

121

USE OF TEMPORARY LAWYERS AND OTHER PROFESSIONALS NOT ADMITTED TO PRACTICE LAW IN COLORADO (“OUTSOURCING”)

Adopted June 16, 2009.

Introduction and Scope

In Colorado Bar Association (CBA) Formal Ethics Opinion 105 (May 22, 1999), the CBA Ethics Committee (Committee) addressed the use of “temporary” lawyers by other lawyers, law firms, or corporate or other institutional legal departments to work or assist on specific projects or matters. Opinion 105 recognized “the myriad of possible arrangements by which temporary legal services can be provided or utilized” and, therefore, did “not attempt to comment on the ethical considerations implicated in every possible arrangement.” Instead, the opinion addressed “certain general ethical principles involved in the provision of legal services or assistance by temporary lawyers who are not otherwise regularly employed by the employing lawyer or law firm.” Opinion 105 focused on potential conflicts, fee-related issues, recommended disclosures to the client, ethical issues arising from the involvement of placement agencies for temporary lawyers, and supervision issues. The Opinion generally addressed these issues from the perspective of the temporary lawyer as well as that of the hiring lawyer. Opinion 105 appeared to assume that both the temporary and hiring lawyers were admitted to practice in Colorado (Colorado Lawyers) and, therefore, were subject to the Colorado Rules of Professional Conduct (Colorado Rules or Colo. RPC).

This opinion supplements Opinion 105. It addresses the use of temporary lawyers who are *not* admitted to practice in Colorado but are admitted to practice only in another U.S. jurisdiction (Domestic Lawyers) or lawyers not admitted in any U.S. jurisdiction, but licensed to practice in a foreign country (Foreign Lawyers).¹ Like Opinion 105, this opinion discusses certain general ethical principles but not every possible implication of the use of Domestic and Foreign Lawyers on a temporary basis. In the judgment of the Committee, the analysis of most issues in Opinion 105 applies equally to all lawyers—Colorado, Domestic, and Foreign—providing temporary legal services.²

Where the analysis and conclusions of Opinion 105 are equally germane to Domestic and Foreign Lawyers as temporary lawyers, this opinion incorporates relevant portions of Opinion 105. Other issues call for further or different analysis when the temporary lawyer is not a Colorado Lawyer. This opinion provides that guidance.³

Syllabus

In addition to the duties described in Opinion 105, a Colorado Lawyer who hires a Domestic or Foreign Lawyer has an obligation under Colo. RPC 5.3(b) to make reasonable efforts to ensure that the Domestic or Foreign Lawyer’s conduct conforms to the Colorado Lawyer’s duties under the Colorado Rules, especially the obligation to provide competent representation under Colo. RPC 1.1. Reasonable efforts include: (a) confirming that the Domestic or Foreign Lawyer is licensed and in good standing in his or her home jurisdiction; (b) confirming that the Domestic or Foreign Lawyer is competent to undertake the work to be assigned; and (c) supervising the work of any nonlawyer hired by the Colorado Lawyer to assist in assigned tasks.

In addition, to avoid assisting in the unauthorized practice of law (UPL) in violation of Colo. RPC 5.5(a)(3), the Colorado Lawyer should satisfy himself or herself that Colorado law permits the Domestic or Foreign Lawyer to assist in the delegated task without engaging in UPL. Although analysis of UPL is beyond the scope of this opinion, in general, the Colorado Lawyer must determine whether the activities of the Domestic or Foreign Lawyer constitute the practice of law in Colorado, and, if so, whether and to what extent those activities are authorized by virtue of the Colorado Lawyer’s supervision of and responsibility for the Domestic or Foreign Lawyer’s work.

To avoid disqualifying conflicts of interest, the Colorado Lawyer must determine: (a) whether the temporary lawyer has a conflict in performing work to be delegated; and (b) whether the temporary and hiring lawyers are “associated in a firm” under Colo. RPC 1.10(a) such that all of the clients of the hiring lawyer or firm are deemed to be the temporary lawyer’s clients, and vice versa, for conflict imputation purposes. The Committee continues to endorse the “functional analysis” of conflict imputation discussed in Opinion 105.

Colo. RPC 1.5(d) regulates the division of fees among lawyers not in the same firm. If the Colorado Lawyer and the Domestic or Foreign Lawyer are not in the same firm, the Colorado Lawyer must determine whether the financial arrangement with the client constitutes a “division of a fee” under Colo. RPC 1.5(d). The Committee adheres to its conclusion in Opinion 105 that an arrangement does not constitute a division of fees if the firm is responsible for paying the Domestic or Foreign Lawyer regardless of whether the client pays the firm, and if the Domestic or Foreign Lawyer’s compensation is not a percentage or otherwise directly tied to the amount paid by the client. If the payment to a Domestic or Foreign Lawyer under this analysis constitutes the division of a fee, then the hiring Colorado Lawyer must comply with Colo. RPC 1.5(d).

Colo. RPC 1.5(a) requires a lawyer’s fees and expenses to be reasonable. That rule sets forth criteria under which reasonableness is to be judged. The Committee concluded in Opinion 105 that it is not improper for a Colorado Lawyer to mark up the cost of a Domestic or Foreign Lawyer’s fees when billing the Colorado Lawyer’s client. If the mark-up is substantial, as when the fees charged by the Foreign Lawyer to the Colorado Lawyer are low by domestic standards, the marked-up fee charged by the Colorado Lawyer might not be considered reasonable under Colo. RPC 1.5(a).

Under Colo. RPC 1.2(a), a lawyer is responsible for determining, in consultation with the client, the means to carry out a representation. Colo. RPC 1.4(a)(3) and (b) require a lawyer to “keep the client reasonably informed about the status of the matter” and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Whether the delegation of tasks to a Domestic or Foreign Lawyer constitutes a significant development that the Colorado Lawyer must disclose to the client depends on the circumstances. If the lawyer reasonably believes that a client expects its legal work to be performed exclusively by Colorado Lawyers, the Colorado Lawyer may be required to disclose the fact of delegation, as well as its nature and extent. The Committee continues to conclude that a Colorado Lawyer is not required to affirmatively disclose the amount of fees paid to, and profits made from, the services of Domestic and Foreign Lawyers, even where the mark-up is substantial.

The considerations discussed in Opinion 105 concerning the use of placement agencies in arranging temporary legal services apply equally when a placement agency is involved in arranging for a Colorado Lawyer’s use of a Domestic or Foreign Lawyer.

Analysis

I. Communication, Competence, and Supervision Issues

Whenever a Colorado Lawyer employs or otherwise contracts with another person to assist in the representation of clients, the Colorado Lawyer has a duty to ensure that the person is capable of performing the assigned tasks. This responsibility arises out of the lawyer’s duties “to provide competent representation to a client” and “to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct,” including the duty to provide competent representation. Colo. RPC 1.1, 5.1(b).

The hiring Colorado Lawyer’s duties related to competence and supervision include, at a minimum, the following: (a) the duty to confirm the Domestic or Foreign Lawyer’s status as a lawyer; (b) the duty to confirm the Domestic or Foreign Lawyer’s competence to undertake the assigned work; (c) the duty to supervise the Domestic or Foreign Lawyer; and (d) the duty to supervise the work of any non-lawyer hired by the Colorado Lawyer to assist in assigned tasks.

A. Communication Issues

The first issue that may arise in considering outsourcing is what communications can be made when interviewing a prospective temporary lawyer. As when using any vendor, the Colorado Lawyer cannot disclose any information inconsistent with Colo. RPC 1.6. Other state Bars considering this issue have not been consistent. For example, the Maine Bar in Opinion 194 (2007) opined that it is ethically permissible to outsource transcription and computer back-up services, even though otherwise protected information will be disclosed. (The Committee recognizes that this is not outsourcing of “legal services” but rather “administrative services,” but the ethical consideration is the same). *See also* Los Angeles Cty. Bar Ass’n Prof. Resp. and Ethics Comm. Op. No. 518 (“Confidential information can be disclosed to outside contractors so long as the outside contractors agree to keep the client confidences and secrets inviolate.”).

On the other hand, American Bar Association (ABA) Formal Opinion 08-451 states that “where the relationship between the firm and the individuals performing the services is attenuated, as in the typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client’s informed consent.”

There is no express exception in Colo. RPC 1.6 simply for convenience; thus, the ABA approach is more consistent with the Colorado Rules. The Colorado Lawyer considering outsourcing should be especially careful when considering outsourcing to foreign jurisdictions that might not treat the attorney-client relationship and requirement of confidentiality in a manner comparable to such treatment in the United States. The more attenuated the relationship between the Colorado Lawyer and the outsourcing services, the more careful the lawyer must be in communications.

B. Confirming the Domestic or Foreign Lawyer’s Status as a Lawyer

When the person providing legal services purports to be a lawyer, the hiring lawyer should confirm that the person is licensed and in good standing, particularly in the case of a person holding himself or herself out to be a lawyer in a foreign country. This duty applies to both temporary and permanent legal services, and to Colorado, Domestic, and Foreign Lawyers providing such services.

Once a Colorado Lawyer has confirmed that another Colorado Lawyer or a Domestic Lawyer providing temporary legal services is admitted to practice law and in good standing in Colorado or another United States jurisdiction, the hiring Colorado Lawyer may reasonably assume that the temporary lawyer possesses certain minimal qualifications to practice law, based on the lawyer admission standards in place in every U.S. jurisdiction; has obtained a reasonably standardized legal education before being admitted to practice law in one or more U.S. jurisdictions; and is subject to similar, if not identical, ethical rules.

These same assumptions *cannot* reasonably be made with respect to every Foreign Lawyer. Rather, various foreign nations, and various states or provinces within foreign nations, impose legal educational, licensing, and ethical requirements that differ significantly from those in place in the United States. The potential for vastly different educational requirements, admission standards, and ethical expectations for Foreign Lawyers require the hiring Colorado Lawyer to carry out additional tasks to comply with the Rules when outsourcing a task to a Foreign Lawyer.

A Colorado Lawyer considering outsourcing work to a Foreign Lawyer must initially determine that the Foreign Lawyer is a member of a recognized legal profession, such that it is reasonable to treat the Foreign Lawyer as a “lawyer.” The ABA Standing Committee on Ethics and Professional Responsibility considered this issue in its Formal Opinion 01-423 (2001), in the context of forming partnerships with foreign lawyers. ABA Opinion 01-423 concluded that to qualify as a lawyer for purposes of ABA Model Rule 5.4 (prohibiting the sharing of fees and formation of a partnership with nonlawyers), a foreign professional “must be a member of a recognized legal profession in a foreign jurisdiction.” According to the ABA:

The term “profession” itself generally connotes the attributes of education and formal training, licensure to practice, standards, and a system of sanctions for violations of the standards. There nevertheless is no arbitrary definition of “lawyer” or “legal profession” that must be applied to determine whether a person in a foreign jurisdiction is a lawyer. The determination essentially is factual, requiring consideration of the jurisdiction’s legal structure as well as the nature of the services customarily performed by the person in question.

ABA Opinion 01-423 concluded that generally, “a person who is specially trained to provide advice on the laws of the foreign jurisdiction and to represent clients in its legal system, and is licensed by the jurisdiction to do so, will qualify as a foreign lawyer.” On the other hand, foreign professionals who “are not members of a recognized legal profession in the jurisdiction” and persons in countries that have “no recognized legal profession” should be considered nonlawyers. The ABA provides examples of professions within some foreign jurisdictions falling into these various categories, at least as of 2001:

For example, foreign lawyers admitted to practice in Sweden, Japan, Great Britain and other European Countries would satisfy these requirements and have been found by bar association ethics committees to qualify for partnerships in U.S. law firms.

If, however, professionals in a foreign jurisdiction are not members of a recognized legal profession in that jurisdiction, the professionals should, in our opinion, be considered nonlawyers rather than lawyers for purposes of Model Rule 5.4. . . . For example, qualification as foreign lawyer for purposes of Rule 5.4 ordinarily should be accorded members of the profession of *avocat* (courtroom lawyer) or *conseil juridique* (transactional or business lawyer), but might not be accorded members of the profession of *notario*, or notary, a substantially different function in most civil law countries.

ABA Op. 01-423 (footnotes omitted).

This Committee finds the ABA’s analysis instructive in assessing a Colorado Lawyer’s duties when hiring a foreign professional as a temporary lawyer, although the ABA’s use of precise terms ironically underscores the difficulty of the issue. In some jurisdictions *notarios* are the more qualified professionals. *See* www.sos.state.tx.us/statdoc/notariopublicoarticle.shtml (indicating that in Mexico a “notario publico” must be a lawyer, gain additional training, and pass additional testing). This confusion underscores the difficulty in this analysis, and serves to emphasize the challenges facing the Colorado Lawyer considering outsourcing services.

Like a lawyer considering whether to form a partnership with a foreign professional, a Colorado Lawyer “must take reasonable steps to ensure that the foreign lawyer is a member of a recognized legal profession authorized to engage in the practice of law in the foreign jurisdiction”—that is, that the person is in fact a “Foreign Lawyer”—before hiring that person to perform legal services that only a lawyer may perform. If the foreign professional does not qualify as a lawyer, it would be misleading for the Colorado Lawyer to hold out the foreign professional as such. *See* Colo. RPC 4.1(a), 7.1(a)(1), 8.4(c). In addition, the Colorado Lawyer would have increased supervisory responsibilities over a nonlawyer. (The Colorado Lawyer’s disclosure and supervision responsibilities are discussed below.)

C. Confirming the Domestic or Foreign Lawyer’s Competence, and Supervising His or Her Work

The discussion in Opinion 105 of the hiring Colorado Lawyer’s responsibility to determine competence and to supervise applies equally when a Colorado Lawyer hires Domestic or Foreign Lawyers to provide temporary legal services. A Colorado Lawyer should be especially sensitive to these obligations when the temporary attorney is not licensed in Colorado. Both Domestic and Foreign Lawyers generally can be expected to be less conversant with Colorado law and practice than are Colorado Lawyers, and Foreign Lawyers generally can be expected to be less familiar with U.S. federal law than Colorado Lawyers. Moreover, as discussed above, Foreign Lawyers in particular might lack the training of lawyers educated in and licensed by U.S. jurisdictions, and might be unfamiliar with important principles of legal ethics that apply to Colorado Lawyers. In addition, Domestic and Foreign Lawyers often work in physically distant locations and cultural and language differences might complicate communications between Colorado and Foreign Lawyers. As a result, the hiring Colorado Lawyer must exercise particular care to supervise the work of Domestic and Foreign Lawyers.

The Committee endorses the observations, quoted below, of the Bar of the City of New York, concerning a lawyer’s supervision of overseas providers of legal services. Although the New York City opinion addressed temporary legal services provided by foreign *nonlawyers*, the Committee believes the analysis also applies to legal services provided by Domestic and Foreign *Lawyers*.

[G]iven 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 resume of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or 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.

Ass'n of the Bar of the City of N.Y. Comm. on Prof. and Jud. Ethics, Formal Op. 2006-3 (2006). *See also* ABA Formal Op. 08-451 (noting that in many countries professionals labeled "lawyers" do not receive the same special training and education as lawyers do in the United States, and that hiring lawyers should consider conducting background checks of and interviews with Foreign Lawyers being considered for hire).

D. Supervision of Nonlawyers

If a Colorado Lawyer concludes that a foreign professional does not qualify as a Foreign Lawyer, the Colorado Lawyer may hire that professional, as long as the Colorado Lawyer exercises supervisory duties as set out in Colo. RPC 5.3. Those include making reasonable efforts to ensure that the temporary lawyer's conduct is compatible with the professional obligations of the lawyer. Colo. RPC 5.3(b). For further discussion regarding the supervision of nonlawyers generally, *see, e.g.*, CBA Formal Ops. 63 (1983, addendum issued 1995) and 78 (1988, revised 1994 and 1997); N.Y.C. Bar Ass'n Formal Op. 2006-3; Diane M. Kueck, "Avoiding Unauthorized Practice of Law by a Non-Lawyer," 32 *The Colorado Lawyer* 27 (March 2003).

A Colorado Lawyer in a firm that regularly hires Domestic or Foreign Lawyers should consider the potential application of Colo. RPC 5.3(a), which requires partners (or those with comparable managerial authority) to "ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the obligations of the lawyer."

II. Unauthorized Practice Issues

Because Opinion 105 assumed that the temporary lawyer is a Colorado Lawyer, it did not address issues related to UPL. Colorado Rule 5.5(a)(3) prohibits a Colorado Lawyer from assisting another person "in the performance of any activity that constitutes the unauthorized practice of law." Therefore, in addition to the duties outlined above, the hiring Colorado Lawyer should satisfy himself or herself that the Domestic or Foreign Lawyer does not engage in UPL.

A complete analysis of Colorado law on UPL is beyond the scope of this opinion. In general, Colo. RPC 5.5(a)(3) requires a Colorado Lawyer initially to determine whether the activities of the Domestic or Foreign Lawyer constitute the practice of law in Colorado. *See Denver Bar Ass'n v. Public Utilities Comm'n*, 391 P.2d 467, 471 (Colo. 1964) ("There is no wholly satisfactory definition as to what constitutes the practice of law; it is not easy to give an all-inclusive definition. We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law."). The Committee notes that Rules 220, 221, and 221.1 of the Colorado Rules of Civil Procedure liberally permit Domestic Lawyers to practice law in Colorado on a temporary basis.

Although the protections of those rules do not extend to Foreign Lawyers, ethics opinions from other jurisdictions hold that, as long as the lawyer supervises and remains responsible for the activities of the nonlawyer, those activities do not constitute the unauthorized practice of law. Los Angeles Cty. Bar Ass'n Op. 518 ("attorneys who contract for services which assist the attorneys in representation of their clients do not assist in [the unlawful practice of law] so long as the attorney remains ultimately responsible

for the final work product provided to or on behalf of the client”); *In re Op. 24 of Comm. on Unauthorized Practice of Law*, 607 A.2d 962, 966-67 (N.J. 1992) (under New Jersey statutes, work performed by paralegal under supervision of attorney is by definition not UPL); San Diego Cty. Bar Ass’n Formal Op. 2007-1 (2007) (attorneys do not aid in UPL where they retain supervisory control over and responsibility for tasks constituting practice of law).

III. Conflicts

The conflict of interest analysis in Opinion 105 applies equally when a Domestic or Foreign Lawyer provides temporary legal services. Specifically, the hiring Colorado Lawyer must determine (a) whether the temporary lawyer has a conflict in performing work to be delegated, and (b) whether the temporary and hiring lawyers are “associated in a firm” under Colo. RPC 1.10(a) such that all the clients of the hiring lawyer or firm are deemed to be the temporary lawyer’s clients, and vice versa, for conflict imputation purposes. The Committee continues to endorse the “functional analysis” of conflict imputation discussed in Opinion 105. It often will be more feasible to successfully screen Domestic and Foreign Lawyers, who frequently will be physically remote from the hiring lawyer’s office, because they likely will have reduced access to information relating to other clients than would a temporary Colorado Lawyer.

IV. Fee-Related Issues

A. Division or Sharing of Fees

Assuming that the temporary Foreign Lawyer is qualified as a lawyer, the analysis of division of fees in Opinion 105 also applies when a Domestic or Foreign Lawyer provides temporary legal services. In particular, the hiring lawyer should undertake the analysis prescribed in Opinion 105 concerning whether the Domestic or Foreign Lawyer is “in the same firm” as the Colorado Lawyer, as that phrase is used in Colo. RPC 1.5(d); and, if the lawyers are not in the same firm, whether the financial arrangement with the client constitutes a “division of a fee” as used in that rule. The Committee adheres to its conclusion in Opinion 105 that an arrangement does not constitute a division of fees if the firm is responsible for paying the Domestic or Foreign Lawyer regardless of whether the client pays the firm, and if the Domestic or Foreign Lawyer’s compensation is not a percentage of or otherwise directly tied to the amount paid by the client.

If the payment of a Domestic or Foreign Lawyer under this analysis constitutes a division of fees, then the hiring Colorado Lawyer must comply with Colo. RPC 1.5(d), which the Colorado Supreme Court has amended since the issuance of Opinion 105. Under the prior rule, a fee could be divided between lawyers in different firms only based on the proportion of the services performed by each lawyer. Under the new rule, lawyers in different firms may now divide fees disproportionately to the services performed by each, but only if “each lawyer assumes joint responsibility for the representation.” Comment [7] to the new rule explains that “[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.” In most cases, Colo. RPC 1.5(d) will prohibit a division of fees disproportionately to the work performed by a Domestic or Foreign Lawyer because a temporary lawyer generally will not “assume[] joint responsibility for the representation.”

If a Colorado Lawyer determines that a foreign professional is not a Foreign Lawyer, then under Colo. RPC 5.4(a), the Colorado Lawyer may not share legal fees with him or her under any circumstances. Rather, the foreign professional must be paid on a per task, per hour, or other basis not related to the amount collected from the client. *See, e.g., People v. Easley*, 956 P.2d 1257, 1258 (Colo. 1998).

B. Reasonableness of Fees

Colo. RPC 1.5(a) requires a lawyer’s fee to be reasonable. The discussion in Opinion 105 of the reasonableness of fees paid to a temporary lawyer applies equally to the reasonableness of fees paid to a Domestic or Foreign Lawyer for temporary legal services. The hiring attorney or firm may bill its client for the time of the Domestic or Foreign Lawyer at a rate higher than that paid to the lawyer, just as a

Colorado Lawyer or firm may charge a client a mark-up over the actual compensation paid to its employees (including associates who are Colorado Lawyers, and paralegals). The factors for assessing reasonableness that were identified in Opinion 105 (“such as the nature of the services provided, the experience and skill of the person providing the services, and the range of rates charged in the community for similar services”) are equally relevant to the temporary services of Domestic and Foreign Lawyers.

In the judgment of the Committee, the compensation actually paid to the Foreign Lawyer is an additional factor in assessing the reasonableness of fees. Press and scholarly reports indicate that some Foreign Lawyers, particularly from non-Western countries such as India, often charge a fraction of the fees charged by Colorado and Domestic Lawyers. *See, e.g.*, Jennifer Fried, “Outsourcing Reaches Corporate Counsel,” *The Recorder* (Aug. 25, 2004) (“There are lots of opportunities to use foreign lawyers in place of outside counsel or other lawyers at a lower cost structure.”); Alison M. Kadzik, “The Current Trend to Outsource Legal Work Abroad and the Ethical Issue Related to Such Practices,” 19 *Georgetown J. of Legal Ethics* 731, 731 (2006) (“The recent downturn in the U.S. economy has driven numerous American corporations to begin outsourcing and offshoring their legal work to professionals in countries such as India, New Zealand, South Korea, and other countries where the cost of labor is significantly lower. One recent study reports that employees in India charge only \$40 an hour as compared to the \$120 an hour charged by U.S. firms for comparable work.”) (footnotes omitted); Joel L. Merkin, “Litigating Outsourced Patents: How Offshoring May Affect the Attorney-Client Privilege,” 2006 *U. Ill. J.L. Tech. & Pol’y* 215, 215 (Spring 2006).

If the differential between the compensation actually paid to a Domestic or Foreign Lawyer and the amount charged to a client is excessive, the fee might not be reasonable. *But see* L.A. Cty. Bar Ass’n Op. 518 (“The Committee believes that the amount paid by the attorney for [work performed by an out-of-state brief-writing service] is not determinative on the question of whether a fee is unconscionable.”). *See also* CBA Formal Op. 105 (differential between fees paid to temporary lawyer and fees billed to client for temporary lawyer’s services is not listed as one of the factors relevant to the determination of reasonableness of fees billed to client).

V. Disclosures to Clients

Colo. RPC Rule 1.2 requires a lawyer to “consult with the client as to the means by which [the objectives of the representation] are to be pursued.” Similarly, Colo. RPC Rule 1.4(a)(2) requires the lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished.” Comment [3] states that this “requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments” In an extreme case, a failure to correct a client’s misapprehension could rise to the level of a misrepresentation prohibited by Colo. RPC Rule 8.4(c).

Under these Rules, if the use of outsourcing is a “significant development” in the representation, it must be disclosed to the client. Opinion 105, in addressing disclosures to clients related to fees and staffing when a Colorado Lawyer wishes to use another Colorado Lawyer to provide temporary legal services, recognizes that the lawyer’s duty to disclose will depend on the facts of a given engagement. Similarly, whether the Colorado Lawyer must inform a client of the use of Foreign or Domestic Lawyers will depend on the facts of the matter, particularly the client’s expectations. At least as of this writing, the Committee is of the opinion that most clients of Colorado Lawyers do not expect their legal work to be outsourced, particularly to a foreign county. Thus, in the vast majority of cases, a Colorado Lawyer outsourcing work to a Foreign Lawyer who is not affiliated with the Colorado law firm would constitute a “significant development” in the case and disclosure to the client would be required.

The Los Angeles County Bar Association has adopted a similar circumstance-specific test for required disclosures, opining that a lawyer must disclose to the client a brief-writing arrangement with an out-of-state lawyer only “when the use of the outside lawyer constitutes a significant development,” and that whether a “significant development” exists “is based upon the circumstances of each case[.]” L.A. Bar Op. 518. Similarly, the San Diego County Bar Association has opined that if the client “has a reasonable

expectation under the circumstances” that the work will be performed by a California lawyer, the California lawyer must inform the client if the work is being outsourced. San Diego County Bar Ass’n Formal Op. 2007-1.

The New York City Bar Association has concluded that “the law firm has an ethical obligation *in all cases*,” including those involving in-state, out-of-state, and foreign lawyers, to disclose the use of temporary lawyers and to obtain the client’s consent. Ass’n of the Bar of the City of N.Y. Comm. on Prof. and Jud. Ethics, Formal Op. 1989-2 (1989) (emphasis added). This Committee does not agree with the approach of the New York City Bar Association that disclosure is required in all cases (although that is obviously the most conservative approach), but emphasizes that the Colorado Lawyer’s duty to disclose the use of Domestic or Foreign Lawyers will apply in *most* cases.

If disclosure is required under Colo. RPC 1.2 and 1.4(a)(2), the Colorado Lawyer should advise the client that a Domestic or Foreign Lawyer will assist in performing particular aspects of the client’s work. See L.A. Bar Op. 518 (requiring “disclosure of the nature and extent of the [attorney’s relationship with an out-of-state provider of legal services] . . . in the written retainer agreement”). Opinion 105 concluded that a Colorado Lawyer “does not have a duty to disclose the amount paid to the temporary lawyer or the profits made from using the temporary lawyer as long as the financial arrangement does not constitute fee-splitting[.]” The Committee reaches the same conclusion regarding fees paid to and profits made from the use of Domestic and Foreign Lawyers, even where the mark-up is substantial.

VI. Placement Agencies

The considerations discussed in Opinion 105 apply equally when a placement agency is involved in arranging for a Colorado Lawyer’s use of a Domestic or Foreign Lawyer to provide temporary legal services.

Conclusion

Using Domestic or Foreign Lawyers and other professionals is ethically acceptable, but should be done with caution. The hiring lawyer must remember that he or she is ultimately responsible to the client, and, where applicable, the court, for the legal product produced. In some circumstances, the decision to hire a Domestic or Foreign Lawyer can be made only after consultation with the client.

A Colorado Lawyer who hires a Domestic or Foreign Lawyer has an obligation to make reasonable efforts to ensure that the Domestic or Foreign Lawyer’s conduct conforms to the Colorado lawyer’s duties under the Colorado Rules of Professional Conduct, including competence, confidentiality, and avoidance of conflicts of interest. Further, Colo. RPC 1.5 issues could arise as to fee sharing or the amount of the fee charged.

NOTES

1. This opinion does not consider the use of persons outside Colorado to perform legal *administrative* services, such as accounting support, file management, and data entry. Services that relate to the administration of a law firm rather than the provision of legal services to particular clients often will be appropriate for outsourcing in the general commercial sense of that term. However, lawyers outsourcing such services must be sensitive to confidentiality issues.

2. The use of such lawyers is often referred to as “outsourcing” and that term is used in this Opinion.

3. The Colorado Bar Association Ethics Committee (Committee) notes that the Colorado Supreme Court amended the Colorado Rules of Professional Conduct effective January 1, 2008. The Committee will issue an Addendum to Opinion 105 to identify specific rules applied in that opinion that have been amended, and any impact on the Committee’s conclusions as a result of those rule amendments.