The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2009-6

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SYLLABUS: The Ohio Rules of Professional Conduct *do not* prohibit an Ohio lawyer or law firm from outsourcing legal or support services domestically or abroad, either directly to lawyers or nonlawyers or indirectly through an independent service provider, but applicable rules *do* impose significant ethical requirements.

Pursuant to Prof. Cond. Rules 1.4(a)(2), 1.2(a), and 1.6(a), a lawyer is required to disclose and consult with a client and obtain informed consent before outsourcing legal or support services to lawyers or nonlawyers. Disclosure, consultation, and informed consent is not necessary in the narrow circumstance where a lawyer or law firm temporarily engages the services of a nonlawyer to work inside the law firm on a legal matter under the close supervision and control of a lawyer in the firm, such as when a sudden illness of an employee requires a temporary replacement who functions as an employee of the law firm. Outside this narrow circumstance, disclosure, consultation, and consent are the required ethical practice.

Pursuant to Prof. Cond. Rules 5.1(c)(1), 5.3(a), and 5.3(c)(1), a lawyer who outsources legal or support services has responsibility for another lawyer's violation of professional obligations if the outsourcing lawyer orders, or with specific knowledge of the conduct, ratifies the conduct involved; has responsibility to make reasonable efforts to ensure that a nonlawyer's conduct is compatible with the professional obligations of the lawyer; and is responsible for a nonlawyer's conduct if the outsourcing lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved. The extent of supervision for outsourced services is a matter of professional judgment for an Ohio lawyer, but requires due diligence as to the qualifications and reputation of those to whom services are outsourced and as to whether the requested outsourced services will be provided with competence and diligence as required by Prof. Cond. Rules 1.1 and 1.3, confidences will be protected as required by Prof. Cond. Rule 1.6, and conflicts of interest will be avoided as required by Prof. Cond. Rules 1.7, 1.9, and 1.10.

Pursuant to Prof. Cond. Rules 1.5(a) and 1.5(b), a lawyer is required to establish fees and expenses that are reasonable, not excessive, and to communicate to the client the basis or rate of the fee and expenses; these requirements apply to legal and support services outsourced domestically or abroad. The decision as to whether to bill a client for outsourced services as part of the legal fee or as an expense is left to a lawyer's exercise of professional judgment, but in either instance, if any amount beyond cost is added, it must be reasonable, such as a reasonable amount to cover a lawyer's supervision of the outsourced services. The decision must be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged.

OPINION: This opinion addresses a question regarding the ethical propriety of outsourcing legal and support services.

> Is it proper for an Ohio lawyer or law firm to outsource legal or support services domestically or abroad, either directly to lawyers or nonlawyers or indirectly through an independent service provider?

The outsourcing of legal and support services by lawyers and law firms is not an entirely new phenomenon. In 1990, the Board considered the ethical propriety of a proposed business venture that would provide lawyers, law firms, sole practitioners, and corporate legal departments with the placement and use of temporary lawyers, advising that it is ethical so long as the business venture operates within certain narrow, ethical guidelines.[1] In 2009, the Board now considers the ethical propriety of a lawyer or law firm outsourcing legal and support services abroad as well as domestically.

The providers of legal outsourcing services attractively market to lawyers and law firms the availability of a large variety of services. Preparation of trial or appellate briefs, drafting of pleadings or motions, document review, legal research, and deposition or trial summaries are examples of services offered.

The Ohio Rules of Professional Conduct *do not* address economic or public policy implications of outsourcing legal services, neither does this advisory opinion. The pros and cons of outsourcing are subject to discussion by the bar and others[2]

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[1] Ohio SupCt, Bd Comm'rs on Grievances & Discipline, Op. 90-23 (1990).

[2] See e.g. Bruce A. Campbell, *Harold and Kumar PLUNGE Into Legal Waters*, Columbus Bar Lawyers Quarterly 6 (Spring 2009); K. William Gibson, *Outsourcing Legal Services Abroad*, 34 No. 5 Law Prac. 47 (2008); Nira J. Sheth & Nathan Koppel, *With Times Tight, Even Lawyers Get Outsourced*, Wall St. J. (Nov. 26, 2008); Suzanne Barlyn, *Call My Lawyer . . . in India*, Time, Apr. 3, 2008; Laura D'Allaird, *'The Indian Lawyer': Legal Education in India and Protecting the Duty of Confidentiality While Outsourcing*, 18 No. 3 Prof.Law. 1 (2007); 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*, BYU L. Rev. 483 (2007); Vijay V.

but are not under consideration in this advisory opinion. Discussion as to whether a particular outsourcing service involves the unauthorized practice of law is also not under consideration in this opinion.

For purposes of this opinion, legal services include but are not limited to document review, legal research and writing, and preparation of briefs, pleadings, legal documents. Support services include, but are not limited to ministerial services such as transcribing, compiling, collating, and copying.

Applicable rules

The Ohio Rules of Professional Conduct *do not* prohibit a lawyer or law firm from obtaining legal and support services from lawyers or nonlawyers outside the law firm, but applicable rules *do* place significant ethical requirements upon outsourcing services, whether domestically or abroad. Disclosure of an outsourcing relationship is subject to Prof. Cond. Rules 1.4(a)(2) and 1.2(a). Protection of client confidences is governed by Prof. Cond. Rule 1.6. Supervision of outsourced services is governed by Prof. Cond. Rules 5.1 and 5.3. Fees for outsourced legal and nonlegal support services are governed by Prof. Cond. Rule 1.5. The implication of these rules is discussed below.

Disclosure, consultation, and informed consent

Prof. Cond. Rules 1.4(a)(2) and 1.2(a) provide the ethical basis for requiring disclosure to a client before outsourcing legal services to lawyers outside the law firm. Prof. Cond. Rule 1.4(a)(2) requires a lawyer to "*reasonably* consult with the client about the means by which the client's objectives are to be accomplished." Prof. Cond. Rule 1.0(i) states "'[r]easonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." Prof. Cond. Rule 1.2(a) requires, with exceptions not applicable herein, that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."

Prof. Cond. Rule 1.6 provides the ethical basis for requiring a client's informed consent to be obtained before revealing information relating to the representation by outsourcing services. Prof. Cond. Rule 1.6(a) requires: "A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule." [Neither the disclosure

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Bondada & Ram Vasudevan, *Erasing the Hurdles: Offshore Outsourcing of Litigation Services*, Mealey's Litigation Report: Discovery, Vol. 3, #6 (Mar. 2006).

permitted by division (b) nor required by division (c) of this rule are at issue in this opinion and are not addressed further herein.]

By application of these rules, disclosure and consultation with a client and informed consent by a client is required before outsourcing legal and support services.

Pursuant to Prof. Cond. Rules 1.4(a)(2) and 1.2(a), the means by which a client's objectives are to be accomplished encompass a lawyer's or law firm's decision to use the assistance of lawyers and nonlawyers outside the law firm to provide legal and support services in a representation. For some clients, a lawyer's or law firm's decision to outsource legal or nonlegal support services may be a deciding factor in whether or not to engage the services of the lawyer or the law firm.

In consultation with a client regarding whether legal and support services will be outsourced to lawyers or nonlawyers, the lawyer or law firm must be clear to the client about the arrangement, including providing disclosure as to whether the outsourcing will be direct to a lawyer or nonlawyer or through an independent service provider. Upon consulting with the client, a client's decision as to outsourcing should be respected by the lawyer or law firm. Further, consultation should include discussion of the measures a law firm has taken or will take to inform those providing the outsourced support services of the necessary requirements of confidentiality.

Pursuant to Prof. Cond. Rule 1.6(a), a client's consent is required before revealing information relating to a representation. Whenever Ohio lawyers or law firms outsource legal or support services domestically or abroad, either directly to lawyers or nonlawyers or indirectly through an independent service provider, information is revealed. Exposure of information relating to a representation may be more likely when legal services, rather than support services, are outsourced; but, like the outsourcing of legal services, the outsourcing of support services, such as photocopying, poses a risk of revealing information relating to a client's representation.

Although one might contend that revelation of information through outsourcing of services is impliedly authorized to carry out a representation, such contention fails to pass ethical muster. Client confidentiality is a hallmark of the attorney client relationship. When a client engages the services of a law firm there is justifiable expectation that confidences remain within the law firm. The client has selected the law firm to be the protector of the information related to the representation. Thus, a client's informed consent is required before information related to the representation is revealed by outsourcing to lawyers and nonlawyers outside the law firm.

As a practical matter, the ethical requirement of disclosure, consultation, and informed consent is not necessary when a lawyer or law firm temporarily engages the services of a nonlawyer to work on a legal matter within the law firm under

the close supervision and control of a lawyer in the firm. For example, when a nonlawyer employee of the law firm is ill and must be replaced suddenly on a temporary basis within the firm. Under such circumstances, the nonlawyer functions as an employee within the law firm under the same conditions of supervision as an employee. Outside this narrow circumstance, disclosure, and informed consent is the required ethical practice.

As advised by the American Bar Association, Standing Committee on Ethics and Professional Responsibility "appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside of the lawyer's firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6."[3]

Ethic committees in several states have advised on the ethical obligation of disclosing outsourcing. A North Carolina State Bar ethics committee advised that "the lawyer has an ethical obligation to disclose the use of foreign, or other, assistants and to obtain the client's written informed consent to the outsourcing. In the absence of a specific understanding between the lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer retained by the client, using the resources with the lawyer's firm, will perform the requested legal services."[4]

A Los Angeles County Bar Association ethics committee, addressing whether an attorney in a civil case may contract with an out-of-state legal research and brief drafting company to draft a brief, advised that an "attorney may be required to inform the client of the nature and scope of the contract between attorney and out-of-state company if the brief provided is a significant development in the representation or if the work is a cost which must be disclosed to the client under California law."[5]

A San Diego County Bar Association ethics committee stated its belief that "in the absence of a specific understanding between the attorney and client to the contrary, the 'reasonable expectation' of the client is that the attorney retained by the client, using the resources within the attorney's firm, will perform the work required to develop the legal theories and arguments to be presented to the trial court, and that the attorney will have a significant role in preparing correspondence and court filings. (Footnote omitted)."[6]

A Florida Bar ethics committee, in addressing the propriety of a lawyer engaging the services of an overseas provider to provide paralegal assistance advised that "the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests."[7]

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[3] ABA, Formal Op. 08-451 (2008).
[4] North Carolina State Bar, Formal Op. 12 (2007).
[5] Los Angeles County Bar Assn., Op. 518 (2006).
[6] San Diego Cty Bar Assn. Op. 2007-1 (undated).
[7] Florida Bar, Op. 07-2 (2008).

An ethics committee of the Association of the Bar of the City of New York, addressing a question regarding outsourcing of legal support services overseas to a foreign lawyer or a lay person, stated that "[n]on-lawyers often play more limited roles in matters than contract or temporary lawyers do. Thus, there is little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to ***outsource*** legal support services overseas to a non-lawyer. But the presence of one or more additional considerations may alter the analysis: for example, if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-lawyer, in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed."[8]

In 1990, when this Board considered the use of temporary lawyers, the Board viewed disclosure as an ethical requirement under DR 5-107(A)(1), a rule stating that "[e]xcept with the consent of his client after full disclosure, a lawyer shall not: [a]ccept compensation for his legal services from one other than his client."[9] DR 5-107(A)(1) is now superseded by Prof. Cond. Rule 1.8(f) which states in pertinent part "[a] lawyer shall not accept compensation for representing a client from someone other than the client unless divisions (f)(1) to (3) and, if applicable division (f)(4) apply: (1) the client gives *informed consent*; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; (3) information relating to representation of a client is protected as required by Rule 1.6; (4) (omitted)." Prof. Cond. Rule. 1.8(f), like DR 5-107(A)(1), addresses an ethical duty of a lawyer who receives compensation from one other than his or her client.

Now, this Board's advice is that pursuant to Prof. Cond. Rules 1.4(a)(2), 1.2(a), and 1.6(a), a lawyer is required to disclose and consult with a client and obtain informed consent before outsourcing legal or support services to lawyers or nonlawyers. Disclosure, consultation, and informed consent is not necessary in the narrow circumstance where a lawyer or law firm temporarily engages the services of a nonlawyer to work inside the law firm on a legal matter under the close supervision and control of a lawyer in the firm, such as when a sudden illness of an employee requires a temporary replacement who functions as an employee of the law firm. Outside this narrow circumstance, disclosure, consultation, and consent are the required ethical practice.

Responsibility for the conduct of persons providing outsourced services

[8] Assn. Bar of City of New York, Formal Op. 2006-3 (2006).
[9] Ohio SupCt, Bd Comm'rs on Grievances & Discipline, Op. 90-23 (1990).

Prof. Cond. Rules 5.1 and 5.3 place responsibilities upon Ohio lawyers as to the professional conduct of other lawyers and as to the conduct of nonlawyers.

In pertinent part, Prof. Cond. Rule 5.1(c)(1) requires that "[a] lawyer shall be responsible for another lawyer's violation of the Ohio Rules of Professional Conduct if . . . the lawyer orders or, with *knowledge* of the specific conduct, ratifies the conduct involved."

In pertinent part, Prof. Cond. Rule 5.3(a) requires "with respect to a nonlawyer employed by, retained by, or associated with a lawyer, . . . a lawyer who individually or together with other lawyers possesses managerial authority in a *law firm* . . . shall make *reasonable* efforts to ensure that the firm . . . has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."

In pertinent part, Prof. Cond. Rule 5.3(c)(1) requires that "[w]ith respect to a nonlawyer employed by, retained by, or associated with a lawyer, . . . a lawyer shall be responsible for conduct of such a person that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer if . . . the lawyer orders or, with the *knowledge* of the specific conduct, ratifies the conduct involved."

Thus, pursuant to Prof. Cond. Rules 5.1(c)(1), 5.3(a), and 5.3(c)(1), a lawyer who outsources legal or support services has responsibility for another lawyer's violation of professional obligations if the outsourcing lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved; has responsibility to make reasonable efforts to ensure that a nonlawyer's conduct is compatible with the professional obligations of the lawyer; and is responsible for a nonlawyer's conduct if the outsourcing lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved.

The ABA, Standing Committee on Ethics and Professional Responsibility, acknowledged that an outsourcing lawyer has a responsibility of supervision. The ABA committee advised: "A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with 'direct supervisory authority' over them."[10]

The ABA opinion provided rigorous, if not onerous, suggestions for lawyers to meet the challenges of ensuring tasks are delegated to competent individuals and

[10] ABA, Formal Op. 08-451 (2008).

overseeing appropriately the execution of the projects. Examples include: conducting reference checks; investigating the background of a lawyer or nonlawyer and any nonlawyer intermediary; investigating the security of the provider's premises, the computer network, the recycling and refuse disposal procedures, and in some instances visiting the premises; assessing the system of legal education under which the lawyers' were trained; evaluating the professional regulatory system; giving consideration to the legal landscape of the nation; and evaluating the judicial system of the county in question.[11]

It is the Board's view that pursuant to Prof. Cond. Rules 5.1(c)(1), 5.3(a) and 5.3(c)(1), a lawyer who outsources legal or support services has responsibility for another lawyer's violation of professional obligations if the outsourcing lawyer orders, or with specific knowledge of the conduct, ratifies the conduct involved; has responsibility to make reasonable efforts to ensure that a nonlawyer's conduct is compatible with the professional obligations of the lawyer; and is responsible for a nonlawyer's conduct if the outsourcing lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved. The extent of supervision for outsourced services is a matter of professional judgment for an Ohio lawyer, but requires due diligence as to the qualifications and reputation of those to whom services are outsourced and as to whether the requested outsourced services will be provided with competence and diligence as required by Prof. Cond. Rules 1.1 and 1.3, confidences will be protected as required by Prof. Cond. Rule 1.6, and conflicts of interest will be avoided as required by Prof. Cond. Rules 1.7, 1.9, and 1.10.

Fees for outsourced legal and nonlegal support services

Prof. Cond. Rule 1.5 governs fees and expenses.

Prof. Cond. Rule 1.5(a) requires, in pertinent part, "[a] lawyer shall not make an agreement for, charge, or collect an *illegal* or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a *reasonable* fee."

Prof. Cond. Rule 1.5(b) requires that "[t]he nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in *writing*, before or within a *reasonable* time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged. Any change in the basis or rate of the fee or expenses is subject to division (a) of this rule and shall promptly be communicated to the client, preferably in *writing*."

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[11] ABA, Formal Op. 08-451 (2008) at 3-4.

Comment [2] to Prof. Cond. Rule 1.5 explains: "Unless the situation involves a regularly represented client, the lawyer should furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate, or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. So long as the client agrees in advance, a lawyer may seek reimbursement for the reasonable costs of services performed in house, such as copying."

In short, Rule 1.5 requires that a fee be reasonable, not excessive, and that the basis or rate of the fee and expenses be communicated to a client, preferably in writing.

The rules and commentary do not specifically answer whether an outsourced legal or support service should be billed to the client as a legal fee or as an expense and whether the addition of an amount beyond the cost of the outsourced services is appropriate in either instance.

In Formal Op. 08-451, the ABA Standing Committee on Ethics and Professional Responsibility advised that in outsourcing legal or nonlegal support services "[t]he fees charged must be reasonable and otherwise in compliance with Rule 1.5" but, left to a lawyer's professional judgment the decision as to whether to bill for outsourced legal or support services as a legal fee or an expense."[12]

In Formal Op. 08-451, the ABA Standing Committee on Ethics and Professional Responsibility also addressed the issue of adding a surcharge to the actual costs of the outsourced services. The committee applied to outsourcing, the advice it offered in Formal Op. 00-420 as to temporary lawyers as well as the advice offered in Formal Op. 93-379 as to billing for professional fees, disbursements and other expenses. "[A] law firm that engaged a contract lawyer could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client. . . . If the firm decides to pass those costs through to the client as a disbursement, however, no mark-up is permitted. In the absence of an agreement with the client authorizing a greater charge, the lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies for the individuals under contract. (Footnote omitted). The analysis is no different for other outsourced legal services, except that the overhead costs associated with the provision of such services may be minimal or nonexistent if and to the extent that the outsourced work is performed off-site without the need for infrastructural support. If that is true, the outsourced services should be billed at cost, plus a

[12] ABA, Formal Op. 08-451 (2008).

reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services."[13]

A Florida ethics committee, addressing paralegal assistance through an overseas provider, relied on its previous advice offered in Consolidated Opinions 76-33 and 76-38 as to billing for nonlawyer personnel. The Florida ethics committee stated: "[T]he lawyer should not in fact or effect duplicate charges for services of nonlawyer personnel, and if those charges are separately itemized, the salaries of such personnel employed by the lawyer should in some reasonable fashion be excluded from consideration as an overhead element in fixing the lawyer's own fee. If that exclusion cannot, as a practical matter, be accomplished in some rational and reasonably accurate fashion, then the charges for nonlawyer time should be credited against the lawyer's own fee."[14]

A New York ethics committee expressed the view that "[b]y definition, the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer to include the cost of outsourcing in his or her legal fees. *See* DR 3-102. Absent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service. ABA Formal Opinion 93-379 (1993)."[15]

In 1990, this Board, addressed ethical issues regarding the use of a temporary placement service, but did not address whether it was proper to bill a client for the services as an expense or as part of the fee.[16] In Op. 90-23, the Board noted that the placement agency intended to receive compensation directly from the law firm as a fee based upon a percentage of the lawyer's compensation. The Board's view in Op. 90-23, citing Formal Op. 1989-2 of the Association of the Bar of the City of New York, was that because the agency provides services in locating, recruiting, screening, and placing lawyers those services are not a legal fee and that such a fee agreement to an agency does not constitute impermissible sharing of fees with nonlawyers. However, the issue of a placement agency receiving a percentage of a lawyer's legal fee is not before the Board now and the Board does not address that issue herein.

Now, the Board's focus is on the appropriate way for a lawyer or law firm to bill a client when legal or nonlegal work is outsourced.

The most straightforward approach, particularly when nonlegal support services as opposed to legal services are outsourced, may be for a lawyer or law firm to bill the client for the outsourced services as an expense based upon the actual cost of

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[13] Id.
[14] Florida Bar, Op. 07-2 (2008).
[15] Assn. Bar of City of New York 2006-3 (2006).
[16] Ohio SupCt., Bd Comm'rs on Grievances & Discipline, Op. 90-23 (1990).

the service to the law firm, with an adjustment if necessary to cover a lawyer or law firm's costs of supervision of the outsourced services.

But, the Board concludes that neither the rules nor the comments to the rules direct that the billing be one way or the other; thus, the decision as to whether to bill a client for outsourced services as part of the legal fee or as an expense is left to a lawyer's exercise of professional judgment.

Either method of billing must be in keeping with the general requirements of Rule 1.5(a) that the fee be reasonable and not excessive and Rule 1.5(b) that "the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in *writing*, before or within a *reasonable* time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged."

To meet the requirement of Rule 1.5(a) that the fee not be excessive, a lawyer must not duplicate charges as both a fee and an expense. To meet the requirement of Rule 1.5(a) that the basis or rate of the fee and expense be communicated to the client, a lawyer will need to address with the client in the fee agreement how he or she will be charged for the outsourced service.

Two disciplinary cases involving billing for nonlawyer employees of a law firm are reminders to lawyers that excessive billing is unethical. In *Columbus Bar Assn. v. Mills*, the Supreme Court of Ohio found, among other misconduct that Mills' conduct of excessive billing and collection practices which included aggressively billing for secretarial, clerical, and other "administrative activities" violated DR 1-102(A)(6) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law) and DR 2-106(A) (prohibiting a lawyer from agreeing to charge or collecting an illegal or clearly excessive fee).[17]

In *Columbus Bar Assn. v. Brooks*, the court found, among other misconduct, that by collecting for secretarial and law clerk expenses in addition to filing fees, deposition fees, and his thirty three percent of a settlement, Brooks did not adhere to his fee contract and thereby charged an excessive fee violating DR 2-106(A).[18] The court noted that "[c]osts of litigation generally do not include secretarial charges or fees of paraprofessionals. Those costs are considered to be normal overhead subsumed in the percentage fee. In cases where legal services are contracted for at an hourly rate, an attorney's secretarial costs, except in unusual circumstances and then only when clearly agreed to, are part of overhead and should be reflected in the hourly rate. If an attorney charges separately for a legal assistant, the legal assistant's hourly charges should be stated and agreed to in writing."[19]

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[17] *Columbus Bar Assn. v. Mills,* 109 Ohio St.3d 245, 249, 2006-Ohio-2290.
[18] *Columbus Bar Assn. v. Brooks* (1999), 87 Ohio St.3d 344, 346.
[19] Id. at 345-46.

Thus, it is the Board's view that pursuant to Prof. Cond. Rules 1.5(a) and 1.5(b), a lawyer is required to establish fees and expenses that are reasonable, not excessive, and to communicate to the client the basis or rate of the fee and expenses; these requirements apply to legal and support services outsourced domestically or abroad. The decision as to whether to bill a client for outsourced services as part of the legal fee or as an expense is left to a lawyer's exercise of professional judgment, but in either instance, if any amount beyond cost is added, it must be reasonable, such as a reasonable amount to cover a lawyer's supervision of the outsourced services. The decision must be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.