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THE ETHICS OF ATTORNEYS' ADDING A SURCHARGE TO THEIR FEES FOR THE USE OF OUTSIDE ATTORNEYS

by

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I. Overview

The prevailing majority view, followed by the American Bar Association ("ABA"), is that whether a lawyer using the services of an outside attorney may bill the client for those services more than the lawyer paid to the outside attorney depends on whether those services are billed as an expense or a disbursement, or as legal services. (When used in this memorandum, the term "outside attorney" refers to contract attorneys, temporary attorneys, research attorneys, and any other such attorneys who are not "inside" the firm in the sense of being a partner, an associate, or otherwise a permanent attorney in the law practice. There may be some differences in the arrangements between the parties, such as in whether and to what extent the hiring attorney supervises the outside attorney and whether the outside attorney causes overhead expenses for the hiring attorney. However, for purposes of the issues addressed here, the circumstances for the various types of outside attorneys are at least closely analogous.)

If the services of an outside attorney are billed as an expense or a disbursement, no surcharge (sometimes also called a "premium" or "markup") is permitted, unless the client has agreed to such a surcharge. On the other hand, if the services of the outside attorney are billed as legal services, a surcharge may be added to the cost of such services so long as the fee as a whole is reasonable.

It is also the prevailing view, followed by the ABA, that when a surcharge is used, the hiring attorney is not ethically obliged to disclose to the client that a surcharge has been used if the hiring attorney has either supervised the outside attorney or adopted the work of the outside attorney as his/her own. This is so although an attorney has a more general obligation to disclose to a client the basis or rate for a legal fee. Under a distinctly minority view, any surcharge should be disclosed to the client in all cases.

On the issue of whether a hiring attorney must disclose to the client his/her intent to use an outside attorney and obtain the client's advance consent to do so, the prevailing view, also followed by the ABA, is that an obligation to advise the client of that intent and to seek the client's consent would arise if the outside lawyer were to perform independent work for the client without the direct and close supervision of the hiring lawyer or another lawyer associated with his/her firm. This conclusion rests, in part, on Rules of Professional Conduct (1) requiring lawyers to consult with clients as to the means by which the clients' objectives are to be pursued, (2) relating to client communication, and (3) prohibiting lawyers from implying that they practice in a partnership or other organization when that is not the fact. Other reasons sometimes offered for this conclusion are that clients are entitled to know who or what entity is representing them, and thus could veto the lawyer's use of an outside attorney,

and that disclosure of client confidences to the outside attorney requires that there be client consent.

For the most part, the opinions of the state bar ethics committees that have addressed these issues are in accord with the opinions of the ABA, but there are some differences among the states. In states where there is no controlling authority, it is reasonable to assume that the opinions of the ABA will be at least persuasive authority, if not controlling.

A small minority of courts or state bars has adopted a rule which precludes the use of a surcharge for the work of an outside attorney when the outside attorney has no formal affiliation with the hiring attorney or, in other words, when the hired attorney is not deemed to be "inside" the law practice of the hiring attorney. In at least one other jurisdiction, the surcharge would not be allowed in any case, regardless of whether the charge for the outside attorney's work is treated as an expense or as a bill for legal services.

Regarding disclosure to, and consent from, the client for the use of an outside attorney, a small minority of authorities would require disclosure and consent in all cases, regardless of whether and to what extent the hiring attorney supervises the outside attorney. Other minority positions which differ somewhat from that of the ABA require disclosure and consent from the client when the use of an outside attorney would be a "material" matter for the representation of the client or when such use would be a "significant development" in the client's legal matter or would affect the client's reasonable expectations.

II. ABA Opinions

Two commentators have summarized the ethics of surcharges to the lay client for the costs of temporary attorneys as follows:

> **Surcharges and Billing Clients for the Expenses of Law—Temporaries**.
>
> May the law-temporary be a profit center for the law firm? When the firm bills the client $200 for an associate, it does not give the full $200 to the associate. The associate's yearly salary (particularly in the case of a senior associate) may well be less than the total hours that the associate bills during the course of the year. The firm makes (or at least hopes to make) a profit from many of its associates. May the law firm treat law-temporaries the same way?
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> If the firm treats the work of the contract lawyer (law-temporary) as an expense item (that is, an expense over and above its regular fee), the ABA advises a law firm to bill the client for only what it actually paid for the contract lawyer's services. In that case, the firm may not charge the client a surcharge in billing for the services of a contract attorney that it hires to work on a case. Unless there is a specific agreement to the contrary, if the firm treats the work as an expense item (over and above its fee), the firm should bill only what it

actually paid for the contract lawyer's services.

> However, the ABA adds, if the contract lawyer is billed as just another lawyer whose work makes up the fee for the matter, the firm may bill the client any reasonable rate for the services just as it does for one of its associates. If the law firm bills the expense of the contract lawyer's as legal fees, the client normally would expect that the law firm has supervised that work and adopted it as its own.

Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics, The Lawyers Deskbook on Professional Responsibility* § 1.5-4(e) (2009–2010 ed.) (footnote omitted).

(The following is an additional article discussing some relevant issues, although it was written before publication of the ABA's most relevant treatment of the issues in ABA Formal Opinions 00-420 and 08-451, discussed *infra*: Vincent R. Johnson & Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*," 66 Notre Dame L. Rev. 359, 426–31(1990).)

The references to the guidance from the ABA in the above-quoted passage particularly refer to ABA Formal Opinion 00-420. The conclusions in Formal Opinion 00-420 are as follows:

> 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) [of the Rules of Professional Conduct] 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. When legal services of a contract lawyer are billed to the client as an expense or cost, in the absence of any understanding to the contrary with the client, the client may be charged only the cost directly associated with the services, including expenses incurred by the billing lawyer to obtain and provide the benefit of the contract lawyer's services.
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> Subject to the Rule 1.5(a) mandate that "a lawyers fee shall be reasonable," a lawyer may, under the Model Rules, add a surcharge on amounts paid to a contract lawyer when services provided by the contract lawyer are billed as legal services. This is true whether the use and role of the contract lawyer are or are not disclosed to the client. The addition of a surcharge above cost does not require disclosure to the client in this circumstance, even when communication about fees is required under Rule 1.5(b). If the costs associated with contracting counsel's services are billed as an expense, they should not be greater than the actual cost incurred, plus those costs that are associated

directly with the provision of services, unless there has been a specific agreement with the client otherwise.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-420 ("Surcharge to Client for Use of a Contract Lawyer"), at 1, 3 (Nov. 29, 2000).

Thus, it is the opinion of the ABA that, assuming that the total fee is reasonable and the services of a contract lawyer are billed as legal services, not as an expense, a lawyer may add a surcharge to the fee for a contract lawyer, and the lawyer is not required to disclose to the client that a surcharge above cost will be included in the fee, whether or not the lawyer discloses to the client that s/he has used a contract lawyer.

Formal Opinion 00-420 notes that its use of the term "contract lawyer" means any lawyer retained by a lawyer or law firm who is not employed permanently for general assignment by the lawyer or law firm engaged by the client. Thus, the services of lawyers working for a legal research firm that is retained by a lawyer or law firm are covered by Formal Opinion 00-420. *Id.* at 1.

Formal Opinion 00-420 observes that when a contract lawyer's services are billed with the retaining lawyer's services as fees for legal services (not as an expense), the client's reasonable expectation is that the retaining lawyer either has supervised the work of the contract lawyer or has adopted that work as his/her own. *Id*. This provides a rationale for permitting a surcharge, or markup, on top of payments made to the contract attorney, so long as the total fee is reasonable.

Regarding the reasonableness of the overall fee charged, the widely accepted factors to be used in determining the reasonableness of a fee, from Rule 1.5 of the Rules of Professional Conduct, are as follows:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers

performing the services; and

(8) whether the fee is fixed or contingent.

Model Rules of Prof'l Conduct R. 1.5(a)(1)–(8).

While Rule 1.5 mandates that a fee be reasonable, it does not address the individual components determining the amount of a fee, or the part of a fee that may be considered profit. In the view of the ABA, "the absence of a specific reference to a lawyer's profit in Rule 1.5 cannot reasonably be read to prohibit a lawyer from including a profit factor in her fees." ABA Formal Op. 00-420, at 2. It is also implicit in ABA Formal Opinion 93-379 that profit from providing legal services is expected and appropriate, as long as the total fee is reasonable. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379 ("Billing for Professional Fees, Disbursements and Other Expenses") (Dec. 6, 1993).

Formal Opinion 93-379 also indicates, however, that fees for legal services should be inclusive of general office overhead. Absent disclosure to a client, it is improper to assess a surcharge on disbursements over and above the actual payment of funds to third persons made by a lawyer on the client's behalf. While Formal Opinion 93-379 deals with expenses and disbursements other than those for outside lawyers, the ABA in Formal Opinion 00-420 adopts the same reasoning in concluding that, absent an understanding with the client, surcharges for legal services by contract lawyers are not permitted when the client is billed for such services as a cost or expense of the retaining lawyer (not as legal services). ABA Formal Op. 00-420, at 2.

Rule 1.5 requires disclosure to a client of the basis or rate of a legal fee, but it does not require disclosure to the client of the share of the fees each lawyer receives or of the relationship between the costs of a lawyer assigned to work on a matter and the billing rate for that lawyer. *Id.* at 2–3. As for any surcharge itself, there is no duty to disclose it to the client when the work of the contract lawyer is supervised or, absent supervision, when the work of the contract lawyer is adopted as the work of the retaining lawyer. *Id.* at 3.

As noted in Formal Opinion 00-420, in ABA Formal Opinion 88-356, an earlier opinion dealing primarily with other issues that arise with the use of temporary lawyers, the ABA stated with regard to use of a temporary attorney through a placement agency that the fee paid by the client to the firm ordinarily would include the total paid to the lawyer and the agency and may also include charges for overhead and profit. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 88-356 ("Temporary Lawyers"), at 2 (Dec. 16, 1988). This provides further support, at least by analogy, for a surcharge for the use of an outside attorney, subject to the requirement of reasonableness.

More recently, in 2008, ABA Formal Ethics Opinion 08-451 mentions again that in outsourcing such services, the fees charged must be reasonable and otherwise in compliance with Rule 1.5. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 ("Lawyers' Obligations When Outsourcing Legal and Nonlegal Support Services") (Aug. 5, 2008). Relying on

and explaining Formal Opinion 00-420, the ABA states in Formal Opinion 08-451:

> In Formal Opinion No. 00-420, we concluded that 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. This is not substantively different from the manner in which a conventional law firm bills for the services of its lawyers. The firm pays a lawyer a salary, provides him with employment benefits, incurs office space and other overhead costs to support him, and also earns a profit from his services; the client generally is not informed of the details of the financial relationship between the law firm and the lawyer. Likewise, the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer; the restraint is the overarching requirement that the fee charged for the services not be unreasonable. If the firm decides to pass those costs through to the client as a disbursement, however, no markup 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. 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 reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services.

Id. at 4 (footnotes omitted).

On the subject of disclosure to the client of the fact of using an outside attorney, Formal Opinion 08-451 states that appropriate disclosures should be made to the client regarding the use of lawyers (or nonlawyers) outside of the lawyer's firm ("outside" meaning where the relationship between the hiring attorney and outside individuals performing services is "attenuated") and that the client's consent should be obtained if those outside individuals will be receiving confidential information protected by Rule 1.6 of the Rules of Professional Conduct. In part relying on Formal Opinion 88-356, Formal Opinion 08-451 explained the disclosure-and-consent issue as follows:

> First, at the outset, it may be necessary for the lawyer to provide information concerning the outsourcing relationship to the client, and perhaps to obtain the client's informed consent to the engagement of lawyers or nonlawyers who are not directly associated with the lawyer or law firm that the client retained. In Formal Opinion 88-356, we opined that when a lawyer engaged the services of a temporary lawyer, a form of outsourcing, an obligation to advise the client of that fact and to seek the client's consent would arise if the temporary lawyer

> was to perform independent work for the client without the close supervision of the hiring lawyer or another lawyer associated with her firm. Relying on Rule 1.2(a), requiring lawyers to consult with clients as to the means by which the clients' objectives are to be pursued, Rule 1.4, relating to client communication, and Rule 7.5(d), prohibiting lawyers from implying that they practice in a partnership or other organization when that is not the fact, we concluded that clients are entitled to know who or what entity is representing them, and thus could veto the lawyer's use of a temporary lawyer.
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> We recognize that Formal Opinion 88-356 held that the client ordinarily is not entitled to notice that its legal work is being performed by a temporary lawyer. We stated that "[c]lient consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm." However, that statement was predicated on the assumption that the relationship between the firm and the temporary lawyer involved a high degree of supervision and control, so that the temporary lawyer would be tantamount to an employee, subject to discipline or even firing for misconduct. That ordinarily will not be the case in an outsourcing relationship, particularly in a relationship involving outsourcing through an intermediary that itself has the employment relationship with the lawyers or nonlawyers in question.
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> Thus, where the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client's informed consent. The implied authorization of Rule 1.6(a) and its Comment [5] thereto to share confidential information within a firm does not extend to outside entities or to individuals over whom the firm lacks effective supervision and control.

Id. at 3 (footnote omitted).

After summarizing ABA Formal Opinions 88-356 and 08-451, and observing that ethics opinions from the states differ on the issue of client consent to the outsourcing of legal work, one commentator recently concluded that it is prudent for a lawyer to disclose the nature of any outsourcing relationship to the client at the outset of the representation if confidential information is at stake. Kathryn A. Thompson, *Do Tell: Client Consent Is a Safe Step When Lawyers Outsource Work on Cases*, 96 A.B.A. J. 26 (June 2010).

The following are additional recent articles addressing, inter alia, the issues of billing for and/or obtaining client consent for the use of outside attorneys:

Mark Ross, *Ethics of Legal Outsourcing White Paper*, *in* 1019 PLI/Pat 163 (Intell. Prop.

Course Handbook Series No. 25879, Sept.-Nov. 2010);

David G. Keyko, *Ethics Limitations on Outsourcing E-Discovery Reviews—Billing for Outsourced Work*, *in* Carole Basri & Mary Mack, *eDiscovery for Corporate Counsel* § 26:32 (Westlaw database updated Dec. 2010);

Edward A. Friedland et al., *Outsourcing and "Unbundling" Legal Research—Ethical and Professional Considerations*, *in* 1 Successful Partnering Between Inside and Outside Counsel § 19:28 (Westlaw database updated Feb. 2010);

David A. Savner, *Ethical Considerations in Outsourcing Legal Work—Disclosure and Consent*, *in* 2 Successful Partnering Between Inside and Outside Counsel § 26:27 (Westlaw database updated Feb. 2010).

III. Court Decisions

In the context of determination of an appropriate attorney's fee award in major litigation arising out of a corporate merger, a court approved the use of a markup on the differential between the amount that a law firm paid to a business referring contract attorneys and the hourly rates sought by the law firm. *In re AOL Time Warner S'holder Deriv. Litig.*, No. 02 Civ. 6302(CM), 2010 WL 363113 (S.D.N.Y. Feb. 1, 2010) (not reported). The contract, or temporary, attorneys did about 11% of the work for which a fee award was sought, and the work consisted primarily of document coding. In pertinent part, the court stated:

> Law firms are not eleemosynary institutions. Economic rationality dictates that the fees they charge clients be higher than the amounts paid to their timekeeping personnel. The Court should no more attempt to determine a correct spread between the contract attorney's cost and his or her hourly rate than it should pass judgment on the differential between a regular associate's hourly rate and his or her salary. *See also* ABA Comm. on Ethics & Prof'l Resp. Formal Op. 00-420 (Nov. 29, 2000) (opining that a firm may charge a markup to cover overhead and profit if the contract attorney charges are billed as fees for legal services). The ultimate test in . . . [the] marketplace is what a reasonable client would pay for the individual's time.

Id. at *26.

In *In re Disciplinary Proceedings Against Brown*, 2010 WI 104, 329 Wis. 2d 21, 787 N.W.2d 800, lead counsel in a law firm's representation of an Indian tribe was found to have violated a former Rule of Professional Conduct relating to a division of fees between lawyers who are not in the same firm. To assist in the representation of the tribe, the firm had hired a contract attorney at $90 per hour for legal services and $55 per hour for related travel time; the firm then billed the tribe $125 per hour for the contract attorney's work and travel time. The problem was not with the markups per se but with the fact that the markups were not

proportionate to the services performed by the contract attorney, as compared with the services of the hiring firm. In addition, the firm had failed to disclose the compensation arrangement with the contract attorney and had failed to obtain the tribe's written agreement to the markup or to the fee arrangement with the contract attorney.

In re Wright, 290 B.R. 145 (Bankr. C.D. Cal. 2003), involved a supplemental fee request by a law firm that debtors in bankruptcy had retained. The debtors were seeking to be reimbursed for services performed not by members of the firm but by a contract attorney whom the firm had retained to perform work in the debtors' case. Regarding informing the clients and obtaining their consent to the use of the contract attorney, the court's analysis was, in part, influenced by the bankruptcy setting, but it found that a duty of disclosure and obtaining consent was present:

> This Court finds that full disclosure to the court is an absolute requirement of the bankruptcy process. Further, even with full disclosure to the court, the applicant must meet the requirements of the State Bar of California as to consent of the client to use of a temporary attorney when that attorney is performing a significant aspect of the work. This disclosure and consent must occur prior to the work being done. For the client to first find out about this when s/he meets the contract attorney in court does not fulfill the requirement of consent—though it would be allowed if the contract attorney was hired due to an unforeseen emergency or timely efforts to communicate with the client were fruitless.

Id. at 155–56.

The court in *Wright* approved the use of a surcharge, on top of the costs to the firm of the contract attorney, if certain conditions were met:

> No sum over the amount paid to the contract attorney will be allowed unless specifically requested in the fee application along with disclosure of its basis. A basis may be that the contract attorney provided the client with an exclusive amount of time equal to that shown on the billing statement and that the hourly rate charged is what would be charged by an attorney with equivalent experience for equivalent work. Or it might consist of unbilled support by other attorneys in the firm. Or a surcharge may be requested as a fee enhancement, if it is supported by evidence upon which the enhancement is based.
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> If the firm seeks to receive an amount in excess of that which it actually paid the contract attorney, in determining the exclusive time which the contract attorney spent on its client, the firm will use the following process: If the appearance attorney who is paid a flat fee per matter and appears on multiple cases can segregate the time spent on a single matter, the law firm which hires him/her can bill for that amount of time (as exclusive to its client). But if the

> appearance attorney cannot segregate the discrete time spent on that client, the maximum amount of time to be attributed to the client is the total time spent (including travel and excluding any time which can be calculated on other specific cases) divided by the number of appearances made.

Id. at 156.

In the context of determining an appropriate fee award in a large class action for securities fraud, a court approved a lodestar attorney's fees calculation (attorney's hourly rate multiplied by his/her hours) that applied a multiplier to contract attorney work billed at $300 per hour rather than at the contract attorneys' actual pay of $55 per hour. *Carlson v. Xerox Corp*., 596 F. Supp. 2d 400 (D. Conn.), *aff'd*, 355 Fed. Appx. 523 (2d Cir. 2009). This did not result in excessive compensation to the law firm that hired the contract attorneys and secured the common fund in the settlement of the action, even though the majority of the lodestar consisted of contract attorney time, and the profit margin for the law firm employing contract attorneys was greater than the profit margin that the firm would have had for work done by full-time employees. The percentages of contract attorney work were in line with a comparable case, and the multiplier would still be reasonable even if the contract attorney time were decreased. *Id.* at 410.

Similarly, in another large securities fraud case, the court ruled that, for purposes of calculating the lodestar, prevailing counsel can recover fees for contract attorneys' services at market rates rather than at their actual cost to the firm. *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 586 F. Supp. 2d 732 (S.D. Tex. 2008). The court cited and relied on ABA Formal Opinion 00-420, discussed *supra*, and it commented as well that there is not much case law addressing the question of whether the charges of contract lawyers and paralegals may be billed separately as attorney's fees at a higher rate than the law firm pays them. *Id.* at 783.

It is significant that the court in the *Enron* case relied on, among other authorities, strong analogous support from a U.S. Supreme Court precedent involving statutory fee awards in upholding the use of a surcharge or premium added to the actual amount paid to outside attorneys so as to arrive at a "market rate" that is allowed to exceed actual cost:

> [T]he reasoning in the Supreme Court's interpretation of 42 U.S.C. § 1988, a fee-shifting statute, in *Missouri v. Jenkins*, 491 U.S. 274, 109 S.Ct. 2463 (1989) (affirming in a desegregation case the district court's compensation of "the work of paralegals, law clerks and recent law graduates at market rates for their services, rather than at their cost to the attorneys"), appears to this Court to support an affirmative answer for any reasonable fee award in a common fund case if the particular facts regarding their services justified such billing. Justice Brennan, writing for the majority, observed that it is "self-evident" that "reasonable attorney's fee" as used in § 1988 "should compensate the work of paralegals, as well as th[at] of attorneys." *Id.* Given the established rule that a reasonable attorney's fee is "one calculated according to prevailing market rates in the relevant community," i.e., "'in line with those [rates] prevailing in the

community for similar services by lawyers of reasonably comparable skill, experience and reputation,'" Justice Brennan opined that the same principle should apply to the "'increasingly widespread custom of separately billing for the services of paralegals and law students who serve as clerks.'" *Id.* at 285-86, 109 S.Ct. 2463. The high court noted that "separate billing appears to be the practice in most communities today." *Id.* at 289 & n. 11, 109 S.Ct. 2463. *See also In re Tyco International, Ltd.*, 535 F.Supp.2d 249, 272 (D.N.H.2007) (Compendium, # 5817 at Ex. P) ("An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completions of a particular document review project, is still an attorney. It is therefor[e] appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar."); *Sandoval*, 86 F.Supp.2d at 609 (fees of contract attorneys and paralegals are separately compensable based on prevailing market rates for the kind and quality of their services, and included in the lodestar), *citing Missouri v. Jenkins*, 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229; *DeHoyos,* 240 F.R.D. at 325 (fees for legal assistants, paralegals, investigators and non-secretarial support staff are included in the lodestar). Regardless of whether the attorney includes the paralegal's charges in his own hourly rate or bills them separately, the court must examine those charges against the prevailing market rate for comparable paralegals' services. 491 U.S. at 286, 109 S.Ct. 2463. *See also Sandoval v. Apfel*, 86 F.Supp.2d 601, 610 (N.D.Tex.2000) (discussing *Missouri v. Jenkins* and stating, "The determining factor for whether law clerk and paralegal fees can be compensated at separately-billed market rates depends on the practice of the relevant market"). *Finally, and important here, the Supreme Court "reject[ed] the argument that compensation for paralegals at rates above 'cost' would yield a 'windfall' for the prevailing attorney*." *Missouri v. Jenkins*, 491 U.S. at 286, 109 S.Ct. 2463. *It noted that it knew of no one who "ever suggested that the hourly rate applied to the work of an associate attorney in a law firm creates a windfall for the firm's partners or is otherwise improper under § 1988 merely because it exceeds the cost of the attorney's services. If the fees are consistent with market rates and practices, the 'windfall' argument has no more force with regard to paralegals than it does for associates." Id. Moreover, "[b]y encouraging the use of lower cost paralegals rather than attorneys wherever possible", permitting market-rate billing of paralegal hours "'encourages cost-effective delivery of legal services . . . . '" Id.* at 288, 109 S.Ct. 2463. *The Court finds that the same reasoning applies to contract attorneys and that prevailing counsel can recover fees for their services at market rates rather tha[n] at their cost to the firm*.

Id. at 783–85 (emphasis added) (footnotes omitted).

Thus, in *Missouri v. Jenkins ex rel. Agyei*, 491 U.S. 274, 284 (1989), relied on in the *Enron* case, the U.S. Supreme Court approved the use of "market rates" for law clerks and paralegals of between $35 and $50 per hour in calculating a fee award, although it was estimated that the

actual cost to the firm for use of such individuals, including salary, benefits, and overhead, was only about $15 per hour.

In the context of determining appropriate fees for legal counsel for the debtors in a bankruptcy proceeding, one court has determined that where a temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm retained by the client, the client must be advised of the fact that the temporary lawyer will work on the client's matter, and the consent of the client must be obtained; this is so because the client, by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer. Conversely, where a temporary lawyer is working under the direct supervision of a lawyer associated with the firm retained by the client, the fact that a temporary lawyer will work on the client's matter will not ordinarily have to be disclosed to the client. *In re Worldwide Direct, Inc*., 316 B.R. 637 (Bankr. D. Del. 2004).

The court in *Worldwide Direct* declined to allow the debtors' attorneys to bill the estate in an amount that included a markup above the amount that they had paid for temporary attorneys and paralegals. Although the temporary attorneys and paralegals who were hired through an employment service and used by the law firm to perform work for the debtors on behalf of the firm were "regular associates" of the firm, so that the firm could bill and receive compensation for their services from the debtors' estates, the firm was not allowed to bill the estates for more than it had paid for the services of these temporary personnel. Rather, the firm would be limited to recovery of its actual costs. While an attorney for the firm testified that hourly rates of the temporary personnel were set to account for the extra overhead they cost the firm, s/he could identify no concrete additional costs incurred by the firm because of their retention, other than a few computers that the firm had retained after they left. No additional support staff was hired for the temporary attorneys, they required no additional furniture or office space, and the firm failed to show that the practice it advocated was normal in the marketplace. *Id.* at 651–52.

In *Mahaney, Geghan & Roosa v. Nelson J. Baker*, No. CR 970138281, 24 Conn. L. Rptr. 597, 1999 WL 367804 (Super. Ct. Aug. 9, 1999) (unpublished), the court determined that a lawyer who had employed the services of contract lawyers for special assistance in his client's litigation matter, after disclosing their involvement to the client but not their hourly rate, could not charge his client the hourly rate agreed upon between them for handling the case when he had paid the contract lawyers at a lesser hourly rate. The charges were billed not as disbursements, but as services.

The court based its conclusion on the fact that the retaining lawyer and the contract lawyers were not formally affiliated in practice. The court's discussion does not disclose the entire terms of the fee contract, and no reference is made to Rules of Professional Conduct. The ABA's contrary view, as expressed in ABA Formal Opinion 00-420, at 6 n.18, is that the formality of affiliation of lawyers does not govern the right to add a surcharge to services under the Model Rules.

In *Oliver v. Bd. of Gov'rs, KBA*, 779 S.W.2d 212 (Ky. 1989), the court ruled that a temporary legal service, under which attorneys would be referred to firms for temporary work, was permissible where (1) the law firm paid the temporary attorney directly and the referral fee to the service separately; (2) the law firm's ultimate client was informed in every case that a temporary attorney was working on the client's matter; (3) safeguards for avoidance of conflict of interest were observed; and (4) confidentiality rules were complied with. (*Oliver* does not address the issue of use of a surcharge or premium in billing for the work of an outside attorney.)

The second requirement mentioned in *Oliver*, that the client be informed in every case, is at odds with the ABA position requiring disclosure to, and consent from, the client when there will be no direct and close supervision of the outside attorney and client confidences will be disclosed to the outside attorney. On that issue, the court in *Oliver* stated:

> We cannot accept the ABA's distinctions and would recommend disclosure to the client of the firm's intention, whether at the commencement or during the course of representation, to use a temporary attorney service on the client's case, in any capacity, in order to allow the client to make an intelligent decision whether or not to consent to such an arrangement.

Id. at 216.

IV. State and Local Bar Opinions

A. Virginia

Virginia Legal Ethics Opinion ("LEO") 1712 states that "[t]he legal fee charged by the law firm to the client may include charges for the Lawyer Temp, and, as discussed in depth, *infra*, such charges may include overhead and profit if certain conditions are present." Va. Legal Ethics Op. 1712 ("Temporary Lawyers Working Through a Temporary Placement Service"), at 9 (July 22, 1998).

The more in-depth discussion of the issue in LEO 1712 is as follows:

> Instead of billing the staffing agency's compensation as a disbursement to the client with a disclosed mark-up, the hiring law firm may simply bill the client for services rendered in an amount reflecting its charge for the Lawyer Temp's time and services. See California Formal Opinion 1994-138. Since the charge is not represented to be the hiring law firm's actual disbursement of funds for client-reimbursement, the hiring firm does not thereby misrepresent as an out-of-pocket disbursement what is actually its out-of-pocket disbursement plus a mark-up. By analogy, law firms bill their clients at a certain rate for services rendered by salaried associates of the law firm without a disclosure of the salary of the associates. A law firm may, for example, charge

> $75 per hour for an associate's time when the associate is paid a salary of $60,000 per year and is expected to produce 1,800 billable hours per year, which is compensation paid the associate at the rate of $33 per hour. That the associate is an employee and the Lawyer Temp is an independent contractor seem to be a distinction without a difference in terms of non-disclosure of the spread between compensation paid and rates charged. In each instance the spread, or the mark-up, is a function of the cost of doing business including fixed and variable overhead expenses, as well as a component for profit. In each instance, too, DR 2-105(A)(1) mandates that a lawyer's fees shall be reasonable.

Id. at 12.

Thus, among the conclusions in LEO 1712 are the following statements:

> If the law firm's payment to the staffing agency is billed to the client as a disbursement, or as a cost advanced by the law firm on behalf of the client, the disbursement shown must be the amount actually paid to the staffing agency. Upon disclosure to and consent from the client, the disbursement shown may be marked-up above the actual payment to the staffing agency. The law firm is not obligated, however, to bill the payment to the client as a disbursement. The law firm, in its statement for services rendered, may bill for the services of a Lawyer Temp at a rate or in the manner that it bills the time of salaried associates for services rendered, without disclosure of the amount paid the staffing agency.

Id. at 14.

Similarly, in LEO 1735, the hypothetical question posed is whether a law firm may bill clients for work performed by an independent contractor attorney at a rate that is reasonable based upon the experience and background of the attorney, even though the rate per hour paid by the firm to the attorney for professional services rendered to those clients is less than the rate billed to the clients. Va. Legal Ethics Op. 1735 ("Attorney Rendering Professional Services for Clients of a Law Firm When Attorney Is an Independent Contractor Rather Than an Employee or Partner of the Law Firm") (Oct. 20, 1999). Citing and relying on LEO 1712, the Committee answers the question in the affirmative, assuming that the client is billed for the independent contractor's work as legal services, not as an expense or a disbursement, and assuming that the overall fee charged to the client is reasonable. *Id.* at 3. Disclosure of the markup is not required if the firm bills for the independent contractor attorney's work in the same manner as it would for any other associate in the firm, and so long as either the attorney works under the direct supervision of the firm or, absent that supervision, the firm adopts the work product as its own. *Id.* at 3–4.

Regarding the necessity of disclosure to the client of the use of an outside attorney, LEO 1712 states that it agrees with the reasoning and result in ABA Formal Opinion 88-356, *supra*,

which it summarizes as follows:

> ABA Formal Opinion 88-356 addressed the necessity of disclosure to the client of the utilization of a Lawyer Temp. It concluded that, if the Lawyer Temp will work independently, without close supervision of a lawyer associated with the law firm, then the client must be informed of the Lawyer Temp's participation in the representation and the client's consent obtained. On the other hand, the ABA concluded, if the Lawyer Temp will work under the direct supervision of a lawyer associated with the law firm, the law firm ordinarily will not have to disclose to the client the fact of the Lawyer Temp's work on the client's matter.

Va. Legal Ethics Op. 1712, at 10.

LEO 1850, in pertinent part, considers the outsourcing of legal services to lawyers. Among the several scenarios embraced by this opinion is one in which a Virginia law firm routinely sends legal work involving legal research and brief writing to a legal research firm to produce work products that are then incorporated into the work product of the Virginia law firm. Va. Legal Ethics Op. 1850 ("Outsourcing of Legal Services") (Dec. 28, 2010).

On the subject of billing, LEO 1850 expressly reiterates the position taken in LEO 1712 and LEO 1735. That is to say, if payment made by the outsourcing law firm to the outside attorney or firm is billed to the client as a disbursement, then the lawyer must disclose the actual amount of the disbursement and must disclose and obtain client consent for any markup or surcharge on the amount actually disbursed to the outside lawyer or firm. Otherwise, no such markup or surcharge is permitted. LEO 1850 does not expressly address the alternative practice whereby the payment made to an outside attorney or firm is billed not as a disbursement but as a part of the legal services rendered to the client. However, given its adoption of LEO 1712 and LEO 1735, LEO 1850 may be considered as implicitly approving the practice of billing the client for the outside attorney's work as legal services, not as an expense or a disbursement, assuming that the overall fee charged to the client is reasonable. In that circumstance, disclosure of the markup is not required if the firm bills for the outside attorney's work in the same manner as it would for any other associate in the firm and as long as either the outside attorney works under the direct supervision of the firm or, absent that supervision, the firm adopts the work product as its own.

Regarding client consent, LEO 1850, citing LEO 1712, concludes that the outsourcing firm must obtain a client's informed consent to engage outside lawyers who are not directly associated with or under the direct supervision of the lawyer or law firm that the client retained and that in a typical outsourcing relationship, no confidential information may be revealed to an outside attorney or firm without the client's informed consent. LEO 1850 recognizes an exception to the consent requirement for the outsourcing of legal support services that are truly tangential, clerical, or administrative in nature, or even where basic legal research or writing is outsourced without any client confidences' being revealed. On the other hand, as to what LEO 1850 calls "substantive client work" involving legal analysis and work

product related to confidential client information, there must be client consent for the involvement of lawyers not directly associated with the outsourcing law firm.

B. North Carolina

2007 North Carolina Ethics Opinion 12 deals with the outsourcing of legal services to a foreign lawyer. 2007 NCBA Formal Ethics Op. 12 ("Outsourcing Legal Support Services"), 2008 WL 5021151 (Apr. 25, 2008). The opinion addresses a number of ethical issues implicated by such an arrangement, but not issues concerning billing the client for the outsourced services. The opinion concludes that a lawyer may outsource limited legal support services to a foreign lawyer, provided the lawyer properly selects and supervises the foreign attorney, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client's advanced informed consent. On the subject of disclosure and client consent, Formal Ethics Opinion 12 states, in part, that, "[i]n the absence of a specific understanding between the lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer s/he has retained, using the resources within the lawyer's firm, will perform the requested legal services." *Id.* at *3.

C. Florida

The Florida State Bar has opined that a lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, the supervision of nonlawyers, conflicts of interest, confidentiality, and billing. FBA Comm. on Prof'l Ethics, Ethics Op. 07-2, 2008 WL 3556663 (Jan. 18, 2008). Concerning the necessity for client consent for use of outside attorneys, Ethics Opinion 07-2 states as follows:

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

Id. at *4.

Regarding billing, Ethics Opinion 07-2 draws an analogy to billing for nonlawyer personnel. It concludes that "[t]he law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead." *Id.* at *6. Thus, the opinion is in accord with the ABA position, assuming that the attorney bills the client for the outsourced legal services as an expense or a disbursement, such as might be the case for nonlawyer services. However, Ethics Opinion 07-2 does not explicitly address billing for outsourced legal services as legal services, not expenses; it is reasonable to assume that using a premium or surcharge in that situation, as the ABA would allow, would not be at odds with Ethics Opinion 07-2.

In Florida Consolidated Ethics Opinions 76-33 and 76-38, the State Bar determines that, in billing a client, a lawyer may separately itemize for legal research and other similar services performed by salaried nonlawyer personnel, but care should be taken to avoid the double billing that could result if such charges are already accounted for in overhead. The Code of Professional Responsibility does not contemplate that such work of nonlawyer personnel will be free of charge, and the Code does not prohibit a lawyer from separately itemizing on the bill to the client the time of nonlawyer personnel of the type referred to in the inquiries. At least in part, the opinion is based on the fact that attorneys can arrange for, and bill for, similar tasks to be accomplished by outside attorneys or other professionals:

> The work described in the present inquiries is such that the lawyer, in our opinion, could charge therefor as separate itemization on his bill if done by outside independent contractors, e.g., legal research services, research computer systems, private investigators and the like, and there should not be a difference in that respect if those same types of services are performed by salaried personnel employed by the lawyer. See ABA Informal Opinion 343 (1970 Supplement to The Digest of Bar Association Ethics Opinions, No. 5050), stating that where a lawyer employs an accountant with the client's consent, he can bill the accountant's fee as a separate item of expense.

FBA Comm. on Prof'l Ethics, Ethics Consol. Ops. 76-33, 76-38, 1977 WL 23158, at *1 (Mar. 15, 1977). As in Ethics Opinion 07-2, consolidated Ethics Opinions 76-33 and 76-38 address only billing for outside legal services as expenses or disbursements, but they do not prohibit, and are not inconsistent with, billing for such services as legal services, with a surcharge if desired and if the total fee is reasonable.

D. Texas

In Texas Ethics Opinion 577, the question posed is whether a law firm may hire a lawyer who is not an associate, partner, or shareholder of the law firm to provide legal services for a client of the firm's and then bill the client a higher fee for the work done by that lawyer than the firm paid to the lawyer. The conclusion turns on whether the hired attorney, although not an associate, partner, or shareholder of the firm, is nonetheless "in" the firm; if the attorney is "in" the firm, the markup is permitted, but not otherwise:

> Under the Texas Disciplinary Rules of Professional Conduct, a law firm may establish an hourly rate for a lawyer who is not a shareholder, partner or associate but is otherwise "in" the firm, the law firm may use that hourly rate in billing clients for such lawyer's work at a rate that is more than the law firm is paying the lawyer for that work, and the law firm may identify such lawyer on the firm's bills with a description of the work performed, the hours expended, and the lawyer's hourly rate without distinguishing such lawyer from other lawyers in the firm and without disclosing the amount paid by the firm to such lawyer. However, when a law firm bills a client for legal services provided by a lawyer that is not "in" the law firm, there will be a division of fees between the law firm and the lawyer unless the law firm bills the client precisely the amount that has been billed to the law firm by such lawyer. Any arrangement for division of fees between a law firm and a non-firm lawyer would be required to meet all the requirements of Rule 1.04(f)—proportionality of fees to services performed or joint responsibility for the representation, *written client consent to the terms of the fee division*, and a total fee that is not unconscionable under Rule 1.04(a). In addition, the law firm would be prohibited from incorporating a non-firm lawyer's name, work and time into its own bill unless it did so in a way that showed that the non-firm lawyer was not in the firm.

Tex. Sup. Ct. Prof'l Ethics Comm., Ethics Op. 577, 2007 WL 1149218, at *4 (Mar. 2007) (emphasis added). As the emphasized language indicates, written client consent is required as to the fee terms when a law firm uses the services of a nonfirm lawyer. It may be inferred from this that the law firm generally will have obtained client consent for using such a nonfirm lawyer in the first place, or at least will have disclosed to the client that the law firm will use a nonfirm lawyer.

The determination of whether an attorney hired by a firm is "in" the firm is governed by objective factors such as

> the receipt of firm communications, inclusion in firm events, work location, length and history of association with the firm, whether the firm and the lawyer identify or hold the lawyer out as being in the firm to clients and to the public, and the lawyer's access to firm resources including computer data and applications, client files and confidential information.

Id. at *2. Ethics Opinion 577 gives examples of hired attorneys considered to be "in" the firm, including lawyers referred to as "of counsel, senior attorneys, *contract lawyers*, and part-time lawyers." *Id.* (emphasis added). At the same time, the examples given of hired attorneys considered not to be "in" the firm, and thus whose services may not be "marked up" in billing the client, include

> outside patent counsel, local counsel, counsel with expertise dealing with a particular government agency, counsel in another state hired to advise

> regarding the application of that state's laws, and *lawyers hired individually or through another organization that provides temporary additional staffing or capabilities such as document review or research for a particular matter*.

Id. (emphasis added).

Significantly, the authors of Ethics Opinion 577 acknowledge that the conclusions set forth in that opinion "differ substantially" from the conclusions of the ABA in ABA Formal Opinion 00-420. *Id.* at *3.

The Professional Ethics Committee of the Supreme Court of Texas opines in Ethics Opinion 515 that if certain conditions unrelated to the billing of a client are satisfied, a Texas attorney may enter into an arrangement with a contract lawyer placement agency under which the agency will seek to place the attorney with law firms or corporate legal departments for work on short-term legal projects. Tex. Sup. Ct. Prof'l Ethics Comm., Ethics Op. 515, 1996 WL 277337 (July 1996).

E. Alabama

Alabama Ethics Opinion RO-2007-03 concludes that a lawyer has a duty to inform the client of the lawyer's intention—whether at the commencement of representation or at some later time—to use a temporary lawyer's services on the client's case. Ala. State Bar Office of Gen. Counsel, Ethics Op. RO-2007-03 ("Temporary Lawyers") (May 18, 2007). The client should always be given the option of either consenting to, or rejecting the use of, the temporary lawyer. If the lawyer wishes to pass on to the client the costs of the temporary lawyer, the client must be so informed and consent to the fee arrangement. Any such charges must be reasonable. (The opinion does not consider the issue of using a surcharge or premium in billing for the services of the temporary lawyer.)

F. Alaska

Alaska Ethics Opinion 96-1 decides that a law firm may charge clients for contract legal services at a rate higher than the law firm's actual cost for the services, so long as the total charge to the client is reasonable. In this opinion, the term "contract attorney" refers to an attorney providing services for hire as an independent contractor and includes an attorney referred by a temporary placement agency. While the opinion justifies the surcharge to the client, in part, to cover such overhead costs as may be incurred, it also states that the rate charged for the contract attorney can appropriately include an amount for "profit." AKBA Ethics Comm., Ethics Op. 96-1 ("Ethical Considerations When Billing Clients for Contract Attorney Legal Services"), 1996 WL 907643, at *1 (Jan. 13, 1996).

Referring to ABA Formal Opinion 88-356, Alaska Ethics Opinion 96-1 states that "the ABA would require a law firm to disclose to the client and obtain the client's consent in advance for work by a contract attorney who is not directly supervised. The reason is that,

when the contract attorney acts independently of the law firm, the client's consent cannot be inferred from the client's relationship to the law firm." *Id.* at *2.

G. California

In California Formal Ethics Opinion 1994-138, the Committee opines that a law firm can charge the client a premium on contract legal services so long as the total charge to the client is reasonable and the rates are specified in the contract with the client. CABA Comm. on Prof'l Responsibility & Conduct ("COPRAC"), Formal Op. 1994-138 ("Must an Attorney Comply with the Fee-Splitting Requirements of Rule 2-200 [CRPC] When the Attorney Hires an Outside Lawyer and When the Attorney Discloses a Rate to a Client but Pays the Outside Lawyer Less Than the Amount Disclosed"), 1994 WL 721969; *see also* L.A. County Bar Ass'n Prof'l Responsibility & Ethics Comm., Formal Op. 518 ("Ethical Considerations in Outsourcing of Legal Services") (June 19, 2006) (stating that a lawyer must accurately disclose the basis of any cost that is passed on to the client, including any markup).

Formal Ethics Opinion 1994-138 says the following about disclosure to the client:

> Depending on the circumstances, rule 3-500 and Business and Professions Code section 6068(m) will generally require the law office to inform the client that an outside lawyer is involved in the client's representation if the outside lawyer's involvement is a significant development. In general, a client is entitled to know who or what entity is handling that client's representation. However, whether use of an outside lawyer constitutes a significant development for purposes of rule 3-500 and Business and Professions Code section 6068(m) depends on the circumstances of the particular case. Relevant factors, any one of which may be sufficient to require disclosure, include the following: (i) whether responsibility for overseeing the client's matter is being changed; (ii) whether the new attorney will be performing a significant portion or aspect of the work or (iii) whether staffing of the matter has been changed from what was specifically represented to or agreed with the client.[8] (See L.A. Cty. Bar Assn. Formal Opn. No. 473.) The listed factors are not intended to be exhaustive, but are identified to provide guidance.
>
> Assuming there is no division of fees, and that the law office does not charge the outside lawyer's compensation to the client as a disbursement, the law office has no obligation to reveal to the client the compensation arrangement with the outside lawyer whether that attorney is paid by salary or on an hourly basis. (See ABA Formal Opn. No. 88–356.)
>
> ---
>
> [8]It would be prudent for the law firm to include the disclosure to the client in the attorney's initial retainer letter or make that disclosure as soon thereafter as the decision to hire is made.

1994 WL 721969, at *6 & n.8 (one footnote omitted).

California Formal Ethics Opinion 2004-165 states the following concerning the context in which an attorney uses an outside contract lawyer to make appearances on behalf of his/her client:

> Under the facts presented, the Committee believes that a division of fees does not occur if Lawyer pays CAS [service providing outside attorneys] or the CAS lawyer an hourly rate which meets the foregoing criteria. *Billing CAS's [sic] fee as a cost, or as a separate identified entry, on Lawyer's bill to his client, also would not constitute a regulated division of fees*.

COPRAC Formal Op. 2004-165 ("1. What Are the Ethical Responsibilities of a Member of the California State Bar Who Uses Outside Contract Lawyers to Make Appearances on Behalf of the Member's Clients? 2. What Are the Ethical Responsibilities of the Outside Contract Lawyer Who Makes the Appearances?"), 2004 WL 3079030, at *4 (emphasis added). This opinion is silent on the issue of adding a surcharge or premium to the bill for the outside attorney's services.

As in Formal Ethics Opinion 1994-138, Formal Ethics Opinion 2004-165 states that a lawyer is required to inform his client that s/he has hired an outside lawyer or firm if the use of the outside lawyer or firm is a significant development. *Id.* at *2.

San Diego County Bar Association Ethics Opinion 2007-1 concludes as follows concerning the duty of a lawyer to inform the client concerning the use of attorneys to whom work is outsourced (in the facts of the scenario giving rise to this opinion, the work was outsourced to India and done by Indian attorneys not licensed in any American jurisdiction): If it is within the client's reasonable expectation that the work to be outsourced will be performed by the lawyer, the client must be informed when the service is outsourced. Conversely, if the service is not a service that is within that expectation, the attorney is not necessarily required to inform the client immediately, absent other requirements compelling disclosure. Premium billing was not an issue in this matter, as the outsourced work was billed to the client "at cost."

H. Colorado

As described in ABA Formal Opinion 00-420, Colorado Formal Ethics Opinion 105 approves the right of a retaining lawyer to charge the client more for the services of a contract lawyer than is paid to the contract lawyer when those costs are billed to the client as legal services, subject only to the obligation of Rule 1.5(a) to charge a reasonable fee:

> Typically, the temporary lawyer submits an invoice to the firm for services performed. If the firm has an hourly rate fee agreement with the client, the firm's invoice to the client may include time entries submitted by the temporary lawyer for the services performed, along with the time entries by lawyers in the

> firm, calculate the value of the temporary lawyer's time (either at the rate charged by the temporary lawyer to the firm or at a higher rate, as discussed further below), and disclose the name of the temporary lawyer. This is analogous to the method by which firms generally bill clients for work done by associates. As long as the firm, rather than the client, is directly responsible for the compensation paid to the temporary lawyer (as is the case with associates), the arrangement does not constitute a division of fees.
>
> This type of disclosure generally will satisfy the firm's duty to disclose the basis for the amount charged to the client, just as this type of disclosure normally suffices in connection with fees arising out of services performed by associates. See ABA Formal Op. 93-379 (1993). This is so even if the firm bills the client for the temporary lawyer's time at a higher rate than that paid by the firm to the temporary lawyer. This differential, or mark-up, is analogous to that between compensation paid by the firm to its employees (including associates and paralegals) and amounts charged to clients for those employees' time. A firm generally charges more for its employees' time than it pays to those employees, to both cover overhead and earn a profit. Just as the firm does not have any duty under the Rules of Professional Conduct to disclose to the client the amount of profit it makes from the use of associates or paralegals, the firm does not have a duty to disclose to the client the amount paid to the temporary lawyer or the profits made from using the temporary lawyer as long as the financial arrangement does not constitute fee-splitting under Colo. RPC 1.5(d).

COBA Ethics Comm., Formal Ethics Op. 105 ("Opinion on Temporary Lawyers") (May 22, 1999) (footnotes omitted).

Regarding disclosure and consent concerning use of a temporary attorney, Formal Ethics Opinion 105 states:

> Thus, where the temporary lawyer works without the close supervision of a lawyer associated with the hiring firm or organization, the client must be informed of the arrangement and client consent obtained. "This is so because the client, by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer." ABA Formal Op. 88-356. Conversely, where the temporary lawyer is under the direct supervision of a lawyer associated with the hiring firm or organization, the client ordinarily need not be informed that the temporary lawyer is working on the matter. Nevertheless, where circumstances are such that the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations, the client should be advised and client consent obtained. D.C.Bar Opinion No. 284, Sept. 15, 1998. Colo. RPC 1.10(a).

Id.

Formal Ethics Opinion 121 supplements Formal Ethics Opinion 105 and is in accord with that earlier opinion. COBA Ethics Comm., Formal Ethics Op. 121 ("Use of Temporary Lawyers and Other Professionals Not Admitted to Practice in Colorado ("Outsourcing")) (May 17, 2008). Thus, Formal Ethics Opinion 121 concludes that a markup of the fee paid by a lawyer to the temporary lawyer is permitted so long as it is reasonable, and a lawyer is not required to affirmatively disclose the amount of fees paid to, or profits made from, the services of the temporary attorneys, even where the markup is substantial. As for disclosure to clients of outsourcing, Formal Ethics Opinion 121 concludes that, at least as of the date of its writing, most clients do not expect their legal work to be outsourced, so disclosure to the client is required on the basis of such outsourcing being a "significant development" in the case.

I. District of Columbia

As described in ABA Formal Opinion 00-420, District of Columbia Ethics Opinion 284 approves the right of a retaining lawyer to charge the client more for the services of a contract lawyer than is paid to the contract lawyer when those costs are billed to the client as legal services, subject only to the obligation of Rule 1.5(a) to charge a reasonable fee mutually agreed to by the lawyer and the client. DCBA Legal Ethics Comm., Ethics Op. 284 ("Advising and Billing Clients for Temporary Lawyers") (Sept. 15, 1990). The same opinion states that where circumstances are such that the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation, or to affect the client's reasonable expectations, the client should be advised and his/her consent obtained.

J. Georgia

Georgia Formal Advisory Opinion 05-9 states that if a temporary attorney is directly supervised by an attorney in a law firm, there is no requirement of consent by the client regarding the fee arrangements. Ga. State Bar, FAO No. 05-9 (Ga. Sup. Ct. Apr. 13, 2006). Nevertheless, the ethically proper and prudent course is to seek the client's consent under all circumstances in which the temporary lawyer's assistance will be a material component of the representation. The fee division with a temporary attorney is also allowed, even if there is no direct supervision, if three criteria are met: (1) the fee is in proportion to the services performed by each lawyer; (2) the client is advised of the fee-splitting situation and consents; and (3) the total fee is reasonable. (The opinion does not discuss imposing a surcharge or premium on top of the fee for the temporary attorney's services.)

K. Illinois

In Illinois State Bar Advisory Opinion 92-07, there is at least implicit recognition of the propriety of passing on to a client the costs of outside legal services, albeit with the possible requirement that the client's written consent be obtained first:

> An essential fact which is not mentioned in the request for opinion is that of the cost of second attorney's service to the client. If the delegation of work to another attorney increases the fees to the client and is not absorbed in the retained attorney's fees, then the provision of Rule 1.5(f) might very well come into play and a written consent could be required. Further facts would be required to express a formal opinion.

ISBA Advisory Op. on Prof'l Conduct 92-07 ("Responsibility of a Law Firm Hiring Temporary Attorneys to Handle Individual Matters"), 1993 WL 851037, at *2 (Jan. 22, 1993). The opinion is silent on the matter of adding a surcharge or premium for the outside legal services.

With regard to obtaining client consent for using an outside lawyer in the first instance, Advisory Opinion 92-07 requires such consent as to the use of another attorney not in the hiring law firm:

> A law firm may hire individual outside counsel, who are generally unaffiliated or unconnected with the law firm in any way, to handle matters involving client's cases. Rule 1.1(c) requires that the attorney procure the client's consent to the delegation of work to another attorney not in the law firm and Rule 1.2(a) requires an attorney to consult with a client as to the means of obtaining the client's objectives. Rule 1.4 demands that an attorney keep the client reasonably informed and, in this instance, such can be accomplished by indicating at the outset of the representation, either by written retainer or direct communication, that some matters in the representation may be delegated to other attorneys outside the firm and an explanation of the extent and scope of such delegation.

Id. at *1.

Advisory Opinion 98-02 states that payment by a lawyer to an independent or temporary lawyer on an hourly basis does not require disclosure to a client if there is close supervision. ISBA Advisory Opinion on Prof'l Conduct 98-02 ("Disclosure to Client of Compensation Payable to Independent or Temporary Lawyer for Work on a Specific Case"), 1998 WL 604440 (Sept. 1998). If the work is delegated without close supervision, then disclosure to, and consent from, the client is necessary. Advisory Opinion 98-02 mentions that one of the possible methods of billing would involve a surcharge to the client, on top of the hourly rate paid by the lawyer to the independent or temporary lawyer, but the opinion does not explicitly express an opinion on using such a surcharge or premium.

L. Maryland

Although the assertion was unsupported by any reason or citation of authority, Maryland State Bar Ethics Opinion 92-19 states that "the law firm may not bill the client for any amount greater than that which it actually paid" to an outside research service. MSBA Ethics

Comm., Ethics Op. 92-19 ("Billing for Outside Research Service"), at 3 (1992). (The above description is taken from a secondary source, and Ethics Opinion 92-19 has not been read in full. MSBA Ethics Opinions are available on the website for the Maryland Bar, but only for members of the Maryland Bar.)

M. New Hampshire

In giving general approval to New Hampshire lawyers' hiring temporary lawyers, New Hampshire Formal Ethics Opinion 1995-96/3 states in general terms that the hiring lawyer should take appropriate steps to disclose to the client the existence of the arrangement with the temporary lawyer, "to the extent appropriate and necessary." NHBA Ethics Comm., Formal Ethics Op. 1995-96/3 ("Temporary Lawyers—Temporary Lawyer Placement Agency"), at II(B) (Nov. 8, 1995).

N. New York

New York City Formal Opinion 1989-2 provides that a law firm using the services of a temporary lawyer has an ethical obligation in all cases "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 to obtain the client's consent to that participation." NYCBA Comm. on Prof'l & Jud. Ethics, Formal Op. 1989-2, 1989 WL 513868, at *2 (May 10, 1989).

New York State Bar Ethics Opinion 721 states that if a lawyer hiring an outside legal research service will have to disclose confidences and secrets of the client in connection with commissioning research or briefs, the lawyer should tell the client what confidential client information the lawyer will provide, and obtain the client's consent. NYSBA Comm. on Prof'l Ethics, Ethics Op. 721 ("Insurance Carrier; Third Party Research; Unauthorized Practice by Lawyers Not Admitted in New York; Confidences and Secrets (Briefs and Memos Prepared for Client)"), 1999 WL 1756189, at *5 (Sept. 27, 1999).

In New York City Ethics Opinion 2006-3, the query is whether a New York lawyer may ethically outsource "legal support services" (including legal research) overseas when the person providing those services is (a) a foreign lawyer not admitted to practice in New York or in any other U.S. jurisdiction, or (b) a layperson. If so, what ethical considerations must the New York lawyer address? NYCBA Comm. on Prof'l & Jud. Ethics, Formal Op. 2006-3 ("Outsourcing Legal Support Services Overseas, Avoiding Aiding a Non-lawyer in the Unauthorized Practice of Law, Supervision of Non-lawyers, Competent Representation, Preserving Client Confidences and Secrets, Conflicts Checking, Appropriate Billing, Client Consent"), 2006 WL 2389364, at *1 (Aug. 2006).

On the subject of billing, Formal Opinion 2006-3 states:

> By definition, the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer

> to include the cost of outsourcing in his or her legal fees. See DR 3-102. *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).

Id. at *5 (emphasis added).

Although there are some New York ethics opinions indicating an ethical obligation to disclose to the client in advance, and to obtain the client's consent for, the use of any temporary lawyers, a "more nuanced" approach in one such opinion indicates that such disclosure and consent is not required for the hiring of a lawyer whose tasks are limited to legal research or "tangential matters." These authorities are described in Formal Opinion 2006-3 as follows:

> **The Duty to Obtain Advance Client Consent to Outsourcing Overseas**
>
> In the case of contract or temporary lawyers, this Committee has previously opined that "the law firm has an ethical obligation in all cases (i) 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 (ii) to obtain the client's consent to that participation." N.Y. City Formal Opinion 1989-2; *see also* N.Y. City Formal Opinion 1988-3 ("The temporary lawyer and the Firm have a duty to disclose the temporary nature of their relationship to the client," citing DR 5-107(A)(1)); 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); EC 4-2 ("[I]n the absence of consent of the client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter . . . ."). Similarly, many ethics opinions from other jurisdictions have concluded that clients should be informed in advance of the use of temporary attorneys in all situations.
>
> The Committee on Professional Ethics of the New York State Bar Association adopted a more nuanced approach in N.Y. State Opinion 715 (1999), explaining that the lawyer's obligations to disclose the use of a contract lawyer and to obtain client consent depend upon whether client confidences and secrets will be disclosed to the contract lawyer, the degree of involvement that the contract lawyer has in the matter, and the significance of the work done by the contract lawyer. The Opinion further explained that "participation by a lawyer whose work is limited to *legal research or tangential matters* would not need to be disclosed," but if a contract lawyer "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." *Id.*

Id. at *5–6 (emphasis added) (footnote omitted). *See generally* NYCBA Comm. on Prof'l Responsibility, *Report on the Outsourcing of Legal Services Overseas* (Aug. 2009).

O. Ohio

Ohio Advisory Opinion 2009-6 states that 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. Regarding billing, in particular, the opinion states:

> 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.

Ohio Sup. Ct. Bd. Commr's on Grievance & Discipline, Advisory Op. 2009-6, 2009 WL 2581719, at *1 syl. (Aug. 14, 2009).

> On disclosure and consent more generally, Advisory Opinion 2009-6 states: [P]ursuant 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.

Id. at *5.

Advisory Opinion 2009-6 observes that the disciplinary 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. The opinion cites and discusses some other relevant ethics opinions, especially from the ABA. *See also* Ohio Sup. Ct. Bd. Comm'rs on Grievance & Discipline, Advisory Op. 2009-9, 2009 WL 4884003, at *3 (Dec. 4, 2009) ("If a plaintiff's personal injury lawyer retains an outside law firm to provide health care

lien resolution services in a settled matter, the plaintiff's lawyer may use professional judgment as to whether to charge the client for the service as part of the contingent fee or as an expense of litigation. Either way, the client's consent to the outsourcing and the fee arrangement must be obtained prior to outsourcing the service. Either way, the fees and expenses must be reasonable, not excessive.").

P. Pennsylvania

It is the opinion in Pennsylvania Ethics Opinion 97-20 that it would be inappropriate for an attorney to farm out nonlegal work to law students or other nonlawyers, who would be paid on the basis of work performed for a particular client and contingent upon the actual receipt of payment from that client, if any of the tasks for which compensation is to be paid to the nonlawyer could conceivably be classified as legal services. PBA Comm. on Legal Ethics & Prof'l Responsibility, Informal Op. 97-20, 1997 WL 816736, at *2 (Sept. 19, 1997). However, in what may be described as dicta, the opinion includes a recognition that the amount billed to a client for the outside services would exceed the amount that the attorney paid to the provider of such services:

> The inquirer presently compensates all non-lawyer staff at an hourly rate but is contemplating changing the compensation rate with respect to law students based solely upon a per hour rate per billable hour actually invoiced to clients. *For the purposes of this response it is assumed that the billing rate provided to the client is greater than the per hour rate paid to the law student*.

Id. at *1 (emphasis added).

Although it also may be considered dicta, the same opinion states the following regarding the "farming out" of work (to nonlawyers in that case) if any of the tasks could conceivably be classified as legal services:

> In any event, all such referrals should be revealed to the client so that the client is aware that the lawyer is not performing this work and it is being assigned to persons not employed by the lawyer. Care should also be taken to preserve all confidential client information if an out source is used to perform work for a client.

Id. at *2.

The Professional Guidance Committee of the Philadelphia Bar Association has adopted the ABA position that unless the client agrees otherwise, no surcharge may be added to a bill for the services of a contract attorney when such services are billed as an expense or a cost; if, on the other hand, such services are billed as fees for legal services, it is understood that the client's reasonable expectation is that the retaining lawyer has supervised the work of the contract attorney or has adopted that work as his or her own. Phila. Bar Ass'n Prof'l Guidance

Comm., Phila. Ethics Op. 2010-4, 2010 WL 4272167 (May 2010).

On client consent, the same opinion by the Philadelphia Bar Association states that ad hoc engagements of outside attorneys for certain specific tasks, such as oral argument, a discrete deposition, expert witness discovery, brief-writing, etc., often by their very nature contemplate that the contract lawyer will not be under the direct supervision of a lawyer associated with the retaining firm. If tasks of this stand-alone nature are simply delegated by the retaining firm to a contract lawyer, certain duties of disclosure may attach where, for example:

> (a) Circumstances are such that the attorney does not "function as a part of the legal services delivery group and reports to a retaining lawyer"; or
>
> (b) Circumstances are such that the client's reasonable expectation [arising from the manner of billing or otherwise] that the retaining lawyer has supervised the work of the attorney or adopted that work as her own is not met; or
>
> (c) The attorney has reason to believe that there is confusion about his/her role in the case vis-à-vis the client.

Id. at *2 (brackets in original).

Q. South Carolina

South Carolina Ethics Advisory Opinion 91-09 adopts ABA Formal Opinion 88-356, *supra*, in its entirety. S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 91-09, 1991 WL 787739, at *1 (July 1991).

Ethics Advisory Opinion 96-13 approves an attorney's hiring of the services of an independent or "freelance" paralegal assistance service to assist him/her in probating estates. S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 96-13, 1996 WL 1101751, at *1. The opinion also allows the lawyer to pay a fee to the paralegal service and then bill the clients for the services provided, including the services of the paralegal organization. Stating only that the lawyer should comply with his fiduciary obligations regarding full disclosure of billing practices, Ethics Advisory Opinion 96-13 is silent on the question of whether a surcharge or premium may be added to the bill for the paralegal services. The opinion is also silent on the matter of whether advance disclosure and client consent are necessary for use of the freelance paralegals.

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