual clients could directly contract with foreign attorneys without having a domestic attorney supervise or take responsibility for the work, much like a lawyer or individual could directly contact a third party vendor of accounting services.

160. Jonathan D. Glater, *Even Law Firms Join the Trend to Outsourcing*, N.Y. TIMES, Jan. 13, 2006, at C7 (quoting Dov L. Seidman, chief executive of LRN).

161. Crawford, *supra* note 12 (quoting George Herreran III, general counsel of Mindcrest). This precise problem of identifying what types of work constitute the practice of law prompted the ABA's recent attempts to adopt a model definition for the practice of law throughout the United States. ABA Task Force on the Model Definition of the Practice of Law, Report (Aug. 2003), http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf ("The adoption of a definition of the practice of law is a necessary step in protecting the public from unqualified service providers and in eliminating qualified providers' uncertainty about the propriety of their conduct in any particular jurisdiction.") [hereinafter Model Definition Report].

162. Rosen, *supra* note 21 (quoting Stephen Gillers, professor at New York University School of Law).

The Committee should have clearly enumerated that some types of work currently performed by foreign attorneys constitute the practice of law. Indeed, performing legal research, drafting contracts, and drafting legal memoranda and briefs appear to require “the professional judgment of a lawyer” and the “ability to relate the general body and philosophy of law to a specific legal problem of a client”¹⁶³ and would thus fall within the definition of the practice of law in New York.¹⁶⁴ This recognition would have clarified claims by foreign vendors regarding whether their work constitutes the practice of law, and would have automatically made supervision necessary by a domestic attorney. By failing to conclude that such work falls within the definition of the practice of law, foreign attorneys can claim that their work does not require a license, thereby opening the door for foreign attorneys to perform this type of work without domestic supervision.

2. Protecting the monopoly . . . oh, and the public as well

Throughout American legal history, critics have condemned the application of measures to prevent the unauthorized practice of law as a mere barrier to entry with a pretextual goal of protecting the public.¹⁶⁵ Modern commentators have similarly questioned whether the bar prohibits foreign attorneys from practicing in the United States to protect the public or to protect their pocketbooks.¹⁶⁶ At

163. NY LAWYER’S CODE, *supra* note 86, EC 3-5.

164. ABA Task Force on the Model Definition of the Practice of Law, Definition of the Practice of Law Draft (Sept. 18, 2002), http://www.abanet.org/cpr/model-def/model_def_definition.html (“A person is presumed to be practicing law when engaging in . . . [s]electing, drafting, or completing legal documents or agreements that affect the legal rights of a person.”). Of course, some work performed by foreign attorneys would not require professional legal judgment, such as databasing documents, checking for compliance with regulations, word processing, or organizing large volumes of evidence. The Committee did not need to draw a bright line or make an extensive list of what activities would constitute the practice of law; however, recognizing that some activities currently performed overseas do fall under the ambit of the prohibition on unauthorized practice would refute any claims to the contrary by foreign sources.

165. See Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, 5 AM. B. FOUND. RES. J. 159, 160 (1980) (summarizing the history of unauthorized practice of law as well as arguments for and against the “monopoly” on legal services).

166. Rosenberg, *supra* note 39, at S4 (“[I]t’s cheaper to hire lawyers in India than it is here and that’s just pure economics. That has nothing to do with competence and professionalism,’ . . . and those who argue otherwise ‘could be concerned about the protection

least one court has recently questioned the application of some practice of law regulations and instructed lawyers to “show us the harm” that makes such strict guidelines necessary.¹⁶⁷ Accordingly, the ABA Task Force for the Model Definition of the Practice of Law recently recommended that bar associations should balance the potential harm to the public with the potential benefits in deciding what groups can practice under the ethical guidelines.¹⁶⁸

Although Opinion 2006-3 pays lip service to protecting the public, the Committee perpetuates the perception of an established barrier to entry by failing to acknowledge the myriad of potential problems individuals might face in doing business with a foreign attorney and instead focuses on the technical details of unauthorized practice of law jurisprudence. Indeed, after the Committee states that the regulation of the unauthorized practice of law “aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work,” the opinion never mentions any dangers that might exist by outsourcing legal work to foreign countries.¹⁶⁹

The Committee could have resolved any question of the propriety of extending the unauthorized practice of law rules to foreign attorneys by listing both the benefits and the dangers associated with outsourcing legal work. Although the cost savings to the public might be significant, foreign attorneys generally work thousands of miles away from an American jurisdiction, are not subject to disciplinary measures of the state or local bar, may have

of their own turf.” (quoting Susan J. Hackett, senior vice president and general counsel for the Association of Corporate Counsel)).

167. Thomas D. Zilavy & Andrew J. Chevez, *The Unauthorized Practice of Law: Court Tells Profession, Show Us the Harm*, WIS. LAW., Oct. 2005, at 8 (summarizing the appeal from the Wisconsin Supreme Court asking for demonstrable evidence of harm stemming from the unauthorized practice of law).

168. Model Definition Report, *supra* note 161.

169. The New York City Bar has reasoned that because the unauthorized practice of law is a crime, debating “the underpinnings of [the rule] is engaging but inconsequential.” Ass’n of the Bar of the City of New York Comm. on Prof’l and Judicial Ethics, Formal Op. 1995-11 (1995). To the contrary, debating the logic behind the rule has resulted in exceptions and even separate licensing agencies for paralegals, legal assistants, and other non-lawyers. *See, e.g.*, Kay D. Hanson, *The Creation and Proposed Future of the Legal Assistant Division of the Utah State Bar*, UTAH B.J., Feb. 1999, at 38–39. Although outside of the scope of this Comment, given the extreme cost savings of utilizing foreign attorneys, perhaps a discussion of the potential benefits and dangers could also lead to the creation of a separate legal regime for the licensing of foreign attorneys.

limited legal training, and do not have any responsibility to abide by United States ethical requirements.¹⁷⁰ These factors pose a significant threat to the quality of services provided by the legal profession and create a dangerous situation for those citizens that rely on foreign attorneys to protect their legal interests, if the work of foreign attorneys is not reviewed by domestic attorneys.¹⁷¹

The Committee could have also pointed out the differences between foreign attorneys as compared with domestic non-lawyers. For example, paralegals generally have direct contact with domestic attorneys and often some separate licensing requirements, whereas foreign attorneys work at different hours than American lawyers, have no face-to-face contact with domestic attorneys, and currently have no separate domestic licensing requirements under which they can be regulated. Similarly, temporary domestic attorneys are generally subject to the disciplinary rules of an American jurisdiction and have American legal training, whereas foreign attorneys have no disciplinary guidelines under which they must operate and may have received training in a foreign system or no legal system at all. These differences indicate that additional dangers exist when giving legal work to foreign attorneys rather than to paralegals or temporary attorneys who are subject to unauthorized practice of law regulations. By failing to acknowledge the potential dangers posed by foreign attorneys to the public—both generally and when specifically compared with other non-lawyers—the Committee paved the way for renewed criticism of the regulation of the unauthorized practice of law.

170. *See supra* Part II.A.3 (discussing the drawbacks of utilizing a foreign attorney, including the dangers with quality).

171. The purpose of mentioning the dangers of outsourcing is not to conclude that they cannot be addressed or minimized, but merely to recognize that they exist, and that the profession has a greater concern in protecting the public in this arena than many other areas where unauthorized practice of law jurisprudence applies. Of course, as noted earlier, outsourcing has a number of benefits, and proponents of legal outsourcing claim that the dangers enumerated here can be minimized. *See supra* Part II.A.3 (discussing the benefits of utilizing a foreign attorney). However, Opinion 2006-3 failed to recognize either the benefits or drawbacks, making a meaningful discussion of the propriety of the Committee's adoption and application of unauthorized practice rules impossible. It is enough for purposes of this Comment to explain that dangers exist that, on their face, warrant application of the unauthorized practice rules to foreign attorneys when compared with obtaining other types of legal assistance.

C. Supervision: More Than Talking Ethical Talk

The four main recommendations contained in Opinion 2006-3 regarding a domestic lawyer's obligation to supervise foreign attorneys deal with obtaining background information, conducting reference checks, interviewing the foreign attorney, and communicating with the foreign attorney during the assignment.¹⁷² However, the opinion ignored the difficulties in obtaining information from and communicating with foreign attorneys, and thereby failed to adequately advise New York lawyers on how to fulfill their obligation to supervise the ethical conduct of foreign lawyers. The Committee should have realized that communication may not be enough to ensure that a foreign attorney does not cause a domestic attorney to vicariously engage in unethical conduct.

A New York state ethics opinion provides an example of how a foreign attorney's conduct could create ethical problems for a domestic attorney:

Suppose, for example, that the ethical rules of Country X generally comport with the New York confidentiality rules but require a lawyer to reveal a client's past fraud. Because a New York attorney is prohibited from revealing a client confidence or secret in that situation, the firm must take reasonable steps to ensure compliance with the New York Code (for example, by ensuring that such confidential information is unavailable to the lawyer licensed in Country X).¹⁷³

The domestic lawyer faces similar exposure to ethical violations in areas such as conflicts of interest, billing, or record retention, and must take steps to reasonably ensure that the foreign lawyer does not violate the domestic attorney's obligations.¹⁷⁴

As one legal commentator noted, "[t]he difficulty lies in instituting measures that give reasonable assurance that foreign lawyers will conform to the rules of professional conduct applicable to the domestic law firm and that the conduct of foreign non-lawyer assistants will be compatible with the U.S. lawyer's professional obligations."¹⁷⁵ With regard to employing foreign attorneys

172. NYC Opinion 2006-3, *supra* note 16, at 5.

173. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 762, at 7 (2003) (citation omitted).

174. *Id.* at 4.

175. Tuft, *supra* note 17, at 107.

generally, the New York State Committee on Professional Ethics has previously stated that the policies required for reasonable supervision depend on the firm's size and structure; thus, "[i]nformal supervision may be sufficient in a small one-office firm, but detailed written policies and procedures may be necessary in a multi-office firm."¹⁷⁶ Therefore, the state ethics committee seems to indicate that the difficulty in supervision and complexity of the relationship between the supervising and subordinate attorney dictate the procedures and extent of supervision required. Along these same lines, the New York State Committee previously stated that because "paralegals do not have legal training and are not subject to discipline, the lawyer has a heightened standard of supervision from that generally owed toward a subordinate attorney."¹⁷⁷

The relationship between a domestic attorney and a foreign attorney performing outsourced legal tasks can be very complex and can present unique supervisory challenges. A domestic attorney faces more difficulty in supervising the ethical conduct of foreign attorneys than supervising paralegals because the attorney does not have face-to-face contact with the foreign attorney. Unlike a foreign attorney in a branch office, in many instances an outsourced foreign attorney will not have any personal supervision by someone obliged to follow ethical guidelines. In addition, some relationships between the foreign and domestic attorneys can be complicated by an intermediary vendor that handles some of the communication between the parties.¹⁷⁸ Consistent communication regarding ethics with a foreign attorney during the progress of an outsourced project may be extremely difficult given the difference in time, the short duration of a project, the lack of person-to-person contact, and the cultural differences between the United States and the foreign country.¹⁷⁹ Communication with a domestic attorney also does not provide significant assurance—other than verbal reassurance—that the foreign lawyer is maintaining his or her ethical responsibilities.

176. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 762, at 4 (2003).

177. Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 1995-11 (1995).

178. Tuft, *supra* note 15 ("The difficulty lies in supervising temporary legal help via the web, particularly where the work is channeled through an intermediary agency that utilizes the services of foreign lawyers and nonlawyers.").

179. Kadzik, *supra* note 38, at 736.

Beyond communicating with attorneys working on a project, to discharge their ethical obligations, domestic lawyers need to take steps tailored to the outsourcing arrangement to ensure that the foreign attorney comports with the domestic lawyer's ethical obligations. Direct supervision by an attorney licensed in the United States but living in the foreign jurisdiction would alleviate many ethics concerns, and the face-to-face communication with the foreign attorney in these circumstances may suffice. For firms outsourcing without an onsite supervisory attorney, additional steps to adequately supervise the foreign attorney could include conducting thorough research regarding the ethical obligations and cultures of attorneys in foreign jurisdictions;¹⁸⁰ establishing training, reporting, and accountability procedures to ensure that foreign attorneys comply with the relevant domestic ethics requirements; and incorporating ethical provisions within outsourcing agreements that outline the domestic obligations that may extend to foreign lawyers.¹⁸¹ Given the difficulty in supervising a foreign attorney, Opinion 2006-3 should have recognized that supervision above and beyond communication may be required depending on the type of outsourcing arrangement.

D. Confidentiality: Overkill of Informed Consent

Opinion 2006-3 makes valid recommendations for domestic attorneys outsourcing legal work to restrict access to confidences and secrets, to include contractual provisions addressing confidentiality, and to inform clients regarding the differences in confidentiality rules between foreign and domestic jurisdictions.¹⁸² However, the opinion

180. Proctor, *supra* note 1, at 24 (“To ensure the quality of work performed, as well as to apply ethics rules according to whether the outsourcing worker is a ‘lawyer’ or ‘nonlawyer,’ the U.S. lawyer contemplating outsourcing must know something about the lawyering requirements of the jurisdiction where the work will be performed”); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 658, at 2 (1994) (advising New York lawyers to conduct additional research regarding the Swedish legal system to determine their ability to uphold the New York lawyers’ ethical obligations); N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 646, at 3 (1993) (“[T]he New York lawyer who enters into a partnership with lawyers licensed in Japan or any other foreign country has an obligation to ensure that participation in the law partnership does not compromise the lawyer’s ability to abide by the ethical standards of this State.”).

181. Proctor, *supra* note 1, at 22 (“In order to fulfill these duties, the outsourcing contract itself should incorporate the ethics duties pertinent to the work contracted.”).

182. See Kadzik, *supra* note 38, at 735 (“First and foremost there should be an agreement between the U.S. law firm and overseas employee setting forth confidentiality

goes too far by requiring domestic lawyers to obtain informed consent for every assignment sent overseas containing a client confidence or secret. In fact, the opinion fails to address and foreclose the argument that sharing confidences with a foreign attorney would be reasonable in helping the attorney represent the client, thus not requiring client consent at all.¹⁸³ The Committee should have explained the differences between sharing confidential information with paralegals and foreign attorneys but recognized that informed consent prior to every assignment is not necessary.

Generally, a lawyer can reveal confidential information, without consent of the client, to paralegals and other non-lawyers “when necessary to perform the lawyer’s professional employment.”¹⁸⁴ Some commentators have argued that foreign attorneys should be treated like paralegals and other non-lawyers: a lawyer should be able to share confidences and secrets as long as they are related to the work performed.¹⁸⁵ Of course, sharing confidential information imposes a duty to ensure that confidentiality is maintained; however, under this theory, the domestic attorney has no obligation to obtain client consent.¹⁸⁶

That said, confidentiality dangers exist when outsourcing legal work that do not exist when sharing information with office personnel; for example, when information is transferred outside of the country, there is an increased risk of electronic data theft, and cultural differences may exist in the foreign country which make dissemination of information more likely. The opinion fails to foreclose the argument that consent may not be required as long as the domestic lawyer sends information reasonably in connection with legal work.

obligations and restrictions. Maintaining client confidentiality can also be accomplished by limiting the outsourced worker’s access to information.”).

183. See NYC Opinion 2006-3, *supra* note 16, at 6.

184. NY LAWYER’S CODE, *supra* note 86, EC 4-2.

185. Richmond, *supra* note 11, at 6 (“It therefore follows that those lawyers who outsource legal work may share confidential client information with the lawyers to whom the work is outsourced without violating their duty of confidentiality so long as the information reasonably relates to the work to be performed.”).

186. *Id.* (“Lawyers who outsource client work must ensure that the lawyers doing the work understand their confidentiality obligations, appreciate the need to maintain and protect client confidences, and have systems in place to ensure that confidentiality is maintained.”).

To support the requirement for consent, the Committee cites to New York State Opinion 721,¹⁸⁷ which discusses the ethical implications of an insurance company requiring a law firm to utilize a private legal research service.¹⁸⁸ In its opinion, the State Bar recommends that the law firm obtain client consent before submitting any confidential information to the legal research provider.¹⁸⁹ This recommendation seems logical under these facts because a non-client—the insurance provider—is requiring the lawyer to divulge the client’s information to a third party.¹⁹⁰ The danger exists that the lawyer would divulge information at the request of the insurance company without the client’s consent. However, Opinion 721 does not support the requirement to seek client consent for every foreign outsourced assignment because those same dangers do not exist in a foreign outsourcing relationship as long as the client gives informed consent to the general outsourcing arrangement without third party pressure. The Committee fails to offer specific reasons for requiring such a strict standard.

In short, the Committee does not explain why the exception to sharing confidential information with paralegals and other office personnel should not apply to foreign attorneys. Additionally, the Committee relied on a distinguishable opinion in requiring lawyers to receive client consent for each foreign outsourced assignment, and it failed to explain why general informed consent to the outsourcing arrangement would not meet a lawyer’s duty of maintaining confidentiality. Certainly, forcing an attorney to obtain informed consent before every transfer of confidential information would keep the client well informed and provide control over every stage of the outsourcing process. However, obtaining client consent before sharing any confidential information with paralegals, temporary lawyers, or other domestic employees would have the same effect. Although the Committee was not completely unjustified in its decision, it should have explained its logic to counteract claims that such a strict requirement is not warranted.

187. NYC Opinion 2006-3, *supra* note 16, at 6.

188. N.Y. State Bar Ass’n Comm. on Prof’l Ethics, Op. 721 (1999).

189. *Id.*

190. *Id.* at 3 (“Despite the fact that an insurance company has retained the lawyer pursuant to its contractual duty to defend the policyholder, the client is the policyholder, not the insurance company.”).

E. Conflicts of Interest: Paralegals or Temporary Lawyers?

Opinion 2006-3 advises lawyers to question foreign lawyers or vendors about conflict of interest procedures, to ask if they have represented parties adverse to a client's interests, to remind foreign attorneys to safeguard confidences, and to "pursue further inquiry as required."¹⁹¹ The Committee bases these recommendations on New York State Opinion 774 relating to conflict of interest requirements in hiring non-lawyer personnel.¹⁹² However, Opinion 2006-3 fails to recognize the differences between hiring foreign attorneys and domestic paralegals or secretaries for purposes of conflicts of interest. The differences between these groups indicate that the Committee should have adopted more specific procedures akin to protecting against conflicts of interest in dealing with temporary lawyers.

In Opinion 774, the New York State Committee on Professional Ethics stated that the New York Rules do "not require law firms to search for conflicts that may be created when nonlawyers join the firm laterally" except for circumstances where the non-lawyer possesses confidential information.¹⁹³ When the risk of obtaining confidential information is "high," the bar suggests performing a full conflicts check.¹⁹⁴ The opinion also states that "[t]he greater the responsibilities of the prospective nonlawyer employee in a matter while at an opposing law firm, the more likely it is that ethics problems will arise in the matter at the new firm."¹⁹⁵ Depending on the responsibilities and information, the opinion recommended screening, obtaining consent from an opposing firm's client, terminating the non-lawyer, or, in the extreme, refusing involvement in the matter.¹⁹⁶ This opinion did not change the general fact that information gained by a non-lawyer can create conflict of interest problems for a domestic firm and can result in disqualifying the firm from representing certain clients.¹⁹⁷

191. NYC Opinion 2006-3, *supra* note 16, at 6-7.

192. *Id.* at 6.

193. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 774 (2004).

194. *Id.*

195. *Id.*

196. *Id.*

197. Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 1995-11 (1995) ("Similar to instances where a law firm has been disqualified due to the confidentiality imputed from a lawyer in the firm, so too may it be due to a non-lawyer employee." (citing *Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc.*, 514 N.Y.S.2d

For paralegals and other personnel, conflicts are generally not a serious issue because, once hired, they will only work on matters within the firm; thus, there is little risk that additional conflicts will arise after an initial general conflicts check.¹⁹⁸ Foreign attorneys, on the other hand, will constantly take on clients that could potentially create a conflict of interest without careful record keeping. Finding potential conflicts at the beginning of the relationship will not protect a law firm because the next day opposing counsel could contact the foreign attorney and request a legal memorandum on the same issue.

In addition, most office staff and non-lawyers have little involvement in the actual development of legal theories or legal work product. When compared to a secretary, foreign attorneys can participate in a case in a significant manner. For example, a foreign attorney that drafts a legal brief will take a significant role in the client's representation by developing the client's legal case and applying the law to the facts at issue.¹⁹⁹ Thus, using the language from Opinion 774, the possibility of obtaining confidential information is "high" for a foreign attorney and the lawyer can have "greater" responsibilities in the legal matter.²⁰⁰ Indeed, as outsourcing legal work becomes more accepted,²⁰¹ the real possibility exists that foreign legal attorneys will work on conflicting sides of the same issue, or at least have exposure to confidential information that would inappropriately assist foreign attorneys in structuring opposing legal arguments.

These differences mandate additional measures, beyond an initial background and conflicts check, to ensure that a lawyer does not violate his or her duty to avoid conflicts by hiring a foreign attorney who has confidential information or who works for opposing counsel. In fact, a foreign attorney may be more analogous to a

440, 441 (N.Y. App. Div. 1987) (holding that an attorney could not represent a client after hiring a paralegal that had previously worked for opposing counsel regarding the subject of the litigation))).

198. Of course, as firms continue to take on additional clients, they may need to check their employees' prior work history to ensure that no conflicts exist; however, that initial list of clients and matters will remain the same over time as opposed to a foreign attorney whose potential conflicts will continuously develop.

199. See Part II.A.2 (discussing work performed by foreign attorneys, including drafting briefs and legal memoranda).

200. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 774 (2004).

201. See *supra* Part II.A.3 (describing the future of outsourcing legal work).

temporary attorney than a paralegal in these instances because of their continued access to clients outside of the law firm, the type of work they may perform, and the possibility that they may be located outside of the jurisdiction.²⁰²

For temporary attorneys, the ABA recommends a variety of procedures to avoid imputed disqualification depending on the “ongoing relationship” between the firm and the temporary attorney, as well as the “circumstances likely to result in disclosure of information relating to the representation of other firm clients.”²⁰³ Recommendations that would address some of these dangers include adopting screening procedures to limit the information available to the temporary lawyer, maintaining “complete and accurate” records regarding the matters a temporary lawyer becomes involved in, and ensuring that a temporary lawyer maintains an accurate list regarding clients and issues the lawyer has worked on.²⁰⁴ Some ethical commentators have also advised outsourcing attorneys to screen foreign attorneys from any unnecessary information and to keep accurate records of matters worked on by foreign attorneys to ensure that conflicts of a foreign attorney do not disqualify a domestic attorney from representing clients.²⁰⁵

In short, the Committee analogized foreign lawyers to paralegals and other office personnel in advising lawyers how to avoid conflicts of interest. However, the Committee should have recognized the differences between office staff and foreign attorneys and advised lawyers to adopt standards similar to those governing temporary

202. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988).

203. *Id.* at 3-4 (noting these factors in determining whether a lawyer's activity rises to the level of “association” with the law firm thus imputing their knowledge of confidential information); *see also* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 715 (1999) (discussing resolving conflicts of interest with contract lawyers); Tuft, *supra* note 17, at 112 (“However, whether the contract or temporary lawyer's conflict in representing clients with adverse interests at different law firms will be imputed to the firm who retains the contract lawyer's services is unclear.”).

204. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356, at 4 (1988).

205. *See, e.g.*, Kadzik, *supra* note 38, at 735. (“In order to ensure that the use of outsourcing and employing overseas workers does not create conflicts of interest for U.S. lawyers and law firms, it is important that all overseas employees are screened from all information relating to clients for which the overseas employee does no work. In addition, all law firms engaged in the practice of outsourcing legal work should maintain a complete and accurate record of all matters for which work is outsourced and the particular overseas employee who worked on each client matter.” (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-365 (1988))).

attorneys, including screening, keeping accurate records of matters involving foreign attorneys, and ensuring that foreign attorneys keep accurate records regarding clients they have worked for—and do work for—as litigation progresses.

F. Billing

Opinion 2006-3 only briefly discusses billing procedures because it initially concludes that foreign attorneys, as non-lawyers, cannot perform legal services.²⁰⁶ Based on this premise the opinion flatly rejects any billing for foreign legal work that exceeds direct costs of obtaining those services.²⁰⁷ This standard makes many of the current billing practices of outsourcing domestic attorneys unethical.²⁰⁸ The opinion should have recognized that foreign attorneys can perform legal services and domestic attorneys can reasonably mark-up the cost so long as the domestic attorney reviews and takes responsibility for the work and bills the client for a legal fee. Because the opinion summarily dismisses the ethical obligations regarding fees, it fails to consider what duties a lawyer has to disclose a fee arrangement with a foreign attorney and whether paying a foreign lawyer would violate ethical rules such as sharing legal fees with a non-lawyer.

1. Ethical mark-up of fees for outsourced legal work

If a lawyer bills outsourced legal work as an expense or a disbursement, the lawyer has an ethical obligation to pass cost savings on to the client.²⁰⁹ The ABA has clearly stated that “[a] lawyer may not charge a client more than her disbursements for services provided by third parties like court reporters, travel agents or expert witnesses.”²¹⁰ Thus, if a domestic attorney merely outsources back-office activities, such as filing, copying, or transcribing, the lawyer could not mark up these services in a bill to a client.

206. NYC Opinion 2006-3, *supra* note 16, at 7.

207. *Id.*

208. *See, e.g.,* Coster, *supra* note 27, at 99 (“I usually bill the clients a certain hourly rate and pay these folks a portion of that rate.” (quoting Solan Schwab, a New York based solo practitioner)).

209. Tuft, *supra* note 17, at 109 (“The cost of outsourced legal work may be billed to the client as an expense incurred by the law firm, in which case the costs billed to the client should represent the actual cost incurred by the law firm plus any additional expense incurred by the firm attributable to that item.”).

210. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379, at 1 (1993).

However, the Committee fails to recognize that foreign attorneys perform legal services²¹¹ and that domestic attorneys can bill this work out as a reasonable legal fee.²¹² The language of ABA opinions regarding billing for contract lawyers actually warrants a contrary conclusion than that drawn by the Committee:

Whether the cost attributable to a contract lawyer is billed as an expense or included in legal services fees is not addressed by the Model Rules and does not seem to be a matter of ethics. When a contract lawyer's services are billed with the retaining lawyer's as fees for legal services, however, the client's reasonable expectation is that the *retaining lawyer has supervised the work of the contract lawyer or adopted that work as her own.*²¹³

To fulfill the ethical obligation regarding supervision, a lawyer has to supervise the work of a foreign attorney and take responsibility for the work; thus, under the standard enumerated by the ABA, a domestic attorney should be able to ethically bill work by a foreign attorney as a legal fee. Indeed, by utilizing a foreign lawyer, a domestic attorney essentially absorbs the risk of the work performed by the foreign attorney; to compensate for the added potential liability, the rules should allow the domestic attorney to increase the price of outsourced legal work. Most commentators that have considered the issue agree that if billed as a reasonable legal fee, domestic attorneys can mark up the direct costs of outsourcing the work.²¹⁴

211. See *supra* Part II.A.2 (discussing the types of legal work performed by foreign workers).

212. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420, at 1 (2000) ("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." (emphasis removed)).

213. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420, at 2 (2000) (emphasis added).

214. See, e.g., Tuft, *supra* note 17, at 108 ("The law firm retaining the services of the outside lawyer is not required to pass through the cost savings to the client if the services of the outside lawyer are billed to the client as fees. The law firm may add a surcharge to the outside services unless the agreement between the lawyer and client specifies otherwise. Where the services of foreign lawyers are billed as part of the U.S. lawyer's fee, however, the client would likely expect that the lawyer billing for those services has supervised the work.").

2. *Sharing legal fees with a non-lawyer*

The Committee also failed to consider whether paying a foreign attorney or vendor would constitute sharing of legal fees with a non-lawyer. One commentator has noted that an outsourcing payment arrangement does not violate the prohibition on sharing legal fees if the domestic attorney pays the foreign lawyer, regardless of whether the client pays, if the amount is not based on the fees paid to the client, and if the foreign lawyer does not receive a percentage of a contingency fee.²¹⁵ For example:

Paying the contract lawyer \$100 per hour and billing the client for the work as fees at \$150 per hour is permissible, as long as the amount paid to the contract lawyer is not tied to the specific fees received by the hiring lawyer.

However, when a contract lawyer is paid a flat fee, for example, for a court appearance, the fee must be disclosed to the client, and consent obtained.²¹⁶

Allowing a domestic attorney to pay a foreign attorney under these circumstances comports with the general guidance given by the ABA and the New York City Committee regarding sharing legal fees with temporary lawyers and their vendors.²¹⁷ Opinion 2006-3 should have recognized that by disconnecting the foreign attorney's fees from the fee paid by the client, a New York attorney could avoid violating ethical rules that prohibit fee sharing with non-lawyers.

215. Tuft, *supra* note 17, at 109–10 (“The fee sharing restrictions should not apply where the amount paid to the foreign lawyer by the law firm is compensation for work performed and must be paid whether or [sic] the lawyer is paid by the client, where the amount paid by the attorney to the foreign lawyer is neither negotiated nor based on fees that have been paid to the attorney by the client and where the foreign lawyer does not receive a percentage fee.”).

216. Buckner, *supra* note 159, at 56 (citation omitted).

217. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356, at 7 (1988). (“This Committee is of the opinion that an arrangement whereby a law firm pays to a temporary lawyer compensation in a fixed dollar amount or at an hourly rate and pays a placement agency a fee based upon a percentage of the lawyer's compensation, does not involve the sharing of legal fees by a lawyer with a nonlawyer”); Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 1995-11 (1995) (“The compensation of a non-lawyer employee may not be a commission or bonus that is directly linked to a percentage of profits or fees received from any client or the volume of business development, or be a reward for clients brought or referred by the non-lawyer to the firm.”).

3. *Disclosing the fee arrangement*

The Committee also failed to address the lawyer's duty to "disclose to a client the basis on which the client is to be billed for both professional time and any other charges."²¹⁸ Indeed, the risk of the lawyer taking advantage of the client through unreasonable expenditures is reduced because the lawyer must provide "an explanation at the beginning of [the] engagement of the basis on which fees and other charges will be billed . . . [and] a sufficient explanation in the statement so that the client may reasonably be expected to understand what fees and other charges the client is actually being billed."²¹⁹ The opinion fails to advise lawyers regarding this duty.

In relation to contract attorneys, the ethical rules do not always require disclosure of the specific billing arrangement, including a mark-up for legal services.²²⁰ However, given the problems with geography, time, and communication between foreign and domestic attorneys and the sensitivity of the topic of outsourcing generally,²²¹ domestic attorneys should realize that failing to disclose the details of the outsourcing agreement may not warrant a "sufficient explanation" of the fees charged for foreign legal work. Opinion 2006-3 should have stated that to comport with ethics rules, a domestic lawyer should give specific disclosure of the fee arrangement if the domestic attorney wishes to mark up the costs of outsourcing legal work. Indeed, no danger exists of an attorney taking advantage of a client if the client knows how much the foreign attorney charges and how much the domestic attorney marks up the cost, yet still agrees to the arrangement. Additionally, this requirement would practically eliminate the chance of a New York lawyer sharing legal fees with a non-lawyer because in the process of disclosure, the client will most likely request specifics and either consent to the deal or demand changes.

218. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379, at 1 (1993) (emphasis removed).

219. *Id.* at 3.

220. Proctor, *supra* note 1, at 23 ("As long as the total fee is reasonable, the contracting firm would not have to disclose a surcharge on the contracting lawyer's work if billed as legal services.").

221. *See supra* Part II.A.3 (discussing the drawbacks of outsourcing legal work).

Instead of merely creating an inflexible rule that a lawyer cannot charge legal fees for foreign work, the Committee should have recognized that foreign attorneys do perform legal work, that domestic attorneys can charge their work as a reasonable legal fee, and that such a fee would not constitute a division of fees with a non-lawyer. In addition to these recognitions, the Committee should have advised New York attorneys to disclose the outsourcing fee arrangement if they wish to mark up the cost to comport with their duties regarding consulting with their clients about legal fees, thereby allowing the parties to discuss a proper arrangement themselves.

G. Consent: Lawyers Should Reflexively Inform Their Clients, For Now

The Committee appropriately outlined many of the factors for determining when lawyers should inform their clients regarding an outsourcing arrangement.²²² This balanced approach mirrors the stance taken by New York and the ABA regarding the duty to disclose the use of temporary lawyers.²²³ This stance regarding temporary lawyers is warranted by the general acceptance of domestic temporary attorneys and the conception that “legal services will be rendered by lawyers and other personnel closely supervised by the firm.”²²⁴ Given some of the future predictions of the potential of outsourcing legal work,²²⁵ the day may come when a client expects a law firm to utilize foreign attorneys to cut costs, making disclosure

222. See Tuft, *supra* note 17, at 110 (“Whether a law firm must disclose to the client that the law firm is outsourcing the client’s legal work overseas will likely depend on the nature of the work that is being offshored, the reasonable expectation of the client and the nature of the relationship between the law firm and the foreign service provider.”).

223. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 88-356, at 6 (1988). (“[W]here the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a temporary lawyer will work on the client’s matter will not ordinarily have to be disclosed to the client.”).

224. *Id.* (discussing the reasons for not requiring consent when utilizing temporary attorneys and noting that “[a] client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm”); Kadzik, *supra* note 38, at 737 (“The ABA, through Formal Opinion 88-356, has made it clear that where a temporary lawyer is providing work for a client without the close supervision of a lawyer associated with the law firm, the client must consent to this arrangement. However, if the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the temporary lawyer’s work on the client’s matter does not need to be disclosed to the client.” (citing ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 88-356 (1988))).

225. See *supra* Part II.A.4 (discussing the future of legal outsourcing).

unnecessary based on the extent of the foreign attorney's involvement, the sharing of client confidences and secrets, the reasonable expectations of the client, and the method of billing the client.

However, the Committee went too far by stating that "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,"²²⁶ without clarifying that in the current social context, outsourcing legal work requires reflexive consent.²²⁷ Unlike utilizing temporary lawyers or contract attorneys, utilizing foreign workers in litigation involves hotly debated social and political issues, may open the door to an increased risk of error due to differences in language or legal training, and involves more complicated supervision.²²⁸ In today's social and political context,²²⁹ and given these special difficulties regarding outsourcing legal work to a foreign attorney, a reasonable client would expect disclosure before any involvement by a foreign attorney or layperson in a legal matter.²³⁰ Indeed, if something goes wrong in an outsourcing arrangement, a client may have more understanding for utilizing a temporary attorney from Memphis than utilizing a foreign attorney from Mambai.

Therefore, although the factors enumerated by the Committee will guide lawyers effectively into the future of outsourcing, it went too far by stating lawyers currently do not need to "reflexively" inform their clients without clarification that in most cases of

226. NYC Opinion 2006-3, *supra* note 16, at 7-8.

227. Tuft, *supra* note 17, at 111 ("[Ethical] provisions weigh in favor of disclosure to the client, preferably in writing, of the arrangements for outsourcing the client's legal work internationally. Except in the case of routine 'back office' services, the client should be consulted and consent to the offshoring arrangement, particularly if an intermediary business or agency is involved.").

228. Kadzik, *supra* note 38, at 737 ("Unlike the employment of temporary workers at U.S. law firms, outsourcing may raise concerns about the way foreign workers are managed, supervised, and instructed." (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988))).

229. *See supra* notes 8-9, 60 and accompanying text.

230. Richmond, *supra* note 11, at 6 ("Lawyers are obligated to reasonably consult with their clients about the means by which client objectives are to be accomplished. They are also obligated to explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Lawyers who intend to outsource legal work must therefore consult with their clients beforehand, and those clients must be given the opportunity to veto the outsourcing. In consulting with their clients about outsourcing, lawyers must explain the associated advantages and disadvantages, whatever they may be.").

outsourcing legal work they do need to instinctively obtain client consent.

V. CONCLUSION

The next outsourcing wave has already crashed onto the American legal regime; unfortunately, national, state, and local bar associations have not been quick to provide concrete guidance for domestic attorneys on how to outsource legal work ethically. In August 2006, the New York City Committee on Professional and Judicial Ethics took the first step in evaluating how outsourcing legal work affects a lawyer's duty to prevent the unauthorized practice of law, supervise the work and ethics of subordinate lawyers and non-lawyers, maintain client confidentiality, avoid conflicts of interest, adopt reasonable billing procedures, and consult with the client. Although the opinion enumerated the main concerns and gave reasonable ethics guidance, the Committee failed in a few key aspects.

The opinion compares foreign attorneys to paralegals, contract attorneys, and laypersons, but failed to address why a foreign attorney compares to each of these categories in a given situation. In evaluating the unauthorized practice of law, the Committee failed to adequately explain the dangers associated with outsourcing legal work, thereby leaving the impression of protecting a monopoly instead of protecting the public. Additionally, the Committee failed to explain that foreign legal work does constitute the practice of law and only becomes authorized if properly supervised by a domestic attorney. In regards to supervising the ethical conduct of foreign attorneys, the Committee should have recognized the difficulties of supervising a foreign attorney and enumerated additional requirements, including conducting thorough investigations of the foreign jurisdiction's ethical requirements and cultures; creating training, reporting, and accountability procedures; and incorporating ethical provisions within outsourcing agreements. The opinion also failed to explain why a domestic attorney should have to obtain informed consent for every assignment outsourced to a foreign attorney containing confidences, especially if the domestic lawyer obtains the client's informed consent to the outsourcing relationship and discusses confidentiality at the outset of the matter.

Similarly, in regards to conflicts of interest, the opinion fails to recognize the differences between office personnel and foreign

attorneys, and should have recommended additional procedures to ensure that conflicts do not arise. These measures could include adopting screening procedures, maintaining records regarding matters involving foreign lawyers, and ensuring that a foreign lawyer maintains an accurate conflicts list regarding clients and matters the foreign lawyer has worked on. The opinion also incorrectly concludes that foreign attorneys cannot perform legal services, and correspondingly fails to consider whether a domestic attorney can mark up the cost of foreign legal work, whether paying a foreign lawyer constitutes sharing of legal fees, and whether a domestic attorney has a duty to disclose the fees to a client. Finally, the opinion lays out a number of factors in determining when an attorney should obtain client consent to foreign outsourcing, but misleads attorneys by stating they need not “reflexively” inform clients; to the contrary, in today’s social and political atmosphere, outsourcing legal work to a foreign country requires disclosure and consent.

The New York Committee took the first step in providing guidance to practicing attorneys regarding how to ethically outsource legal work to foreign attorneys. It is the author’s hope that other national, state, and local bar associations and lawyers contemplating or conducting foreign outsourcing will utilize the information and analysis contained within this Comment to realize the benefits of outsourcing legal work without compromising professional responsibility.

Keith Woffinden

