In re: Supreme Court Rule 13

Exhibit A

AOC Letter and Memorandum of 18 September 2007

And Letter and Memorandum of 14 September 2007
(Believed by Petitioners Not to Have Been Disseminated Generally)

Supreme Court of Tennessee

Administrative Office of the Courts
Nashville City Center, Suite 600
511 Union Street
Nashville, Tennessee 37219
615 / 741-2687 or 800 / 448-7970
FAX 615 / 741-6285

ELIZABETH A. SYKES
Director

TIM D. TOWNSEND
Deputy Director

September 18, 2007

Billable Hours, Inc.
ATTN: Robert Foster and Brandon Hammer
P.O. Box 10
Greeneville, TN 37744

Dear Mr. Foster and Mr. Hammer:

Enclosed please find a copy of correspondence that is being distributed to attorneys who submit claims for indigent defense representation pursuant to the provisions of Tennessee Supreme Court Rule 13. As you can see, it is necessary for this office to discontinue payment of these fees to a third party addressee, such as your organization.

I regret to inform you that we must make payment on Rule 13 claims to the office address of the attorney who makes the claim, and must deal directly with that attorney to resolve any issues related to a claim. Please take all necessary steps to comply with these requirements from this date forward.

Please feel free to contact me if you have questions or concerns.

Sincerely,

Elizabeth A. Sykes

Elizabeth A. Sykes
Director

Supreme Court of Tennessee

Administrative Office of the Courts
Nashville City Center, Suite 600
511 Union Street
Nashville, Tennessee 37219
615 / 741-2687 or 800 / 448-7970
FAX 615 / 741-6285

ELIZABETH A. SYKES
Director

TIM D. TOWNSEND
Deputy Director

MEMORANDUM

TO: Rule 13 Appointed Counsel

FROM: Elizabeth A. Sykes, Director

DATE: September 18, 2007

RE: Assignment of Attorney Fee Claims

****

The Administrative Office of the Courts (AOC) occasionally receives attorney fee claims presented by third party billing agents acting on behalf of attorneys providing indigent defense representation pursuant to the provisions of Tennessee Supreme Court Rule 13. These claims are typically made by agencies which administer claims on behalf of several attorneys and charge a fee for their services. They also request that payment be sent to an address other than that of the attorney.

This office recognizes that the process of submitting these claims and seeing that payment is made is one that some attorneys may wish to delegate to such a third party. However, Rule 13 does not allow an attorney to assign these claims or to delegate any responsibilities for claims submission.

Effective immediately, all Rule 13 payments must be made to the attorney who provided indigent client representation. AOC staff will deal only with these attorneys when necessary to resolve any issues related to a particular claim. The members of the Supreme Court concur in this directive.

Thank you in advance for your understanding and cooperation.

Supreme Court of Tennessee

Administrative Office of the Courts
Nashville City Center, Suite 600
511 Union Street
Nashville, Tennessee 37219
615 / 741-2687 or 800 / 448-7970
FAX 615 / 741-6285

ELIZABETH A. SYKES
Director

TIM D. TOWNSEND
Deputy Director

September 14, 2007

Billable Hours, Inc.
ATTN: Robert Foster and Brandon Hammer
P.O. Box 10
Greeneville, TN 37744

Dear Mr. Foster and Mr. Hammer:

Enclosed please find a copy of correspondence that is being distributed to attorneys who submit claims for indigent defense representation pursuant to the provisions of Tennessee Supreme Court Rule 13. As you can see, accounting and auditing obstacles, as well as ethical considerations, have made it necessary for this office to discontinue payment of these fees to a third party addressee, such as your organization.

I regret to inform you that we must make payment on Rule 13 claims to the office address of the attorney who makes the claim, and must deal directly with that attorney to resolve any issues related to a claim. Please take all necessary steps to ensure that these requirements are met immediately.

I apologize for this inconvenience, but at this time we currently have no choice but to mandate this change. Please feel free to contact me if you have questions or concerns.

Sincerely,

Elizabeth Sykes

Elizabeth A. Sykes
Director

Supreme Court of Tennessee
Administrative Office of the Courts
Nashville City Center, Suite 600
511 Union Street
Nashville, Tennessee 37219
615 / 241-2687 or 800 / 448-7970
FAX 615 / 241-6285

ELIZABETH A. SYKES
Director

TIM D. TOWNSEND
Deputy Director

MEMORANDUM

TO: Rule 13 Appointed Counsel

FROM: Elizabeth A. Sykes, Director

DATE: September 14, 2007

RE: Assignment of Attorney Fee Claims

****

The Administrative Office of the Courts (AOC) frequently receives attorney fee claims presented by third party billing agents acting on behalf of attorneys providing indigent defense representation pursuant to the provisions of Tennessee Supreme Court Rule 13. These claims are typically made by agencies which administer claims on behalf of several attorneys and charge a fee for their services. They also request that payment be sent to an address other than that of the attorney.

This office recognizes that the process of submitting these claims and seeing that payment is made is one that some attorneys may wish to delegate to such a third party. However, this arrangement produces numerous accounting and auditing problems. The State of Tennessee's accounting system simply will not support payments on these terms. Additionally, ethical considerations require that the AOC deal directly with the appointed attorney in addressing any issues associated with processing these claims.

Effective immediately, all Rule 13 payments must be made to office address of the attorney who provided indigent client representation. AOC staff will deal directly with these attorneys when necessary to resolve any issues related to a particular claim. The members of the Supreme Court concur in this directive.

Thank you in advance for your understanding and cooperation.

In re: Supreme Court Rule 13

Exhibit B

Proposed Amendments to Supreme Court Rule 13

Exhibit B to Petition *In Re Supreme Court Rule 13*
Proposed Language for Amendment of Supreme Court Rule 13

Delete the word "and" after Section (a)(1)(F), delete the period after Section (a)(1)(G), and insert a semicolon followed by the word "and" and a comma after Section (a)(1)(G). Then, add new subsection in Section 1(a)(1), as follows:

(H) to establish guidelines and procedures for preparation of claims by an agent on behalf of appointed counsel.

Add the following sentence to the end of Section 6(b)(3):

Payment "made directly" includes mailing the payment to any agent acting on behalf of appointed counsel under Section 6(c) of this Rule.

Add subsection (c) to Section 6, as follows:

(c) Claims for compensation and/or reimbursement may be prepared and submitted to AOC by an agent or processing service on behalf of appointed counsel. If the services of an agent or processing service are used, then the following provisions apply:

(1) Appointed counsel shall ensure compliance with RPC 1.6 in regard to any information provided to the agent.

(2) Before preparing any claim for submission to a trial court or the AOC, an agent shall file a notice with the director that provides to the director the name and address of agent (and the agent's stockholders or partners, as applicable) and the name of the agent's officers and/or managers. The notice shall contain a sworn statement by the agent that the agent will adhere to this rule, will not engage in any prohibited alteration of claims processed by the agent, and will

honestly and respectfully deal with the clerks, judges, and justices of the courts of this state and with the employees of the AOC. The notice shall state that agent (and the agent's stockholders or partners, as applicable) submit to the jurisdiction of this Court for any determinations made as to any claim processed by the agent and submitted to the director under this rule.

(3) The notice described in subsection (c)(2) above may contain a specimen of any stamp certification(s) the agent will use in preparing claims. If a specimen stamp certification(s) is(are) included, then the notice shall also contain a statement that the agent's certification stamp(s) will not be placed on any claim submitted to a court or to the AOC unless the statements contained in the certification(s) is(are) true and accurate. If a specimen certification(s) is included with the notice, then the agent may comply with the certification provisions of this rule by affixing a stamped certification to any claim prepared by the agent. If no specimen certification(s) is(are) included with the original notice described in subsection (c)(2) above, then an amended notice may be filed with the director containing the specimen certification(s).

(4) The services to be provided by the agent to appointed counsel must be set forth in a written agreement. Upon request of the director, a copy of the written agreement shall be provided to the director, but, because the proprietary business information of the agent is contained in the agreement, the agreement shall not be made a public record.

(5) All claim forms must be signed by appointed counsel in duplicate and the preparation of a claim form by an agent shall not relieve appointed counsel of direct responsibility for the veracity of the claim form and all individual items in the claim form. If an agent is used for claim form preparation and/or processing, then the name of the agent must be submitted with or upon the claim form as follows: "This claim form (including any accompanying documentation) was prepared and/or processed on behalf of the appointed counsel whose name appears upon this

claim form by [*name and address of agent*], and accurately reflects the information provided by to the agent by the named attorney." This certification must appear in blue on both original claim forms prior to the agent sending the original claim forms to the court for approval. Furthermore, the following additional certification must be submitted with the claim form after approval by the appointing court: "[*Name of agent*] certifies that the foregoing claim form and any accompanying documentation was prepared using information provided by the appointed counsel whose name appears upon this claim form and that no alterations have been made to the claim other than this certification since the court approved this claim." This certification, shall appear in blue either on the front or back of the first page of both original claim forms.

(6) The agent shall mail one original claim to the appropriate court clerk for filing and forward the other original to the director. The agent shall attach a copy of the order appointing counsel to the original claim forwarded to the director (along with the original certification for extended and complex representation, if such a certification exists).

(7) For purposes of the 180 day filing rule, the filing date shall be determined to be the date the appropriate judicial official executed and dated the claim.

(8) Appointed counsel shall retain a copy of all documentation related to time and expenses provided to an agent, in paper or electronic format. The agent shall maintain, in either paper or electronic format, copies of all time records and other documentation provided by its principals. The agent shall also retain, in either paper or electronic format, a copy of all claim forms submitted to a court on behalf of its principals and shall provide copies upon request to the trial court, the director, or appointed counsel.

(9) Payment shall be made only in the name of the appointed counsel and only with the taxpayer identification number of appointed counsel. Upon written request of appointed counsel,

payment and all accompanying documentation relating to a claim shall be mailed to appointed counsel in care of the agent at the agent's mailing address. Such written request from an individual attorney shall remain in force until revoked in writing signed by the attorney and the agent. As long as the written request remains in effect, payment to the address of the agent is payment to appointed counsel, subject to any dispute regarding the amount of the payment.

(10) After having received notice of an agent's involvement, the director shall deal directly with such an agent to resolve administrative, statistical, and other issues that are capable of being resolved without the direct involvement of appointed counsel. The director shall provide an agent, upon the agent's request, information relating to a claim that the agent submitted on behalf of appointed counsel. If the director requires further information, such as for an audit of a claim, the director shall first request further documentation from the agent. The agent shall obtain the requested information from its principal to the extent such information is available and forward the information to the director promptly. Nothing in this rule shall prohibit the director from contacting an appointed attorney directly and an agent shall facilitate direct contact with appointed counsel when requested by the director.

(11) An agent, prior to submitting any claims to an appointing court to which it has not submitted claims in the past, shall contact that court in writing and make known to that court that the agent will be preparing and/or processing claim forms for attorney(s) practicing in that court. The written notification to the trial court shall include a copy of this section of Rule 13.

(12) When submitting claims for approval by a court, the agent shall provide the appropriate court, judge, justice, or other judicial official with two original claims for approval and a copy of the order appointing counsel, along with a self addressed stamped envelope for return of the claim forms and order to the agent. Once the court, judge, justice, or other judicial official acts

upon the claim, then the official shall return the claim to the agent, so long as the agent provided to the official proper self-addressed stamped mailing containers.

(13) If a claim requires an extended and complex motion and certification, the agent shall forward the motion, executed by appointed counsel, to the appropriate court clerk to be filed and shall attach a copy to the original claims provided to the court for approval. In the event the court certifies the matter as extended and complex, the court shall forward the original certification along with its accompanying claims to the agent and the agent shall forward the original certification with the claim form to the director, and the agent shall maintain a copy of such certification in paper or electronic format.

(14) An agent shall not alter a claim or any accompanying documentation or certification in any manner after the claim form has been executed by a judicial official, other than by placing the agent's required certification upon the claim form, or upon request of the director.

(15) If the director determines that any agent is violating the provisions of this rule, is altering claim forms so that the claims do not reflect appointed counsel's time and expenses as provided to the agent by appointed counsel, or is altering any claims after approval by the court, other than as provided for in this rule, then the director shall issue a written notice to the agent setting forth the exact items asserted to have violated this rule or to have deviated from the time and expenses provided by appointed counsel. The notice shall provide the agent a reasonable time of not less than thirty (30) days to correct all existing problems and bring all claims into compliance with this rule and other applicable law. If the agent fails to rectify the problems identified by the director, then the director may refuse to process further claims prepared, processed, and/or submitted by that agent and shall issue a notice of refusal to process further claims. The notice of refusal must be in writing. The director, however, shall process any and

all claims that were executed and approved by appointed counsel prior to the date of the notice of refusal, so long as no such claims were improperly altered by the agent. Any agent whose principals' claims the director refuses to process may file a petition with this Court for review of the decision of the director. Any agent may request a hearing within ten (10) days of the director's refusal to process claims. If a hearing is not requested or after a hearing the director's refusal is affirmed by the Court, then the director shall send notice to all attorneys for which that agent has prepared and processed claims for in the last three (3) months, stating the actions taken by the AOC and/or the Court.

In re: Supreme Court Rule 13

Exhibit C

Attorney Letters in Support

Nannette Clark
Attorney at Law
P.O. Box 148
Whites Creek, Tennessee 37189
615/299-0934

September 26, 2007

Robert L. Foster, Esquire
Billable Hours
P.O. Box 10
Greeneville, TN 37744

Re: Billable Hours Services

Dear Mr. Foster,

I have been most impressed with the services that Billable Hours has provided to me as a solo practitioner who focuses on Juvenile and Family Law. This spring, I was ready to quit taking court appointments and focus on other areas of the law or leave the practice of law completely. This was in great part due to not being able to have a reliable income from court appointments.

It has been a concern to many of us practicing in Juvenile Court that we are expected to represent a child through the post disposition phase and not be able to interim bill. There are times when we represent a child for two, three, four and yes sometimes five years without receiving payment. Additionally, we often have out of pocket expenses during that time and have to wait to re-coup them as well. To add insult to injury, we then wait 90 – 180 days after a lengthy and complex order is signed to be paid by the AOC. I do not know any other line of work, where you accept a fee lower than others in your profession and are limited to how much make on case and wait for years to be paid. I have quit calling the AOC to follow up on claims, because I rarely got a return phone call. It was simply not possible for me to continue working this way. I was so excited when I met with you in August and saw what services you were able to offer. I have to admit I was a bit leery that your company would perform to my expectations. However, I have been absolutely delighted with the services that Billable Hours has provided me.

Billable Hours services have lifted the weight of the world off my shoulders. I have received my payments from Billable Hours usually within one week of submission. I have been able to meet all of my financial obligations in a timely manner and due to your services; I recently accepted quite a few new appointments from the Juvenile Court of Davidson County. Your services eliminated so many secretarial and paperwork hassles for me that I was able to focus my attention on my clients and be more productive. Quite honestly, had I known that the AOC would decide that I do not have the ability to manage my accounts receivable and

use Billable Hours, my practice at Juvenile Court would be about sixty percent less than what it is currently.

As an attorney, I maintain complete independent legal judgment of my caseload and complete control of the review and certification of my claims and accompanying documents. I am completely confused as to why the AOC would take a stance that I am unable to hire a company to maintain my billing records and advance me money on my accounts receivable. It seems to me that it would be so much easier for their staff to deal with one person at Billable Hours rather than forty or fifty different attorneys and their secretaries.

I have struggled for approximately thirteen years as an attorney who accepts court appointments in Juvenile Court. I truly love the work that I do. There are absolutely no benefits to this line of work other than the ability to control my work schedule. Unfortunately, due to changes in the court system and unwillingness of DCS to work with attorneys when scheduling staffings and meetings, that benefit is rapidly dwindling. With that in mind, I will have to look at other alternatives for income if Billable Hours is no longer available to me.

I thank you for all of your help recently and hope to resume business with you in the very near future.

Please feel free to call me if you have any questions.

Sincerely,

Nannette Clark

cc: Judge Betty Adams Green

Ginna Kennedy
ATTORNEY AT LAW

Robert Foster
Billable Hours, Inc.
P.O. Box 10
Greeneville, TN 37744

Dear Robert,

I am writing in support of Billable Hours, Inc. I signed up for this service because I believed that it would benefit my practice and my clients by allowing me to less time on paperwork and more time practicing law. It has more than exceeded my expectations.

Using BHI eliminated hours of paperwork from my schedule. It has made taking and working on appointed cases easier and more desirable. While appointed work is necessary to my practice, it has always been a hassle as well. BHI took the hassle and left me to do the actual practice. This benefits not only my staff and me but my clients as well. I have more time to devote to their actual cases instead of worrying about the red tape involved in billing. It allows me to take more appointed cases because I do not have to worry about the time involved in submitting claims and the cash flow problems created by waiting as much as 2 months to get paid.

While BHI has taken over the administrative side of this process, they have no input in the legal aspects of my cases. I do not consult them about how to handle a case or a client. I simply provide them with the finished result and they submit the paperwork on my behalf. I still exercise my own legal judgment in every case. I keep track of time and billable expenses while the case is ongoing and verify the accuracy of my claims before handing them over to BHI.

Using BHI to process my claims was an easy decision. The fee I pay is well worth the services they provide. This is a decision that I have made as an independent attorney and business owner. I reviewed the applicable law and the rules of professional conduct and found no cause for concern. I hope that I can continue to have a relationship with BHI for as long as I am in private practice.

Sincerely,

Ginna S. Kennedy

200 W. Unaka Ave. • Johnson City, TN 37604 • Ph: 423-202-7345 • Fx: 423-202-7548 • ginna@ginnakennedylaw.com

M. TIMOTHY ARRANTS
ATTORNEY AT LAW

1415 MIDDLE CREEK ROAD, SEVIERVILLE, TENNESSEE 37862
TELEPHONE 865-453-0442
TELEFAX 865-453-8789

September 26, 2007

Re: Robert Foster and Billable Hours

Dear Sir or Madame:

I am writing to inform you of my experience with Robert Foster and Billable Hours. I have had a short acquaintance with Billable Hours and a short friendship with Robert Foster. I credit Robert and Billable Hours with transforming my practice by helping me organize and stream-line my billing. Because of their assistance, I am now both willing and able to take more Court appointed cases without the fear of losing money. In the past I would have trouble getting the forms to the AOC and would lose money for work I performed due to missing a time limit. Robert and Billable Hours have helped me with this. I would also lose money due to time management problems. Robert and Billable Hours have helped me with that as well.

I have a solo practice. I have no assistant or secretary to help me in the preparation of my claims. I am in Court 4 days a week on an average week. I am a single parent. Robert and Billable Hours act as a secretary would in aiding me with the preparation of my claims. They in NO WAY interfere with my duties as an attorney. They have never suggested anything, nor do they know anything about my cases or clients beyond what they see in the preparation of my claims to the AOC. They make me a better attorney because they allow me to spend more time acting as an attorney rather than as my own clerk/secretary.

I have enjoyed my business relationship with Robert Foster and Billable Hours. I think Robert is a fine person and a terrific attorney and I hope to continue that relationship forward into the future. I also hope that he will be able to continue to operate Billable Hours as an aid to both me and to other attorneys who need a bit of help, attorneys that may be starting out in practice who are relying on Court-appointed cases to provide income, attorneys who may be waiting for the next big retainer so they can hire someone to help with the paperwork. In short, I am writing about attorneys like me who appreciate Robert and Billable Hours and all they can provide to us and to our practice.

Thanks,

M. Tim Arrants

M. Timothy Arrants

Law office of

J. DERRECK WHITSON
Attorney and Counsellor at Law

Telephone: (423) 613-0160

Telecopier: (423) 613-016

September 20, 2007

Robert L. Foster, Esq.
P.O. Box 10
Greeneville, TN 37744

Re: Billable Hours, Inc.

Dear Robert:

I am in receipt of your letter dated this day and wanted to express my gratitude for you and your company. I appreciate all your hard work and dedication because without your service I could not practice law and manage my practice. Your company allows me to serve indigent clients that need legal representation, but cannot afford the costly retainers that must be charged. Good luck with your endeavors to return the service that you provide to the members of the Tennessee bar.

With kindest personal regards I remain,

Yours very truly,

J. Derreck Whitson

325 East Broadway • P.O. Box 1230 • Newport, Tennessee 37822-1230

KELLI BARR SUMMERS
P. O. Box 1084
Brentwood, TN 37024
615-221-0976

September 25, 2007

Robert Foster
CEO/President
Billable Hours, Inc.
P.O. Box 10
Greeneville, TN 37744

Dear Mr. Foster:

I am writing in regards to the valuable service your organization has provided.

As a sole practitioner, I am responsible for every aspect of my law practice including the administrative functions. I have chosen for many reasons to limit my practice to Juvenile dependency and neglect law and adoptions. As such, my source of income is mainly from court appointments paid by the AOC.

Historically, I have had a cash flow problem with my practice due to the inability to track payments through the AOC for a specific scheduled payment date. Once I submit the billing forms to the AOC it takes almost 6 – 8 (six to eight) weeks to receive a check.

Since enrolling with your company, I have submitted over two dozen claims. Upon obtaining my submitted paperwork, I received a check within 72 (seventy two) hours. I still exercise control over preparing the claim form, attaching the required documentation and having the forms signed by a judicial officer, which I did when dealing directly with the AOC. The only thing that I do not have control over is when I receive payment for my services. As previously stated, since my association with your firm, I receive payment within 72 (seventy two) hours. This has been a tremendous help in balancing my monthly budget. Moreover, I do not have to bother the AOC about payment requests and, lastly, I get paid for the services I have rendered in a timely fashion. Since I get paid much quicker, I am more eager to submit my claim forms and continue to accept court appointed cases.

The service your company has provided me has alleviated a tremendous amount of stress for my family and myself. My practice has allowed me to spend more time with my own children while they are young. I am able to be my own boss and set my own hours around the needs of my family especially since my husband's job does not offer a flexible schedule.

I enjoy the work I do with suffering families in my community. I believe that I have provided a valuable service to many families over the past years. I have not only protected many children in my community but also helped put many families back together in a safer, happier home for all. I cannot continue to do this work without the benefit of the services of your company. Prior to learning of your company, I had begun a job search for employment with a steady, guaranteed income. The prospect of such a move was a great source of sadness for me.

I look forward to our continued business relationship in the future.

Sincerely,

Kelli Barr Summers

Kelli Barr Summers

LAW OFFICES
HERNDON, COLEMAN, BRADING & McKEE
104 EAST MAIN STREET
JOHNSON CITY, TENNESSEE 37604

JAMES E. BRADING
THOMAS C. McKEE
CHARLES T. HERNDON IV
J. EDDIE LAUDERBACK
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MAILING ADDRESS:
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JOHNSON CITY, TENNESSEE 37605-1160

TELEPHONE (423) 434-4700
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C. T. HERNDON III (Retired)
J. PAUL COLEMAN (1919-2008)

WRITER'S DIRECT DIAL
(423) 434-4721
Martha T. O'Quinn, Legal Assistant
(423) 434-4703

September 25, 2007

Billable Hours, Inc.
PO Box 10
Greeneville, TN 37744

Elizabeth A. Sykes, Director
Administrative Office of the Courts
Nashville City Center, Suite 600
511 Union Street
Nashville, TN 37219

Dear Billable Hours and Ms. Sykes:

I am writing to express my deep concern over the events that have transpired between Billable Hours, Inc and the Administrative Office of the Courts over the past few weeks. I am a younger attorney, having been licensed for a little over a year now. I began taking many court appointed cases in January of 2006 in efforts to build up my caseload and develop a criminal and domestic practice. The number one thing that acted as a deterrent from taking appointed cases after I became much busier was the billing process. I understand that this process is the "nature of the beast". However, I soon found myself with less and less time to fill out all the paperwork and follow up on a lot of my claims that were not getting processed due to inherent difficulties within the system, i.e. getting certain judges to sign orders, making sure court clerks actually processed the claims, etc. It got to the point in late summer where I said to myself that I was done with the hassle, because it simply became more trouble than it was worth.

Billable Hours solved all of this for me and made me excited to take court appointments again.

I cannot adequately express what a wonderful service this is. When I initially signed up, I handed over one of my billing software invoices for an appointed case that had been sitting on my desk because I dreaded having to process the claim. I was paid for my services in less than a week. Billable Hours professionally handled the claim for me, filling out the forms and Orders and providing me with an envelope to mail everything back to them after I signed the completed forms. They even caught a few mistakes I had made while keeping my time, but all the independent legal judgment that went into the actual billing process was solely my own. I was

given complete control of the review and certification of my own claims and accompanying documents. Removing the tediousness of the process allowed me to focus much more time on actually practicing law, which has helped me to become a more efficient and effective attorney.

I am greatly distressed at the current status of the situation and sincerely hope as a practitioner that things can be resolved in a timely fashion. Please feel free to contact me with any questions or concerns.

I am,

Very truly yours,

HERNDON, COLEMAN, BRADING & MCKEE

J. Matthew Bolton

KENDRICKS LAW OFFICE
101 KIOWA TRAIL
MADISON, TN 37115

Attorney Charisse Kendricks
Phone/Fax: 615-868-6835
ckendricks@comcast.net

Family Law
Probate, Wills
Guardian ad Litem

September 25, 2007

Billable Hours, Inc.
P.O. Box 10
Greenville, TN 37744

Dear Attorney Foster:

As a sole practitioner, Billable Hours, Inc., ("BHI") has allowed me to focus more on my cases and to be able and more willing to take more assigned cases. Your services have eliminated the stress of the time it takes to bill the Administrative Office of the Courts ("AOC") and not know when I will receive a check. Since contracting with BHI to bill the AOC, the frustration and stress of waiting for months to be paid has disappeared. Now I am paid for the work that I do on assigned cases much more promptly. Because of your help I am enjoying my work and devoting more time to the practice of law.

I still manage and maintain control of all my claims, including the documents that I have to submit to the AOC. I continue to keep a hard copy of all of the claims that I submit to AOC through BHI and I still use Quicken as my accounting program for tax purposes. Even though I continue to keep track of the time that I spend in and out of court, managing my accounting is not as time consuming.

BHI has helped me to plan for the future of my business because I can be sure that I will be getting reimbursed promptly. As a sole practitioner, it was difficult to purchase major items that would benefit my business because I never knew when the next check from AOC would arrive.

Recently, I needed to update some of my office equipment because it was not working. Without the services of BHI I would have had to wait two or three months to be able to budget to get the necessary equipment. Thanks to BHI I purchased new office equipment right away knowing that BHI would be reimbursing me promptly.

Finally, thanks so much for your services that have helped to remove the stress of billing the AOC and waiting for a check, helping me to be able to take more cases, thereby, growing my practice to eventually become financially sound.

Sincerely yours,

Charisse Kendricks

Attorney Charisse Kendricks

Susie Piper McGowan
P. O. Box 6
Nunnelly, TN 37137
615-405-8115

September 25, 2007

Robert Foster
CEO/President
Billable Hours, Inc.
P.O. Box 10
Greeneville, TN 37744

Dear Mr. Foster:

I am writing in regards to the valuable service your organization has provided.

As a sole practitioner, I am responsible for preparing my own motions, orders (as directed by the court), attending court appearances, Child and Family Team meetings and seeing my clients or contacting their caregivers (my entire practice is court appointed guardian ad Litem work). I also do my own trial preparation and law research. Additionally, I have to find time to prepare the billing statements in order to get paid.

Unfortunately, billing is something I put off until the last possible moment and that is my fault. The reason is twofold: one, I have to schedule office time to sit down and devote the hours necessary to bill and secondly, once I submit the billing form, it takes almost 6 – 8 (six to eight) weeks to receive a check from the AOC, which is quite depressing. In the past, I have made numerous phone calls to the AOC to see when I can expect payment. I do not blame the personnel at the AOC because, as a former business manager, I truly understand the volume of claims they have to process and the time it takes to process those claims. Whenever I have called to inquire as to the status of a payment, I usually speak with Jeana Hendrix. She has always been polite, respectful and courteous and tells me what phase my claim is in, i.e., not processed, processed, or waiting on the check to be prepared.

Since enrolling with your company, I have submitted over two dozen claims. Upon obtaining my submitted paperwork, I received a check within 72 (seventy two) hours. I still exercise control over preparing the claim form, attaching the required documentation and having the forms signed by a judicial officer, which I did when dealing directly with the AOC. The only thing that I do not have control over is when I receive payment for my services. As previously stated, since my association with your firm, I receive payment within 72 (seventy two) hours. This has been a tremendous help in balancing my monthly budget. Moreover, I do not have to bother the AOC about payment requests and, lastly, I get paid for the services I have rendered in a timely fashion. Since I get paid much quicker, I am more eager to submit my claim forms.

Again, I want to thank you for the services you have provided.

Sincerely,

Susie Piper McGowan

Brad L. Davidson
Attorney At Law
317 East Main
Newport, Tennessee 37821
Phone (423)613-8100 Fax (423)613-0085

October 4, 2007

Billable Hours, Inc.
P.O. Box 10
Greeneville, TN 37744

Re: Supreme Court of Tennessee Denial of Service

To Whom It May Concern:

I have been a customer of Billable Hours for nearly two months now. I enthusiastically endorse the service they provide and, after several years of practice and numerous assigned cases, can report that:

1. The ease with which my assigned case billings can be done now versus past headaches makes me more willing to accept assigned cases;
2. I do not have to devote the time I used to gathering clerical information for the billings. I can spend my valuable time on other things (such as attention to the details and legal aspects of the assigned case)
3. My office staff does not have to deal with my complaints regarding timely billing for assigned cases.

I retain independent judgment regarding the information and time that I ask the State reimburse me for. As long as this information remains accurate, and the State is not asked to reimburse erroneously, I fail to understand why the service provided by Billable Hours is illegal.

If I can provide any further information please let me know.

Best Regards,

Brad L. Davidson, Esq.
Attorney At Law

Roger W. Smith
Attorney at Law
• • •
333 E. Main St.
Newport, TN 37821
Office: (423) 625-8498
Fax: (423) 625-8499

October 1, 2007

TO WHOM IT MAY CONCERN

Re: Billable Hours, Inc.

Please note that the services provided by Billable Hours, Inc., are indeed of great assistance to both me and to fellow attorneys with whom I have discussed this matter. Their assistance in filing these claims does indeed free me to work on other things and does allow my staff to conduct other facets of office duties.

I support Billable Hours, Inc., and do hope that all matters can be resolved in the best interest of all parties.

Sincerely,

Roger W. Smith

RWS/skj

In re: Supreme Court Rule 13

Exhibit D

San Diego County Bar Association,
Ethics Opinion 2007-1

SAN DIEGO COUNTY BAR ASSOCIATION

Ethics Opinon 2007-1

I. FACTUAL BACKGROUND

A partner in a two-lawyer California litigation firm was contacted by a business acquaintance to defend a complex intellectual property dispute in San Diego Superior Court. The attorney and his partner had limited experience in intellectual property litigation.

The attorney nonetheless took the case and assured the client of his firm's ability to develop a solid understanding of the areas of law involved. Without telling his client, the attorney contracted on an hourly basis with Legalworks, a firm in India whose business is to do legal research, develop case strategy, prepare deposition outlines, and draft correspondence, pleadings, and motions in American intellectual property cases at a rate far lower than American lawyers could charge clients if they did the work themselves. None of the foreign-licensed attorneys at Legalworks held law licenses in any American jurisdiction.

The California attorney reviewed the work he got from Legalworks and signed all court submissions and communications with opposing counsel himself. The work of Legalworks was billed to the client at cost, but was classified on the bills in broad categories such as "legal research" or "preparation of pleadings."

Ultimately, the attorney and his partner obtained dismissal of the case on a summary judgment motion. When the client asked how the attorneys developed the theory on which summary judgment was granted, and had done the work so inexpensively, the attorney told him that virtually all of the work was done by India-based Legalworks.

II. QUESTIONS

A. Did the attorneys violate RPC 1-300 by aiding Legalworks in the unauthorized practice of law?

B. Did the attorneys have a duty to inform the client of the firm's arrangement with Legalworks before or at the time of entering the contract with Legalworks?

C. Did the attorneys violate RPC 3-110 by the extent to which that firm relied on Legalworks to provide substantive expertise that the attorneys lacked to defend the suit? Specifically, may a California lawyer with limited experience in the subject matter of the service to be undertaken outsource important responsibilities in performing the service to a "lawyer" reasonably believed to be competent who is not licensed or otherwise authorized to practice in California? Does the answer differ if the other lawyer is licensed to practice law in another U.S. state rather than in another country?

III. AUTHORITIES CITED

Cases
Baron v. City of Los Angeles (1970) 2 Cal.3d 535
Birbower, Montalbano, Condon & Frank, PC v.
Superior Court (1998) 17 Cal.4th 119
Bluestein v. State Bar (1974) 13 Cal.3d 162
Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.
(2002) 99 Cal.App.4th 1094
Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal.App.3d 1142
Crane v. State Bar (1981) 30 Cal.3d 117
Gafcon, Inc. v. Ponsor & Associates (2002) 98 Cal.App.4th 1388
Matter of Phillips (Rev.Dept. 2001) 4 Cal.State Bar Ct. Rpt. 315
People ex rel. Lawyers' Institute of San Diego v.

Merchants Protective Corp. (1922) 189 Cal. 531
Upjohn Co. v. United States (1981) 449 U.S. 383
Vaughn v. State Bar (1972) 6 Cal.3d 847

Statutes
California Business and Professions Code §6067
California Business and Professions Code §6068
California Business and Professions Code §6125
California Business and Professions Code §6126
California Evidence Code §912

Rules
ABA Model Rule 1.1
ABA Model Rule 5.1
ABA Model Rule 5.3
Rule of Court 227
Rule of Court 965
Rule of Court 983
Rule of Professional Conduct 1-100
Rule of Professional Conduct 1-300
Rule of Professional Conduct 3-110
Rule of Professional Conduct 3-500

Ethics Opinions
ABA Ethical Consideration 3-6
ABCNY Formal Op. 2006-3
Cal. State Bar Form. Opn. 1982-68
COPRAC Formal Opinion 1994-138
COPRAC Formal Opinion 2004-165
Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion No. 518 (June 19, 2006)

New York Committee on Professional and Judicial Ethics, Formal Opinion 2006-3 (August 2006)
Orange County Bar Formal Opinion No. 94-2002 (1994)
State Bar Opinion 1987-91

Other
David Lazarus, Looking Offshore: Outsourced UCSF notes highlight privacy risk. How one offshore worker sent tremor through medical system, S.F. Chron., March 28, 2004
Marcia Proctor, Considerations in Outsourcing Legal Work, Mich. Bar Journal, September 2005
Eileen Rosen, Corporate America Sending More Legal Work to Bombay, NY Times, March 14, 2004
Indian Evidence Act of 1972

IV. DISCUSSION

As an initial matter, the Committee emphasizes that a California attorney has a duty under the applicable law and rules to act loyally and carefully at all times. Outsourcing does not alter the attorney's obligations to the client, even though outsourcing may help the attorney discharge those obligations at lower cost.

A. Did the Attorneys Aid the Unauthorized Practice of Law?

California Business and Professions Code section 6125, part of the State Bar Act, states: "No person shall practice law in California unless the person is an active member of the State Bar." RPC 1-300(A) states: "A member shall not aid any person or entity in the unauthorized practice of law." Leading or assisting the layman in his or her unauthorized practice of law is considered aiding and abetting in California. (Bluestein v. State Bar (1974) 13 Cal.3d 162 ; Cal. Bus. & Prof. Code §§ 6125 and

6126.)

The State Bar Act does not define the practice of law. In 1922, the California Supreme Court defined the practice of law as "the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure." (People ex rel. Lawyers' Institute of San Diego v. Merchants Protective Corp. (1922) 189 Cal. 531, 535, internal quotation marks and citation omitted.) The practice of law "includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court." (Ibid., internal quotation marks and citations omitted.) The definition delineates "those services which only licensed attorneys can perform." (Baron v. City of Los Angeles (1970) 2 Cal.3d 535, 543.)

The California Supreme Court has refined the scope of the unauthorized practice of law to include legal work by New York attorneys in connection with prospective private arbitration in California. (Birbower, Montalbano, Condon & Frank, PC v. Superior Court (1998) 17 Cal.4th 119 ("Birbower").) In that fee collection/malpractice action, the Court rejected the New York attorneys' argument that section 6125 is not meant to apply to out-of-state attorneys. "Competence in one jurisdiction does not necessarily guarantee competence in another. By applying section 6125 to out-of-state attorneys who engage in the extensive practice of law in California without becoming licensed in our state, we serve the statute's goal of assuring the competence of all attorneys practicing law in this state." (Id. at 132.)

In Birbower, the Court focused on what is meant by the practice of law "in California" for purposes of section 6125. The Court concluded that the New York attorneys "clearly" had practiced law "in California" in violation of section 6125 by: (1) traveling to California on several occasions over a two-year period to discuss with the client and others various matters pertaining to the dispute; (2) "discuss[ing] strategy for resolving the dispute and advis[ing] [the client] on this strategy" in California; (3) meeting with the client "for the stated purpose of helping to reach a settlement agreement and to discuss the agreement that was eventually proposed"; (4) and traveling to California "to initiate arbitration proceedings before the matter was settled." (Id. at p. 131.)

The Court further made it clear that section 6125 could be offended by actions taken by the attorneys when they were not physically present in the state. "The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state or created a continuing relationship with the California client that included legal duties and obligations. [] Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. . . . For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means." (Id. at pp. 128-129.) Conversely, the Court rejected a rule that "a person automatically practices law in California' whenever that person practices California law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite." (Id. at p. 129, emphasis in the original, citations omitted.) In other words, physical presence in the state is neither necessary nor sufficient to engage in activities constituting the practice of law "in California" in violation of section 6125. Instead, California courts "must decide each case on its individual facts." (Ibid.)

Nonetheless, it is clear from the nature of the work Legalworks performed that, if Legalworks had done the work directly for the client, Legalworks would have been engaged in the unauthorized practice of law.(1) The question is whether Legalworks' act of contracting to do the work for a California attorney, who in turn exercised independent judgment(2) in deciding how and whether to use it on the client's behalf, rendered the services that Legalworks provided something other than the practice of law. We conclude that it did.

While there is no case law on point(3), there is instructive case law in analogous contexts. In Gafcon, Inc. v. Ponsor & Associates (2002) 98 Cal.App.4th 1388, an

insured sued an insurer's captive law firm seeking a declaration, among other things, that the insurer had engaged in the unauthorized practice of law by using the captive firm briefly to defend the insured. Both the trial court and the Court of Appeal rejected the contention. The insurer did not "influence or interfere" with the attorney's ability to represent the insured or direct or control the attorney's representation in any way. (Id. at 1415.)

In further determining that the insurer had not engaged in the impermissible corporate practice of law, the Court of Appeal favorably discussed State Bar Opinion 1987-91, even while emphasizing it was not bound by State Bar Opinions. That State Bar Opinion concluded that in-house counsel does not aid an insurer in engaging in the unauthorized practice of law by representing insureds in litigation as long as, among other things, "the insurance company does not control or interfere with the exercise of professional judgment in representing insureds. . . ." (Gafcon, Inc., 98 Cal.App.4th at 1413, citing State Bar Opinion 1987-91 at *1.) The State Bar Opinion further concluded that use of salaried employee attorneys within an insurer's law division to represent insureds does not violate the corporate practice of law "as long as [inter alia] attorneys within the law division (1) do not permit the division to 'become a front or subterfuge for lay adjustors or others unlicensed personnel to practice law;' [and] (2) adequately supervise nonattorney personnel working under the attorneys' supervision. . . ." (Gafcon, Inc., 98 Cal.App.4th at 1413, quoting State Bar Opinion 1987-91. See also Orange County Bar Formal Opinion No. 94-002 (1994) (opining that a paralegal who does work of a preparatory nature, such as drafting initial estate planning documents, is not engaged in the unauthorized practice of law where the attorney supervising the paralegal maintains a "direct relationship" with the client, citing ABA Ethical Consideration 3-6.) The key issue appears to be the amount of supervision over the non-lawyer: the greater the independence of the non-lawyer in performing functions, the greater the likelihood that the non-lawyer is practicing law.

Thus, the attorney does not aid in the unauthorized practice of law where he retains supervisory control over and responsibility for those tasks constituting the practice of law. The authorities make it clear that under no circumstances may the non-California attorney "tail" wag the California attorney "dog."(4) The California Supreme Court in Birbower specifically rejected the trial court's implicit assumption that the New York attorneys may have been able to perform the legal work that they did in California had they simply associated California counsel into the case. There is "no statutory exception to section 6125 [that] allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar." (Birbower, 17 Cal.4th at 126, note 3. Compare Rule of Court 983, authorizing pro hac vice admission to practice of law in California of out-of-state attorney in good standing in his jurisdiction who associates an active member of the California bar as attorney of record and subjects himself to the California Rules of Professional Conduct.)

The California lawyer in this case retained full control over the representation of the client and exercised independent judgment in reviewing the draft work performed by those who were not California attorneys. His fiduciary duties and potential liability to his corporate client for all of the legal work that was performed were undiluted by the assistance he obtained from Legalworks. In short, in the usual arrangement, and in the scenario described above in particular, the company to whom work was outsourced has assisted the California lawyer in practicing law in this state, not the other way around. And that is not prohibited.(5)

B. Did the Attorneys Have the Duty to Inform the Client of the Firm's Arrangement with Legalworks?

The only published California opinion which addresses this issue, LACBA Opinion No. 518, concludes that the use by a California lawyer of the services of non-lawyers (commonly referred to as "outsourcing") "may be a 'significant development' within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m)", and that, when it is a "significant development", rule 3-500 and Section 6068 require that the California attorney inform the client prior to utilizing the outsourcing service. Opinion 518 applies CORBAC's analysis in Formal Opinion

outsourcing service. Opinion 518 applies COPRAC's analysis in Formal Opinion 2004-165 (this opinion holds that the use of a contract lawyer may be a "significant development" which would require that the client be informed) to services provided by non-lawyers. Formal Opinion 2004-165, in turn, relies upon the rule established in Formal Opinion 1994-138, in which COPRAC found that the use of an outside lawyer can constitute a "significant development".

Formal Opinion 2004-165 holds that the use of a contract lawyer may be a "significant development" but acknowledges that the determination of whether the use of a contract lawyer is a "significant development" is based upon the circumstances of each case. Opinion No. 518 considers the somewhat different issue of whether the client must be informed of a decision to "outsource" the drafting of an appellate brief to a non-lawyer outsourcing company, but relies upon Formal Opinion 2004-165 to conclude similarly that "[t]he relationship with [the outsourcing company] may be a 'significant development' within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m)". Although Opinion No. 518 further states that "[i]n most instances, the filing of an appellate brief will be a 'significant development'," it does not provide specific guidance under other facts.

Although an issue may once have existed as to whether the decision to use the services of lawyers outside of the attorney's firm could constitute a "significant development" which required that the client be informed, that issue appears settled by both COPRAC Formal Opinions 1994-138 and 2004-165. Formal Opinion 1994-138, recognizes that the use of another attorney is a "significant development", but states that the determination of "whether it is a significant development" should be made by considering the following factors: (1) whether responsibility for overseeing the client's matter is being changed; (2) whether the new attorney will be performing a significant portion or aspect of the work; and (3) whether staffing of the matter has been changed from what was specifically represented to or agreed to by the client. In Formal Opinion 2004-165, COPRAC held that the determination as to whether a development is "significant" is not only a function of the three factors discussed in Formal Opinion 1994-138, but also whether the client had a "reasonable expectation under the circumstances" that a contract lawyer would be used to provide the service. To determine whether the "outsourcing" of services to non-lawyers is a "significant development," Opinion No. 518 merely extends COPRAC's analysis in "contract lawyer" cases to that factual scenario. Although the factual scenarios are different in each case, all of these decisions clearly are founded upon a recognition that the determination of whether and when to inform the client as to the use of outside services can be a "significant event" is a function of the client's expectations with respect to the services which are to be provided by the attorney.

We agree with Opinion No. 518 that the factors addressed by COPRAC in Formal Opinion 2004-165 should not be limited to the use of outside attorneys, and will also determine whether the client must be informed when a service is "outsourced" by an attorney to a non-attorney. The analysis of Formal Opinion 2004-165 should not be limited to whether the service to be "outsourced" technically involves the practice of law; to the contrary, the duty to inform the client is determined by the client's reasonable expectation as to who will perform those services. Therefore, if the work which is to be performed by the outside service is within the client's "reasonable expectation under the circumstances" that it will be performed by the attorney, the client must be informed when the service is "outsourced". Conversely, if the service is not a service that is within the client's reasonable expectation that it will be performed by the attorney, the attorney is not necessarily required to inform the client immediately, absent other requirements compelling disclosure.

We believe 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.(6)

C. Did the Attorneys Violate RPC 3-110 by the Extent to which the Firm Relied on Legalworks to Provide Substantive Expertise that the Attorneys Lacked?

1. Duty of Competence

Section 6067 of the California Business & Professions Code recites the attorney's oath "to faithfully discharge the duties of an attorney at law to the best of his knowledge and ability." California Rule of Professional Conduct 3-110(A) states, "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Rule 3-110(B) defines acting with "competence" to mean applying "the 1) diligence, 2) learning and skill, and 3) mental, emotional and physical ability reasonably necessary for the performance of such service."

An attorney may, consistent with the duty of competence, enlist the services of others when they are unfamiliar with the area of law at stake. Specifically, RPC 3-110(C) states, "If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." (See also ABA Model Rule 1.1, Comment 1 – competent representation can be provided by associating with counsel that established competence in a particular field.)

An attorney unfamiliar with the area of law in a case must acquire the knowledge and skill necessary to act competently in the case. The attorney may acquire that knowledge and skill by learning the area of law, associating experienced counsel who already knows the law, or other means suited to the case. Failure to acquire such knowledge can be the basis for sanctions. (See CRC 227.) Overall, the duty to act competently requires an attorney to know whether they can handle a particular case and, if they are unable to do so, the attorney must choose a suitable alternative to protect the client's interests.

Retaining a firm experienced in American intellectual property litigation does not relieve the attorney from the duty to act competently. The attorney retains the duty to supervise the work performed competently, whether that work is outsourced out-of-state or out of the country.(7) An attorney's duty to act competently in a supervisory role is highlighted in the discussion section of rule 3-110, which states, "The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorneys and non-attorney employees or agents." (See Crane v. State Bar (1981) 30 Cal.3d 117, 123 ("An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority;" see also ABA Model Rule 5.1(b) – "a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to insure that the other lawyer conforms to the rules of professional conduct.")

Nor does procuring work product from a firm experienced in American intellectual property litigation fulfill the attorney's duty to act competently. To satisfy that duty, an attorney must be able to determine for himself or herself whether the work under review is competently done. To make such a determination, the attorney must know enough about the subject in question to judge the quality of the work.

As noted above, there are various ways an attorney may acquire the knowledge needed to perform such a review. Whether an attorney has acquired such knowledge will, of course, depend on the facts and issues of the case at hand. An attorney may not, however, rely on a firm such as Legalworks to evaluate its own work. The duty to act competently requires informed review, not blithe reliance.

In addition to knowledge of the legal and factual issues in a case, and regardless of the attorney's level of expertise and experience in the subject matter of the assignment, the duty of competence may require an attorney to learn enough about a firm such as Legalworks to evaluate its general quality and reliability. The degree to which the duty requires such an inquiry will depend on the facts of the case. Factors

relevant to (though not exhaustive of) discharging the duty could include inquiry into (a) pertinent background information about the firm (such as industry reputation), and the individuals (such as qualifications), who will perform the work; (b) references of the firm or individuals assigned to perform the work. The duty also could require that the attorney (c) interview the firm in advance; (d) request a sample of the firm's work product that is comparable to your project; (e) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and executing it to the attorney's expectations; and (f) review ethical standards with individuals who will perform work and incorporate the ethical standards into the terms of the contract with the firm. (See ABCNY Formal Op. 2006-3; Marcia Proctor, Considerations in Outsourcing Legal Work, Mich. Bar Journal, September 2005, at 24.)

In the hypothetical scenario, whether the attorney discharged his duty of competence – or even whether he was capable of discharging his duty of competence without further study before accepting the representation – turns on how "limited" his experience was in intellectual property litigation at the time of the outsourcing. There is plainly a point at which an attorney will lack sufficient understanding of a kind of legal work that he will be unable to accept the work and outsource aspects of it at all because he will be incapable of critically and independently evaluating the work product he receives. The outsourcing posited by the hypothetical may constitute "professionally consulting another lawyer reasonably believed to be competent" for purposes of RPC 3-110 only if the attorney's "limited" experience was sufficiently substantial to enable him to perform that indispensable evaluative function.

2. Responsibility for Work

In addition to bearing a duty to competently supervise the performance of the outsourced work, an attorney also retains ultimate responsibility for that work. (Vaughn v. State Bar (1972) 6 Cal.3d 847, 857; Matter of Phillips (Rev.Dept. 2001) 4 Cal.State Bar Ct. Rpt 315, 335-336; Cal. State Bar Form. Opn. 1982-68; ABA Model Rule 5.3). By retaining responsibility for the work, the supervising attorney is subject to the ABA Model Rules that hold a lawyer responsible for another lawyer's violation of professional responsibility rules where: 1) the lawyer orders or ratifies the misconduct; or where 2) the lawyer has supervisory authority over the other lawyer and knows of the conduct at the time when the consequences could have been avoided or mitigated but failed to take remedial action. (ABA Model Rule 5.1(c) & Comment 5.)(8)

3. Considerations in Supervising Work Performed Abroad

The degree of supervision warranted for outsourced work was magnified by the work being performed in India rather than a United States jurisdiction. A number of obstacles can arise when work is assigned to foreign companies. An attorney acting with competence will foresee and understand such obstacles and will weigh them against the client's interests. Some legal ethics experts, like Stephen Gillers, believe that "[t]here is no problem with offshoring, because even though the lawyer in India is not authorized by an American state to practice law, the review by American lawyers sanitizes the process." (Ellen Rosen, Corporate America Sending More Legal Work to Bombay, NY Times, March 14, 2004.) We agree only to a point. In order to satisfy the duty of competence, an attorney should have an understanding of the legal training and business practices in the jurisdiction where the work will be performed.

One factor should be considered when outsourcing work is the educational background of those persons performing the work. While an attorney in another U.S. state will have a legal educational background comparable to that of the assigning attorney, an attorney abroad may not. The necessary training to become a lawyer differs around the world. In order to determine the applicable ethical rules, a lawyer must first determine whether the worker is a "nonlawyer" or "lawyer" within the foreign jurisdiction. In order to do so, the U.S. lawyer must know something about the requirements of lawyering where the work will be performed and the credentials of those who will actually perform the work. In cases where the attorney is supervising nonlawyers, reasonable steps must be taken to ensure that the nonlawyer's conduct

nonlawyers, reasonable steps must be taken to ensure that the nonlawyer's conduct meets the assigning attorney's professional obligations. (ABA Model Rule 5.3(b).) In the instant scenario, this means the lawyer should make sure that anyone who assists on the case will not expose the assigning attorney to a possible violation of the professional responsibility rules in the attorney's jurisdiction. (ABA Model Rule 5.1(b).)

Other questions the State Bar may consider in determining the adequacy of supervision of non-California lawyers include: i. whether the non-attorney be disciplined, perhaps even terminated, by the attorney for improper conduct; ii. whether the non-attorney's compensation be adjusted by the attorney for poor performance by the non-attorney; iii. whether the non-attorney has been educated and/or trained in any way by the attorney; iv. whether the attorney has the ability to review the non-attorney's work ethics and practices; v. whether the attorney regularly provides input to the non-attorney on his/her performance; and vi. whether the attorney has the ability or discretion to restrict or confine the non-attorney's areas of work or scope of responsibility. In the case of a paralegal or other employee, the answer to these questions would be yes, but for an overseas lawyer the answers would be no. Those distinctions as well, then, justify a heightened duty of supervision under the hypothetical facts.

In addition, part of acting competently in the case of outsourcing work is ensuring other duties are fulfilled as well. An additional duty of an attorney who outsources work, whether within the U.S. or abroad, is to "maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, or his or her client." (See Business & Professions Code section 6068(e).) This is especially important as the legal and ethical standards applicable to foreign lawyers may differ from those applicable to domestic lawyer, particularly with respect to client confidentiality, the attorney-client privilege, and conflicts of interests.(9) One unfortunate example of a breach of confidentiality involving an outsourced project concerns a medical transcription project that was subcontracted to India. There, the subcontractor threatened to post confidential patient records on the Internet unless the UC San Francisco Medical Center retrieved money owed to the subcontractor from a middleman. (David Lazarus, Looking Offshore: Outsourced UCSF notes highlight privacy risk. How one offshore worker sent tremor through medical system, S.F. Chron., March 28, 2004.)

Legalworks was not retained as an attorney but to provide law-related assistance. Thus, there would be an argument that the attorney-client privilege that applies in the outsourcing company's jurisdiction would be irrelevant. Instead, the applicable rule is that the attorney-client privilege is not waived for disclosure of information "reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted . . . ." (Cal. Evid. Code §912(d).) As the above example shows, it is not clear that California privilege law would apply to a threatened breach of confidentiality by the outsourcing company. Given the uncertainty – not to mention the substantial geographical distances -- imposing a duty of heightened due diligence is warranted.

V. CONCLUSION

The Committee concludes that outsourcing does not dilute the attorney's professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged. Under the hypothetical as we have framed it, the California attorneys may satisfy their obligations to their client in the manner in which they used Legalworks, but only if they have sufficient knowledge to supervise the outsourced work properly and they make sure the outsourcing does not compromise their other duties to their clients. However, they would not satisfy their obligations to their clients unless they informed the client of Legalworks' anticipated involvement at the time they decided to use the firm to the extent stated in this hypothetical.

1. The important effect of that conclusion is that corporations, at least, may not directly contract with non-California attorneys to represent them in court in California absent pro hac vice admission of the attorney by the court. "As a general rule, it is well established in California that a corporation cannot represent itself in a court of record either in propria persona or through an

officer or agent who is not an attorney." (Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd. (2002) 99 Cal.App.4th 1094, 1101, citations omitted. See also Rule of Court 965, requiring registration of non-California in-house counsel advising corporations with California contacts and prohibiting their appearance in court absent pro hac vice admission.)

2. See discussion, infra, at Section C(1) regarding the attorney's duty of competence to be able to evaluate Legalworks' work product.

3. Through a somewhat different route, we reach the same general conclusion on this point as our colleagues in the Los Angeles County Bar Association. (See LACBA Professional Responsibility and Ethics Committee Opinion No. 518 (June 19, 2006) pp. 5-6 ("LACBA Opinion"). See also, Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2006-3 (August 2006).)

4. See LACBA Opinion at p. 9: "[I]n performing services for the client, the attorney must remain ultimately responsible for any work product on behalf of the client and cannot delegate to [outsourcing] Company any authority over legal strategy, questions of judgment, or the final content of any product delivered to the client or filed with the court. [] It follows that if a term of the agreement between the attorney and Company delegates to Company a decision-making function that is non-delegable, then the attorney may be assisting Company in the unauthorized practice of law or violating the ethical duties of competence and obligation to exercise independent professional judgment." We differ only in not qualifying the conclusion that such an abdication of a non-delegable duty would constitute assisting in the unauthorized practice of law in violation of RPC 1-300.

5. We do not address the interesting and perhaps fact-specific question whether an attorney who is incompetent to evaluate the work of an outsourced contractor, even if he retains control over the matter and exercise such independent judgment as he can, would indeed violate the prohibition on assisting the contractor in the unauthorized practice of law. For a discussion of the duty of competence, see infra Section (C)(1).

6. The client's reasonable expectation does not preclude use of employees of the attorney's firm, including partners, associate attorneys and paralegals, to perform work on the case, including research and drafting of documents. It should not ordinarily preclude other attorneys of the firm from making appearances on behalf of the client.

7. We note that California Rule of Professional Conduct 1-100 (B)(3) defines the term "lawyer" to include members of the State Bar of California, attorneys licensed in other state, the District of Columbia, and United States territories, "or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof."

8. In this case, of course, the ABA Model Rule is only applicable by analogy. As set forth in part II.A above, the work was not delegated and the person doing the work was not a California attorney. That, however, imposes more of a supervisory burden on the attorney not less of one.

9. Under India's attorney-client privilege, no attorney may: "(i) disclose any communication made to him in the course of or for the purpose of his employment as such attorney, by or on behalf of his client; (ii) state the contents or condition of any document with which he has become acquainted in the course of and for the purpose of his professional employment; or (iii) disclose any advise [sic] given by him to his client in the course and for the purpose of such employment." (Indian Evidence Act of 1972, quoted at www.lexmundi.com, India.) The attorney-client privilege is more limited than in America. For example, "[a]n in-house counsel is not recognized as an 'attorney' under Indian law. Thus, professional communications between an in-house counsel and officers, directors and employees are not protected as privileged communications between an attorney and his client. . . ." (lexmuni.com, India. Compare: "In Upjohn Co. v. United States (1981) 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, the United States Supreme Court expanded the previous 'control group test' and held that all confidential communications concerning the scope of their employment between corporate employees and the corporation's in-house counsel are covered by the attorney-client privilege." Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal.App.3d 1142, 1151 holding, however, that attorney-client privilege did not apply where in-house counsel merely acted as a negotiator, gave business advice, or otherwise acted as company's business agent. (Ibid).)

In re: Supreme Court Rule 13

Exhibit E

In re PNC Bank, Delaware v. Berg,
45 U.C.C.Rep.Serv.2d 27, 1997 WL 527978
(Del. Super., January 31, 1997)

H

In re PNC Bank, Delaware v. Berg
Del.Super.,1997.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

Re: PNC BANK, DELAWARE
v.
Howard M. BERG, Michael K. Tighe, Paul Cottrell, Donald L. Logan, Berg, Tighe & Cottrell, P.A., and Tighe, Cottrell & Logan, P.A.

No. 94C-09-208-WTQ.

Jan. 31, 1997.

Jeffrey S. Welch, Carl N. Kunz, Murphy Welch & Spadaro, Wilmington.
Jeffrey S. Goddess, Rosenthal Monhait Gross & Goddess, Wilmington.
Francis S. Babiarz, Biggs & Battaglia, Wilmington.
QUILLEN, Associate Judge.
***1** Gentlemen:

This is the Court's decision on plaintiff PNC Bank, Delaware's Motion for Partial Summary Judgment, defendant Howard M. Berg's Motion for Summary Judgment, and defendants Michael K. Tighe, Paul Cottrell, Donald L. Logan and Tighe, Cottrell & Logan, P.A.'s Motion for Summary Judgment. For the reasons herein stated, plaintiff PNC Bank's Motion is GRANTED in part and DENIED in part, defendant Berg's Motion is DENIED, and defendants Michael K. Tighe, Paul Cottrell, Donald L. Logan and Tighe, Cottrell & Logan, P.A.'s (collectively "the Tighe defendants") Motion is DENIED.

FACTS

Howard M. Berg ("Berg") was a fixture on Delaware's legal landscape from his admission to the Bar in the 1950s until his retirement in the 1990s. His law firm has undergone many personnel changes over the years, but the one constant was the presence of Berg as the sole or majority partner. At the beginning of the time period relevant to this inquiry, around 1992, Berg's firm was Berg, Tighe & Cottrell, P.A. ("the Berg firm"). Berg owned 80% of the shares of the firm.

In early 1992, the Berg firm undertook a relocation and upgrade of its office space. To finance the project, Berg approached PNC Bank for a loan.[FN1] Berg spoke with Steven Clark, a loan officer at PNC Bank whom he had known for some time.[FN2] After reviewing Berg's personal financial statements, Clark set up two loans. The first was a $25,000 amortizing term loan for the Berg firm's new telephone system. The second was a $75,000 line of credit which would be drawn upon and repaid several times in the normal course of business. It is this second loan which is at the center of this litigation.

> FN1. At the time of the loan, PNC Bank was still operating the Bank of Delaware in its orginal name. For purposes of simplicity, the Court will refer to the lending bank under its current name, "PNC Bank."
>
> FN2. Clark was the lending officer on a 1989 loan made to a development corporation owned by Berg and Berg's wife. He was also the lending officer on a loan to a business entity owned by Berg's son-in-law, a loan which Berg guaranteed.

Clark sent a commitment letter on the loans to Kevin Downs, the Berg firm's controller,

that is, internal accountant, with a copy to Berg. Absent demand or default, the interest on the loan was to be paid monthly, and the principal had to be reduced to a zero balance once each fiscal year. The commitment letter contained no personal guarantees, nor did it take a security interest in furniture and equipment. Pursuant to the commitment letter, the Berg firm executed and delivered to PNC Bank a note in the amount of $75,000. The Berg firm also executed and delivered a financing statement covering "all existing and future accounts, accounts receivable, contract rights, chattel paper, notes, instruments, documents, [and] contracts" owned by the Berg firm. PNC Bank delivered to the Berg firm a security agreement to be executed on behalf of the Berg firm. The security agreement was returned to PNC Bank bearing only the signature of the Berg firm's secretary, defendant Paul Cottrell. PNC Bank sent the "partially executed" security agreement back to the Berg firm for full execution, but this was apparently never accomplished. The Berg firm subsequently made draws against the line of credit and payments against the draws, but by mid-1992 the entire $75,000 line of credit was outstanding.

***2** In December 1992, while Berg was vacationing in Florida, an agent of the United States Internal Revenue Service ("IRS") visited the Berg firm. Speaking to defendant Michael K. Tighe, she informed him that the Berg firm's withholding taxes had not been paid in some time and that delinquency notices had heretofore not been answered. The outstanding exposure on these unpaid taxes came to a total of $400,000. Defendants Tighe, Cottrell, and Logan confronted Downs regarding these financial discoveries. Downs apparently confirmed the IRS's report, telling them that Berg was aware of the nonpayment of the withholding taxes, having received and disregarded the delinquency notices. Downs also told Tighe, Cottrell, and Logan that Berg had engaged in various acts of self-dealing, including misdirecting to himself checks intended for the firm's accounts at banks. He estimated that Berg had diverted almost $200,000 in this fashion.

Having concluded about one month earlier that they needed to leave the firm, Tighe, Cottrell, and Logan were convinced by the IRS visit and Downs' revelations that the need was pressing and that they should leave immediately. On December 31, 1992, Tighe, Cottrell, and Logan, without warning to PNC Bank, Berg, or the Berg firm, withdrew from the law firm and opened the new law firm of Tighe, Cottrell & Logan, P.A. ("the Tighe firm"). They took with them over 300 client files, apparently the active files on which Tighe, Cottrell, and Logan had been working.

The IRS filed a lien against the Berg firm for the unpaid withholding taxes. Defendants Tighe, Cottrell, and Logan met with Berg and insisted that he pay off the tax lien. An accord of some sort was apparently reached, as the lien was subsequently released in exchange for Berg's payment to the IRS of approximately $250,000. In exchange for assuming sole responsibility for the tax lien, Berg demanded that Tighe and Cottrell return their stock interests in the Berg firm. The negotiations culminated in a letter agreement dated January 26, 1993, in which the following agreement was made:

Howard Berg and the corporation forego any claim for fee recovery on contingent fee cases which the departing attorneys now have with them. Costs incurred shall be reimbursed in the event and to the extent the cases close with a recovery sufficient to pay the same.

On February 7, 1993, an article about the

Berg firm had appeared in the Wilmington News-Journal, detailing the filing of the IRS lien and allegations of misconduct by Berg, and noting that the Berg firm was down to just three attorneys. Clark then sent Berg a letter in which he requested, once again, execution and return of the security agreement. The letter also requested information regarding plans for paying the outstanding loan balance, which accounts receivable remained with Berg and which were taken by Tighe, Cottrell, and Logan when they left, and a copy of an accounts receivable schedule. Apparently Berg never provided this information to Clark.

***3** During the first sixteen months after defendants Tighe, Cottrell, and Logan left the Berg firm, Berg continued to cover the monthly interest payments due on the $75,000 line of credit. None of the outstanding balance on the line of credit was paid down, although the terms of the note required that it be paid down to a zero balance at least once each fiscal year. Berg ceased making payments in April 1994. On June 9, 1994, PNC Bank's internal counsel sent a default letter to the Berg firm, demanding payment by July 31, 1994. A copy of the letter was sent to defendants Tighe, Cottrell, and Logan. Authority for the loan and its collection was transferred from Clark to Michael P. McIntyre ("McIntyre"), a "troubled loan" workout officer for PNC Bank. McIntyre spoke with Christopher Amalfitano ("Amalfitano"), an attorney working for the remaining Berg firm. On behalf of Berg and the firm, Amalfitano offered to assign to PNC Bank all right, title, and interest in certain accounts receivables, the total amount of which, if fully collected, would cover the outstanding loan. These receivables, however, were as much as eighteen months old and had already proven difficult for the Berg firm to collect. PNC Bank did not accept the offer, and instead filed this action in September 1994 against Berg, Tighe, Cottrell, and Logan individually, the Berg firm, and the Tighe firm. The three count Complaint alleged that Berg was liable on the note because he had personally guaranteed it, that Berg had tortiously interfered with the PNC Bank/Berg firm loan, and that PNC Bank had a perfected security interest in the files which Tighe, Cottrell, and Logan removed from the Berg firm and took to the Tighe firm. The Tighe defendants then filed a cross-claim against Berg, arguing that they are entitled to indemnification from Berg should they be found liable to PNC Bank.

Prior to the deadline for making dispositive motions, each party moved the Court for summary judgment with respect to either all or part of the claims. The Tighe defendant's Motion seeks a dismissal of PNC Bank's complaint insofar as it applies to them. Berg's Motion seeks dismissal of PNC Bank's claims against him and of the Tighe defendants' cross-claim. PNC Bank's Motion seeks summary judgment with respect to its claims against the Tighe defendants.

DISCUSSION

When considering a motion for summary judgment, the Court's function is to examine the record to determine whether genuine issues of material fact exist. *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, Del.Super., 312 A.2d 322, 325 (1973). If, after viewing the record in a light most favorable to the non-moving party, the Court finds there are no genuine issues of material fact, summary judgment will be appropriate. *Id.* The Court's decision must be based only on the record presented, including all pleadings, affidavits, depositions, admission, and answers to interrogatories, not on what evidence is "potentially possible." *Rochester v. Katalan*, Del.Supr.,

320 A.2d 704 (1974). All reasonable inferences must be drawn in favor of the non-moving party. *Sweetman v. Strescon Indus.*, Del.Super., 389 A.2d 1319 (1978). Summary judgment will not be granted if the record indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances. *Ebersole v. Lowengrub*, Del.Supr., 180 A.2d 467 (1962).

***4** For purposes of clarity and comprehension, the Court will address defendant Berg's Motion separately. The cross-motions filed by PNC Bank and the Tighe defendants will be addressed together, since they both deal with the same issue, namely, the existence and validity of a perfected security interest in the contingency fee files which Tighe, Cottrell, and Logan took with them upon their departure from the Berg firm.

Summary Judgment as to Defendant Berg

During the submission of briefs, PNC Bank withdrew its claim that Berg had personally guaranteed the loan. The only issues remaining from the Berg Motion are whether summary judgment in favor of Berg is appropriate as to PNC Bank's tortious interference claim against Berg and whether the Tighe defendants have a factual case in their claim for indemnification against Berg for any liability they may have arising out of the default on the note.

Delaware generally follows the Restatement with regard to tortious interference with a contract.

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

RESTATEMENT (SECOND) OF TORTS § 766 (1977). A long line of Delaware cases endorses this principle. *See, e.g., Irwin & Leighton, Inc. v. W.M. Anderson Co.*, Del.Ch., 532 A.2d 983, 992 (1987); *Bowl-Mor Co. v. Brunswick Corp.*, Del.Ch., 297 A.2d 61, 64,*appeal dismissed,*Del.Supr., 297 A.2d 67 (1972). Beyond this statement, there are five general elements to this tort.There must be (1) a contract, (2) about which defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury.

Irwin & Leighton, Inc., 532 A.2d at 992 (citations omitted). As these elements make clear, it is by no means necessary that the tortfeasor act for the primary purpose of interfering with the contract.It applies also to intentional interference ... in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action. *The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action.*

RESTATEMENT (SECOND) OF TORTS § 766, cmt. j (emphasis added).

PNC Bank's Complaint adequately alleges facts that, if proven, would support a claim for tortious interference. It alleges that, beginning in 1992, Berg knowingly diverted funds intended for the payment of the PNC Bank loan, as well as knowingly diverting other assets of the firm. The $400,000 federal tax lien was a direct consequence, it

alleges, of Berg's diversion of funds. The Complaint also alleges that, upon discovering Berg's diversion of firm funds, Tighe, Cottrell, and Logan decided to leave the firm. Finally, the Complaint alleges that Berg's actions resulted in the subsequent default on and non-payment of the PNC Bank loan.

***5** In making his Motion for Summary Judgment, Berg argues that PNC Bank has failed to demonstrate that Berg had the requisite intent to interfere and that PNC Bank has demonstrated a sustainable chain of causation from his actions to the Berg firm's defaulting on the loan. He makes several points in his argument. First, the Berg firm continued to make interest payments on the loan for more than one year after Tighe, Cottrell, and Logan departed. Second, the Berg firm offered to assign a substantial amount of accounts receivable to PNC Bank and assist in its collection. After they departure of Tighe, Cottrell, and Logan, the firm apparently continued to have ample resources to repay the loan, and even collected over $700,000 in receivables. Third, PNC Bank never made a demand for full payment of the loan, as the agreement permitted it to do, at the time it became concerned about the status of the loan. Fourth, PNC Bank never took any actions, beyond a letter and two conversations, to compel the Berg firm to pay the note down to a zero balance as required once every year.

In response, PNC Bank argues that Berg's reading of Delaware law and Section 766 of the Restatement is incorrect. It argues that PNC Bank need only show that the default on the loan was a necessary consequence of Berg's actions. PNC Bank asserts that it has satisfied the chain of causation by adequately alleging that Berg knowingly diverted the Berg firm's assets, that he knew the withholding taxes were not being paid, and that if he diverted funds earmarked for the PNC Bank loan it would not be paid. PNC Bank argues that interest payments on the loan from 1992 to 1994 do not interrupt the chain of causation. Finally, PNC Bank asserts that its refusal to accept the Berg firm's offer of accounts receivables and collection assistance is irrelevant because the offer was not made until after the Berg firm defaulted and because the accounts receivable were old and uncollectable.

After reviewing the party's contentions and examining all of the evidence in a light most favorable to PNC Bank as the nonmovant, the Court concludes that Berg's Motion for Summary Judgment must be denied. PNC Bank has brought sufficient facts regarding the existence of all five elements of the tort as the *Irwin & Leighton* Court described them. There was a contract, the PNC Bank loan, of which Berg clearly and undisputedly was aware. There is evidence, particularly in the testimony of Downs, the Berg firm's controller, tending to show that Berg's diversions of funds intended for the payment of the loan were intentional acts. There is also evidence in the record to support the conclusion that Berg's diversion of funds, not only those directly intended for payment of the PNC Bank loan but those which would have paid other firm expenses, including the withholding taxes, was a significant factor in causing a breach of the contract. That injury was caused to PNC Bank is clear, and the evidence, viewed in PNC Bank's favor, does not show that Berg's acts were justified. Under Delaware law, it appears that PNC Bank has set forth sufficient evidence to persuade this Court that summary judgment is inappropriate on this Count.

***6** The Court reaches the same conclusion applying the literal language of the commentary to Section 766 of the Restatement

(Second). The initial positions of both parties as to the requirements of Section 766 are incorrect. Actual intent to cause a default is not necessary, but a plaintiff must also show a little more than just that the default on the loan was a "necessary consequence" of the alleged tortfeasor's actions. What *is* necessary is that the effect of causing the breach is "known to [the tortfeasor] to be a necessary consequence of his action." RESTATEMENT (SECOND) OF TORTSSS § 766, cmt. j. Based on the evidence in the record, the Court is unable to conclude as a matter of law that Berg could not have known that the Berg firm's default on the loan would be a necessary consequence of his actions. The evidence in the record, particularly the testimony of Mr. Downs, if proven true, shows a systematic and continuous diversion of firm funds by Berg with the intent to keep his partners from discovering it. Downs' testimony alleges that Berg siphoned more than $250,000 of the firm's funds, funds that the firm needed to pay city, state, and federal taxes, as well as the PNC Bank loan. Downs also alleges that Berg threatened Downs with the loss of his job should he ever disclose any of Berg's actions to any of the other partners. Downs states that he told Berg that his actions were preventing the Berg firm from paying those debts. If Berg was indeed misappropriating firm funds and actively concealing the misappropriation, with the knowledge that his actions were impeding the firm's ability to operate in a financially sound manner, it is by no means an unforeseeable proposition that Berg simply had to know that his continued misappropriation of funds would ultimately cause the firm to be unable to meet its obligations with respect to the PNC Bank loan.

Berg, as the Court noted above, raises several facts that cast doubt on whether his alleged diversions of funds actually caused the Berg firm's default on the loan. Causation, however, generally involves substantial questions of fact and consequently is usually not susceptible to summary judgment. Such is the case here. For example, the fact that Berg continued to make interest payments on the loan may not mean much if his actions prior to that had already set the Berg firm on an irreversible course toward default. However, the Berg firm's collection of over $700,000 in receivables itself raises questions regarding why those funds were not used to pay down the balance. Finally, the Court wonders why PNC Bank failed to take any action prior to the default to ensure that the balance was paid down, such as insisting upon adherence to the yearly zero balance requirement. These and other unanswered question prevent the Court from deciding the causation issue at this stage.

Berg also asserts that he is entitled to summary judgment on the cross-claim filed against him by the Tighe defendants, a cross-claim that seeks to have Berg indemnify them should they be found liable to PNC Bank. He claims that the letter agreement of January 26, 1993 contains an express indemnity provision that limits Berg's liability for indemnification strictly to taxes:

*7 Howard Berg and the corporation will indemnify Michael Tighe, Paul Cottrell and Don Logan and hold them harmless against any claims, assessments or liability arising from or with respect to the corporation's taxes including state and local taxes.

Notwithstanding Berg's arguments, the letter agreement did not purport to be an integrated dissolution agreement, complete on its terms. There is nothing to suggest that it was intended to represent a comprehensive treatment of all issues which could arise after the break up of the Berg firm. In other words, there is nothing to suggest

that the parties intended that tax liability was the only point on which liability would be agreed. The cases cited by Berg do not support his claim. Rather, they make it clear that the parties' intent to indemnify something must be *clearly and unequivocally* expressed in the indemnification agreement. *See* Rock v. Delaware Elec. Coop., Inc., Del.Super., 328 A.2d 449, 453 (1974) (holding that parties cannot enlarge by implication one party's indemnifying liability when a written agreement expressly sets forth that party's liability); Waller v. J.E. Brenneman Co., Del.Super., 307 A.2d 550, 553 (1973). This letter agreement does not "expressly" set forth Berg's indemnification liability. It simply sets his liability with regard to idemnification arising out of the IRS tax lien, and does not appear to contain any express language covering indemnity on points other than the tax lien. The January 23, 1993 letter agreement does not preclude the Tighe defendants from claiming indemnity against Berg. Consequently, Berg's Motion for Summary Judgment is DENIED on all grounds.

Summary Judgment on PNC Bank's and the Tighe Defendants' Motions

PNC Bank's and the Tighe defendants' cross-motions deal with the same issue, namely, the existence and validity of a perfected security interest in the hourly billing and contingent fee files which Tighe, Cottrell, and Logan took with them upon their departure from the Berg firm.

It is not clear whether the parties continue to dispute whether the Security Agreement itself is valid. PNC Bank has argued, with some strength, that a security agreement need not be in a specific form; that a writing which sufficiently describes the collateral, is signed by the debtor, and establishes that a security interest was agreed upon satisfies the formalities of the statute. *Delaware Trust Co. v. Adams,* Del.Super., C.A. No. 88C-JN-138, Gebelein, J., 1988 WL 130368 (Dec. 2, 1988), slip op. at 2. This gives effect to the general theory that one should not exalt the form of the security agreement over its substance. *In re Bollinger Corp.*, 3d Cir., 614 F.2d 924, 928 (1980).

Although PNC Bank thus far has been unable to provide the Court with a complete copy of the Security Agreement that shows any signatures, PNC Bank's Motions assert that the agreement was signed and the Tighe defendants initially take no issue with this. Instead, the Tighe defendants argue that the description of collateral in the Security Agreement does not include the client contracts (files) which they took with them when the departed the Berg firm. However, the Tighe defendants, in their Reply Brief to their own Motion, state that they have never argued that PNC Bank lacked security because it never obtained a signed security agreement, but then state that "[i]n point of fact, there was no security agreement ."Given the entire tenor of the Tighe defendants' briefs, the Court understands the Tighe defendants to be saying not that there was no security agreement *per se,* but that there was no valid security interest in the contingent fee files. The Court will assume for purposes of these Motions that a security agreement exists, but it would be helpful if someone would supply the Court with a complete copy of the Security Agreement document, to the extent that it exists.[FN3] Under some circumstances, there can of course be a binding agreement even without a fully-executed document.

FN3. The Court currently has only a one page portion of the Security Agreement. This page identifies and describes the collateral, but does not contain any signatures of either the

creditor (PNC Bank) or the debtor (the Berg firm).

***8** The question for the Court's resolution, then, is whether a law firm's hourly billing and contingency fee contracts come within one of the definitions of collateral described in the Security Agreement. Stated more broadly, the question is whether a lender can take a security interest in those contracts. It appears that the question is an issue of first impression here in the Delaware courts. The first page of the Security Agreement for the PNC Bank loan listed the following types of collateral as security for the loan:

ACCOUNTS, ETC.-All existing and future accounts, accounts receivable, contract rights, chattel paper, notes, instruments, documents, contracts, choses in action, returned and unearned insurance premiums, tax refunds and all obligations now or hereafter owing to Borrower, together will all interest of Borrower in goods, the sale or lease of which shall have given or may give rise to such accounts and contract rights.

GENERAL INTANGIBLES-All present and future general intangibles, including but not limited to customer lists, books, records, including, without limitation, all correspondence and credit files, tapes cards, computer runs, computer programs, and other papers and documents whether in the possession or control of Borrower or any computer service bureau, rights in franchises and sales contracts, patents, copyrights, trademarks, logos, trade names, label designs, brand names, plans, blueprints, patterns, trade secrets, licenses, jibs, dies, molds and dormulae.

All proceeds and products of the foregoing Collateral, including insurance proceeds.

All products of the type designated herein as Collateral now owned or hereafter acquired including but not limited to all replacements, substitutions, additions, and accessions thereto.

All records whether printed electronic or otherwise pertaining to any of the Collateral now owned or hereafter acquiring or arising.

The U.C.C. defines an "account" as "(i) any right to payment for goods sold or leased or for services rendered, and (ii) any credit device account, which, in either case, whether or not it has been earned by performance." 6 *Del.C.* § 9-106. To the extent that the Security Agreement includes, *inter alia,* accounts receivable, contracts, and contract rights, they are subsumed within the definition of an account. *See Bramble Transp., Inc. v. Sam Senter Sales, Inc.*, Del.Super., 294 A.2d 97, 100 (1971), *aff'd,* Del.Supr., 294 A.2d 104 (1972) (accounts receivable). *See also* Ronald A. Anderson, 8A UNIFORM COMMERCIAL CODE 502 (3d ed.1990) (contracts, contract rights).

With regard to hourly billing or contingent fee cases as accounts receivable, neither party disputes that a matured contingent fee claim is an account receivable under the U.C.C.[FN4] The fee has been earned and the money is owed. They disagree, however, whether an unmatured contingency fee contract is an account receivable. The question appears to be resolved by prior case law in this State, which dealt with a bank's taking of a security interest in the "accounts receivable" of a construction company.

FN4. The parties have not been entirely clear in their preparation of materials. The Tighe defendants indicate that the most of the 300 files they took with them were hourly billing files, mostly insurance defense work. Yet the vast bulk of both PNC Bank's and the Tighe defendants' Motions concerns whether

> the eighteen contingency fee files are covered by the Security Agreement and includible within the Delaware Uniform Commercial Code ("U.C.C.") definition of accounts or general intangibles. Little discussion is made regarding the hourly billing files. PNC Bank asserts that it has a valid, perfected security interest in the hourly billing contracts, but does not explain how. The Tighe defendants agree only that the time they spent on hourly billing matters while they were being paid by the Berg firm created accounts receivable which were properly the property of the Berg firm. The Court is uncertain to what degree the parties agree or disagree that hourly billing and contingent fee files are to be accorded similar treatment by the Court and whether their arguments as to the contingent fee contracts should apply, where applicable, to the hourly billing contracts.

***9** *A security interest cannot attach, however, until the debtor has rights in the collateral. A debtor has no rights in an accounts receivable until the debt is owed.* In other words, a security interest in an accounts receivable cannot be perfected until it has attached by means of the debtor having delivered goods or performed services which caused the account to come into existence. Therefore, the Bank here could not have perfected its security interest in the accounts receivable due from the State until the accounts actually became receivable. *United Pacific Ins. Co. v. Ripsom,* Del.Ch., C.A. No. 7056, Hartnett, V.C., letter op. at 6 (Sept. 25, 1984) (statutory citations omitted and emphasis added). Since an unmatured contingent fee is not yet owed, the debtor cannot yet have rights in it as an account receivable. Under this reasoning a contingent fee contract is not an account receivable.

PNC Bank correctly points out, however, that its purported security interest extends further, to include "contracts" and "contract rights." Both are now included within the definition of account. In the 1962 version of Article 9, contract rights were a category of collateral separate and distinct from "accounts." Contract rights were, and presumably still are, defined as "any right to payment under a contract not yet earned by performance and not yet evidenced by an instrument or chattel paper." *United States v. Samel Refining Corp.*, 3d Cir., 461 F.2d 941, 942 (1972) (applying Pennsylvania law). It is, in other words, "a right to payment *to be earned* by future performance under an existing contract." *Matthews v. Arctic Tire, Inc.*, R.I.Supr., 106 R.I. 691, 262 A.2d 831, 833 (1970) (emphasis added). A "contract right" in many respects is a "potential account receivable." That is, it is contingent upon future performance, becoming an account receivable as that performance is made. *See Continental Finance, Inc. v. Cambridge Lee Metal Co.,* N.J.Super.Law Div., 241 A.2d 853, 80 (1968), *aff'd,* N.J.Super.App.Div., 105 N.J.Super. 406, 252 A.2d 417 (1969), *aff'd,* N.J.Supr., 56 N.J. 148, 265 A.2d 536 (1970). It was the difference between being earned and unearned that distinguished "account" from "contract right" under the 1962 Code. *See* Anderson, 8A UNIFORM COMMERCIAL CODE 510-11. The 1972 amendment to the U.C.C. includes contract rights within the definition of account. *Id.* at 504.

In the Court's opinion, both the hourly billing and the contingency fee contracts meet the definition of "contract rights," and therefore "accounts," within the meaning of the Uniform Commercial Code. The hourly billing contract is an "existing con-

tract" creating a "right to payment," the hourly fee, that is "to be earned by future performance," future work by an attorney on that case. In a contingency fee case the "right to payment" is more speculative, since the amount of payment to be earned by future performance depends upon whether the case results in a verdict or other recovery in favor of the client. This seems, however, to be a distinction without a difference.

***10** The Tighe defendants also argue that a valid security interest cannot exist because they themselves do not have a valid Article 9 security interest. However, it is of little consequence for resolution of this issue that an attorney's lien to secure his fees and expenses is not an Article 9 security interest itself. *See* 6 *Del.C.* § 9-104(c) (excluding from Article 9 "a lien given by statute or other rule of law for services or materials"). The ability to claim an Article 9 security interest in a secured obligation "is not affected by the fact that the obligation is itself secured by a transaction or interest to which [Article 9] does not apply." 6 *Del.C.* § 9-102(3). PNC Bank can claim a security interest in the hourly billing and contingent fee contracts even though the underlying obligation, the attorney's lien for services rendered, is not subject to Article 9.[FN5]

> FN5. The Tighe defendants suggest that it is "inappropriate" for a lender to have a security interest in an attorney's contract rights. Yet it is routine practice for lenders to take security interests in the contract rights of other business enterprises. A law firm is a business, albeit one infused with some measure of the public trust, and there is no valid reason why a law firm should be treated differently than an accounting firm or a construction firm. The Rules of Professional Conduct ensure that attorneys will zealously represent the interests of their clients, regardless of whether the fees the attorney generates from the contract through representation remain with the firm or must be used to satisfy a security interest. Parenthetically, the Court will note that there is no suggestion that it is inappropriate for a lender to have a security interest in an attorney's accounts receivable. It is, in fact, a common practice. Yet there is no real "ethical" difference whether the security interest is in contract rights (fees not yet earned) or accounts receivable (fees earned) in so far as Rule of Professional Conduct 5.4, the rule prohibiting the sharing of legal fees with a nonlawyer, is concerned. It does not seem to this Court that we can claim for our profession, under the guise of ethics, an insulation from creditors to which others are not entitled.

The Tighe defendants raise additional arguments. They assert that any security interest in the hourly billing and contingent fee contracts was lost as a result of the negotiated agreement of January 26, 1993, wherein the Berg firm forewent any interest in the taken files as consideration for return of the Tighe defendants' twenty percent stake in the Berg firm. At first blush, this argument seems to have less to do with whether PNC Bank has a security interest than it does with whether the Tighe defendants are entitled to indemnification from the Berg firm. Nevertheless, the Tighe defendants argue that agreement was a "sale," and that it is the proceeds of that "sale," the twenty percent interest in the Berg firm, which the security interest must follow. However, unless this transfer was authorized in some way by PNC Bank, Section

9-306 of the U.C.C. would allow PNC Bank to "follow" the collateral notwithstanding "sale, exchange or other disposition,.. and also [[[follow] identifiable proceeds." 6 *Del.C.* § 9-306. Furthermore, even were this "transfer" to come within Section 9-306, the Tighe defendants would have to demonstrate that PNC Bank either expressly or impliedly authorized the disposition. The Tighe defendants claim that Clark's failure to stop them from taking the files, or notify them that PNC Bank had an interest in them, constitutes implied authorization. It is premature for the Court to rule whether or not Clark's actions here constitute an implied authorization, there are issues of material fact regarding the nature and extent of this claimed implied authorization that preclude the Court from deciding the question as a matter of law.

The Tighe defendants also argue that there was no "meeting of the minds" over whether PNC Bank would have security in contingent fee contracts. This argument on these Motions is similarly unpersuasive. The loan "contract" with PNC Bank clearly includes "contract rights" as a category of collateral. The parties clearly had a meeting of the minds on this point. That the Tighe defendants unilaterally believed that the security interest did not cover contingent fee and/or hourly billing contracts does not change the fact that the parties objectively manifested in writing a meeting of the minds that contract rights were a category of collateral. There has been no evidence that "contract rights" was intended to have any meaning other than that which the law would normally attribute to it. The Tighe defendants have presented no evidence that the parties ever discussed whether contract rights included hourly billing and contingent fee contracts. The mistake of the Tighe defendants, if any, was one of law, unilateral and uncommunicated. That mistake, even if established, cannot carry the day.

***11** The Tighe defendants make another argument, this one premised on the fact that the security interest was "lost over time" on the contingency fee files, just as it says happened with the accounts receivable and contingency fee files which closed at the Berg firm. They cite to 6 *Del.C.* § 9-306(3) for support. However, this section of Article 9 says nothing about "losing" a security interest. All it states is that, under certain circumstances, a *perfected* security interest may be lost. In other words, the perfected becomes the unperfected, but the security interest remains .[FN6] Nor do the Tighe defendants cite to any case law in support of their argument that a mere lapse of time, without more, can end a security interest. This opinion, however, should not be construed as foreclosing the argument as a factual matter for trial.

> FN6. For our purposes, the difference between a perfected and unperfected security interest here is simply that a perfected security interest gives the secured party a priority over certain other creditors. *See generally*6 *Del.C.* §§ 9-301 to 9-318. Therefore, even if a secured creditor has an unperfected security interest, it will usually still have certain rights over the collateral vis-a-vis the debtor.

The final argument advanced by the Tighe defendants is that they have invested "eighteen months of effort and additional expense outlays on the assumption that the total of any contingent fee recoveries would be theirs." Whatever the truthfulness of this statement, it has absolutely nothing to offer on the issue of whether PNC Bank has a security interest. Having taken those files from the Berg firm, the Tighe defendants would have invested the same amount

of additional effort and expense even if they made a different assumption, since the Rules of Professional Conduct require an attorney to represent zealously the interests of his client. *See*Delaware Lawyers' Rule of Professional Conduct 1.3. No one would have expected or asked them to cease work on those files. All PNC Bank expects is that it will be able to reach the proceeds of those contract rights, and in the Court's opinion the law does not prohibit that.[FN7]

> FN7. From a practical standpoint, it seems best to limit a lender's recovery to the proceeds generated from the contract rights of hourly billing or contingent fee cases. The Tighe defendants' grand invocation of the spectre of interference with the attorney-client relationship is no great worry here, although the Court agrees with the Tighe defendants that actual physical possession could run up against the general right of a litigant to choose her own counsel and could result in delays which conceivably could harm a client's interests. PNC Bank, however, does not ask for physical possession of the files, since the files are of little value to them as such. Instead, they want to follow the proceeds arising from those contract rights, and in this respect the Court is unable to conclude that contract rights are any different from accounts receivables.

The Tighe defendants' Motion for Summary judgment is DENIED. PNC Bank's Motion for Summary Judgment is GRANTED to the limited extent that PNC Bank seeks a determination that the law permits a security interest in hourly and contingency fee contracts. In all other respects, PNC Bank's Motion is DENIED.

CONCLUSION

Defendant Berg has failed to demonstrate that there are no genuine issues of material fact regarding PNC Bank's claim against him for tortious interference with a contract. PNC Bank has alleged sufficient facts to support this tort claim, and there is a genuine issue of material fact as to whether Berg's alleged malfeasance did in fact cause the default. The tax liability indemnification provision of the January 23, 1993 letter agreement does not preclude the Tighe defendants from claiming indemnity against Berg. Defendant Berg's Motion for Summary Judgment is DENIED. IT IS SO ORDERED.

As a matter of law, plaintiff PNC Bank was not precluded from taking a security interest in the hourly billing and contingent fee contracts of the Berg firm, as "contract rights" collateral. There are genuine issues of material fact concerning whether by its actions PNC Bank has waived its right to assert its security interest in the hourly billing and contingent fee files taken from the Berg firm by the Tighe defendants. As more specifically noted above, plaintiff PNC Bank's Motion for Partial Summary Judgment is GRANTED in part and DENIED in part. Defendants Tighe, Cottrell, Logan, and Tighe, Cottrell & Logan, P.A.'s Motion for Summary Judgment is DENIED. IT IS SO ORDERED.

Del.Super.,1997.
In re PNC Bank, Delaware v. Berg
Not Reported in A.2d, 1997 WL 527978 (Del.Super.), 45 UCC Rep.Serv.2d 27

END OF DOCUMENT

In re: Supreme Court Rule 13

Exhibit F

Association of the Bar of the City of New York,
Committee on Professional and Judicial Ethics,
Formal Opinion 2006-3 (August 2006)

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2006-3

August 2006

TOPICS: 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.

DIGEST: A New York lawyer may ethically outsource legal support services overseas to a non-lawyer, if the New York lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserves the client's confidences and secrets when outsourcing; (c) avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) when necessary, obtains advance client consent to outsourcing.

CODE: DR 1-104, DR 3-101, DR 3-102, DR 4-101, DR 5-105, DR 5-107, DR 6-101, EC 2-22, EC 3-6, EC 4-2, EC 4-5.

QUESTION

May a New York lawyer ethically outsource legal support services overseas when the person providing those services is (a) a foreign lawyer not admitted to practice in New York or in any other U.S. jurisdiction or (b) a layperson? If so, what ethical considerations must the New York lawyer address?

DISCUSSION

For decades, American businesses have found economic advantage in outsourcing work overseas.[1] Much more recently, outsourcing overseas has begun to command attention in the legal profession, as corporate legal departments and law firms endeavor to reduce costs and manage operations more efficiently.

Under a typical outsourcing arrangement, a lawyer contracts, directly or through an intermediary, with an individual who resides abroad and who is either a foreign lawyer not admitted to practice in any U.S. jurisdiction or a layperson, to perform legal support services,

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[1] *See, e.g.*, Adam Johnson & John D. Rollins, *Outsourcing: Unconventional Wisdom*, Accenture Outlook Journal, (October 2004), at http://www.accenture.com/Global/Services/By_Industry/Travel/R_and_I/UnconventionalWisdom.htm; Fakir Chand, *Business Process Outsourcing Propels the 21st Century*, SME Outsourcing (October 2003), at http://smeoutsourcing.com/viewnew.php?id=9bd912e64b470d2f28ea096a56bdebd0.

such as conducting legal research, reviewing document productions, or drafting due diligence reports, pleadings, or memoranda of law.[2]

We address first whether, under the New York Code of Professional Responsibility (the "Code"), a lawyer would be aiding the unauthorized practice of law if the lawyer outsourced legal support services overseas to a "non-lawyer," which is how the Code describes both a foreign lawyer not admitted to practice in New York, or in any other U.S. jurisdiction, and a layperson.[3] Concluding that outsourcing is ethically permitted under the conditions described below, we then address the ethical obligations of the New York lawyer to (a) supervise the non-lawyer and ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserve the client's confidences and secrets when outsourcing; (c) avoid conflicts of interest when outsourcing; (d) bill for outsourcing appropriately; and (e) obtain advance client consent for outsourcing.[4]

The Duty to Avoid Aiding a Non-Lawyer in the Unauthorized Practice of Law

Under DR 3-101(A), "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law." In turn, Judiciary Law § 478 makes it "unlawful for any natural person to practice or appear as an attorney-at-law . . . without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state and without having taken the constitutional oath ." Prohibiting the unauthorized practice of law "aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." *Spivak v. Sachs*, 16 N.Y.2d 163, 168, 211 N.E.2d 329, 331, 263 N.Y.S.2d 953, 956 (1965).

Alongside these prohibitions, the last 30 years have witnessed a dramatic increase in the extent to which law firms and corporate law departments have come to rely on legal assistants and other non-lawyers to help render legal services more efficiently.[5] Indeed, in EC 3-

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[2] *See, e.g.*, Jonathan D. Glater, *Even Law Firms Join the Trend to Outsourcing*, N.Y. Times, Jan. 13, 2006; Eric Bellman & Nathan Koppel, *More U.S. Legal Work Moves to India's Low-Cost Lawyers*, Wall St. J., Sept. 28, 2005; George W. Russell, *In-house or Outsourced? The Future of Corporate Counsel*, Asia Law (July/Aug. 2005); Ellen L. Rosen, *Corporate America Sending More Legal Work, to Bombay: U.S. Firms Face Challenge Over Outsourcing Legal Work to India*, N.Y. Times, Mar. 14, 2004; Ann Sherman, *Should Small Firms Get on Board with Outsourcing?*, Small Firm Business, Sept. 12, 2005.

[3] *See, e.g.*, New York State Bar Association Committee on Professional Ethics Opinion ("N.Y. State Opinion") 721 (1999).

[4] This opinion concerns outsourcing of "substantive legal support services," which include legal research, drafting, due diligence reports, patent and trademark work, review of transactional and litigation documents, and drafting contracts, pleadings, or memoranda of law. This is distinguished from "administrative legal support services," which include transcription of voice files from depositions, trials and hearings; accounting support in the preparation of timesheets and billing materials; paralegal and clerical support for file management; litigation support graphics; and data entry for marketing, conflicts, and contact management.

[5] *See, e.g.*, NYC Formal Op. 1995-11 ("In the two decades since this committee issued its Formal Opinion on paralegals, *see* N.Y. City 884 (1974), much has happened with regard to non-lawyers' involvement in the provision of legal services.") (describing the paralegal field as one of the fastest growing occupations in America).

6, the Code directly acknowledges both the benefits flowing from a lawyer's properly delegating tasks to a non-lawyer, and the lawyer's concomitant responsibilities:

> A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

In this context, we have underscored that the lawyer's supervising the non-lawyer is key to the lawyer's avoiding a violation of DR 3-101(A). In N.Y. City Formal Opinion 1995-11, we wrote:

> Some jurisdictions have concluded that any work performed by a non-lawyer under the supervision of an attorney is by definition not the "unauthorized practice of law" violative of prohibitory provisions, *see, e.g.*, In re Opinion 24 of Committee on Unauthorized Practice of Law, 128 N.J. 114, 123, 607 A.2d 962 (1992). This committee does not go so far. However, given that the Code holds the attorney accountable, the tasks a non-lawyer may undertake under the supervision of an attorney should be more expansive than those without either supervision or legislation. Supervision within the law firm thus is a key consideration.

The Committee on Professional Ethics of the New York State Bar Association has specifically addressed the unauthorized practice of law in the context of a lawyer's using an outside legal research firm staffed by non-lawyers. In N.Y. State Opinion 721 (1999), that Committee opined that a New York lawyer may ethically use such a research firm if the lawyer exercises proper supervision, which involves "considering in advance the work that will be done and reviewing after the fact what in fact occurred, assuring its soundness." *Id.* Without proper supervision by a New York lawyer, the legal research firm would be engaging in the unauthorized practice of law. *Id.* That Committee also noted that, "other ethics committees in New York have determined that non-lawyers may research questions of law and draft documents of all kinds, including process, affidavits, pleadings, briefs and other legal papers as long as the work is performed *under the supervision* of an admitted lawyer" (citations omitted).[6]

In this same vein, the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association recently wrote, "[T]he attorney must review the brief or

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[6] *See, e.g.*, Ellen L. Rosen, *Corporate America Sending More Legal Work to Bombay*, N.Y. Times, Mar. 14, 2004 (quoting Professor Stephen Gillers of NYU School of Law as stating that "even though the lawyer [in the foreign country] is not authorized by an American state to practice law, the review by American lawyers sanitizes the process."); Jennifer Fried, *Change of Venue; Cost-Conscious General Counsel Step up Their Use of Offshore Lawyers, Creating Fears of an Exodus of U.S. Legal Jobs*, The American Lawyer, (Dec. 2003) (Professor Geoffrey Hazard, Jr. of University of Pennsylvania Law School stated that if foreign attorneys are "acting under the supervision of U.S. lawyers, I wouldn't think it would make much difference where they are.").

other work provided by [the non-lawyer] and independently verify that it is accurate, relevant, and complete, and the attorney must revise the brief, if necessary, before submitting it to the . . . court." L.A. County Bar Assoc. Op. 518 (June 19, 2006) at 8-9. We agree.

The potential benefits resulting from a lawyer's delegating work to a non-lawyer cannot be denied. But at the same time, to avoid aiding the unauthorized practice of law, the lawyer must at every step shoulder complete responsibility for the non-lawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality.

The Duties to Supervise and to Represent a Client Competently When Outsourcing Overseas

The supervisory responsibilities of law firms and lawyers in this context are set forth, respectively, in DR 1-104(C) and (D).[7] DR 1-104(C) articulates the supervisory responsibility of a law firm for the work of partners, associates, and non-lawyers who work at the firm:

> C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

DR 1-104(D) articulates the supervisory responsibilities of a lawyer for a violation of the Disciplinary Rules by another lawyer and for the conduct of a non-lawyer "employed or retained by or associated with the lawyer":

> D. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:

[7] DR 1-104(C) requires a law firm, *inter alia*, to supervise the work of non-lawyers who "work at the firm," whereas DR 1-104(D) describes, *inter alia*, the supervisory responsibilities of a lawyer for the conduct of a non-lawyer "employed or retained by or associated with the lawyer." Based on this difference in language, it can be argued that DR 1-104(C) should not apply in the case of an overseas non-lawyer because that person does not "work at the firm," whereas DR 1-104(D) should apply because the overseas non-lawyer is "retained by" the New York lawyer. Nonetheless, the Committee believes that these two phrases were intended to be equivalent. To conclude otherwise and make the individual lawyer, but not the law firm, responsible for supervising the overseas non-lawyer would be difficult to justify and could also easily lead to untoward results. For example, a law firm seeking to cabin responsibility under DR 1-104(D)(2) for the conduct of the overseas non-lawyer could simply refuse to appoint anyone to supervise the non-lawyer.

1. The lawyer orders, or directs the specific conduct, or with knowledge of the specific conduct, ratifies it; or

2. The lawyer is a partner in the law firm in which the other lawyer practices or the non-lawyer is employed, or has supervisory authority over the other lawyer or the non-lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.

Proper supervision is also critical to ensuring that the lawyer represents his or her client competently, as required by DR 6-101 — obviously, the better the non-lawyer's work, the better the lawyer's work-product.

Given these considerations and given the hurdles imposed by the physical separation between the New York lawyer and the overseas non-lawyer, the New York lawyer must be both vigilant and creative in discharging the duty to supervise. Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the professional résumé of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or by voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer's suitability for the particular assignment; and (d) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the non-lawyer is discharging the assignment according to the lawyer's expectations.

The Duty to Preserve the Client's Confidences and Secrets When Outsourcing Overseas

DR 4-101 imposes a duty on a lawyer to preserve the confidences and secrets of clients. Under DR 4-101, a "confidence" is "information protected by the attorney-client privilege under applicable law," and a "secret" is "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A). DR 4-101(D) requires that a lawyer "exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client." *See also* EC 4-5 ("a lawyer should be diligent in his or her efforts to prevent the misuse of [information acquired in the course of the representation of a client] by employees and associates.")

In N.Y. City Formal Opinion 1995-11, this Committee addressed a lawyer's supervisory obligations regarding a non-lawyer's maintaining client confidences and secrets. This Committee noted that "the transient nature of lay personnel is cause for heightened attention

to the maintenance of confidentiality. . . . Lawyers should be attentive to these issues and should sensitize their non-lawyer staff to the pitfalls, developing mechanisms for prompt detection of . . . breach of confidentiality problems."

We conclude that if the outsourcing assignment requires the lawyer to disclose client confidences or secrets to the overseas non-lawyer, then the lawyer should secure the client's informed consent in advance. In this regard, the lawyer must be mindful that different laws and traditions regarding the confidentiality of client information obtain overseas. *See* N.Y. State Opinion 762 (2003) (a New York law firm must explain to a client represented by lawyers in foreign offices of the firm the extent to which confidentiality rules in those foreign jurisdictions provide less protection than in New York); *Cf.* N.Y. State Opinion 721 (1999) ("[i]f the lawyer would have to disclose confidences and secrets of the client [to the outside research service] in connection with commissioning research or briefs, the attorney should tell the . . . client what confidential client information the attorney will provide and obtain the client's consent").[8]

Measures that New York lawyers may take to help preserve client confidences and secrets when outsourcing overseas include restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality.[9]

The Duty to Check Conflicts When Outsourcing Overseas

DR 5-105(E) requires a law firm to maintain contemporaneous records of prior engagements and to have a system for checking proposed engagements against current and prior engagements. N.Y. State Opinion 720 (1999) concluded that a law firm must add information to its conflicts-checking system about the prior engagements of lawyers who join the firm. In N.Y. State Opinion 774 (2004), that Committee subsequently concluded that this same obligation does not apply when non-lawyers join a firm, but noted that there are circumstances under which it is nonetheless advisable for a law firm to check conflicts when hiring a non-lawyer, such as when the non-lawyer may be expected to have learned confidences or secrets of a client's adversary.

As a threshold matter, the outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients. The outsourcing New York lawyer should also ordinarily ask both the intermediary and the non-lawyer performing the legal support service whether either is performing, or has performed, services for any parties adverse to the lawyer's client. The outsourcing New York lawyer should pursue further inquiry as required, while also reminding both the intermediary and the non-lawyer, preferably in writing,

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[8] We do not mean to suggest that confidentiality laws and traditions overseas always provide less protection than in New York. *See, e.g.,* M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 Tex. Int'l L.J. 289, 313 (2000) ("Although difficult to imagine, a Muslim party or client may expect a higher degree of confidentiality than a [U.S.] lawyer is accustomed to.").

[9] Mary Daly, *How to Protect Confidentiality When Outsourcing*, Small Firm Business, Sept. 12, 2005.

of the need for them to safeguard the confidences and secrets of their other current and former clients.

The Duty to Bill Appropriately for Outsourcing Overseas

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).

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.[10]

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.*

Non-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

[10] *See, e.g., Oliver v. Board of Governors, Kentucky Bar Ass'n*, 779 S.W.2d 212, 216 (Ky. 1989) (recommending "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."); Ohio Bd. of Comm'rs on Grievances and Discipl. Opinion No. 90-23 (Dec. 14, 1990) (finding a duty under DR 5-107(A)(1) to "disclose to the client the temporary nature of the relationship in order to accept compensation for the legal services"); Los Angeles County Bar Assoc. Formal Opinion 473 (Jan. 1994); New Hampshire Bar Assoc. Ethics Comm. Formal Opinion 1989-90/9 (July 25, 1990).

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.

CONCLUSION

A lawyer may ethically outsource legal support services overseas to a non-lawyer if the lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserves the client's confidences and secrets when outsourcing; (c) under the circumstances described in this Opinion, avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) under the circumstances described in this Opinion, obtains the client's informed advance consent to outsourcing.