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# ABA Ethics Guidelines to Legal Outsourcing: The Law Clerk Connection Solution

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Law Clerk Connection White Paper Series  
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## Introduction

The United States is an incubator for what author Richard Florida has termed the "Creative Class."<sup>1</sup> The Creative Class is comprised of the thinkers and "idea" persons who drive intellectual property products to market. Florida divides the Creative Class into two sub-classes: "creative professionals," such as doctors, lawyers, engineers, etc.; and the "creative core," made up of the truly innovative, outside-the-box thinkers who have helped revolutionize the way we live. The creative core contains the sort of thinkers who created Microsoft, Ebay, Google, and YouTube.

Law Clerk Connection is concerned here with the creative professionals, many of whom are being passed up in favor of cheaper professionals in other countries in the form of Offshore Legal Services. Law Clerk Connection provides an alternative to this legal offshoring phenomenon by connecting competent law students from ABA-approved law schools across the nation with lawyers and law firms in need of per diem assistance. The Law Clerk Connection Solution is two-fold. First, it allows law firms to remain competitive by offering their clients the same superior level of legal service at reduced rates. Second, it provides law students - future U.S. lawyers - with the mentoring and experience they need to assume their place in the "creative class" and to ensure that the U.S. remains a bastion of productive creative professionals.

Below are the ethical issues that the ABA and other state bar associations have voiced concern over with regards to legal outsourcing, guidelines for avoiding ethical breaches, and the Law Clerk Connection solution.

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## Avoiding Conflicts of Interest

Model Rule of Professional Conduct ("MRPC") 1.7 outlines the basic rule regarding conflicts of interest, namely that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." "Concurrent conflicts of interest" involve situations where representation of one client would negatively impact simultaneous representation of another client.

MRPC 1.7 is complemented by MRPC 1.8, which addresses specific limitations on the scope of an attorney's dealings with her client, and MRPC 1.9, which focuses on an attorney's continuing obligations to former clients.

MRPC 5.3 is relevant to situations in which non-lawyers are hired as outsourced service providers to lawyers or law firms. In such cases, the hiring firm must "make reasonable efforts" to ensure that the conduct of the contract individuals is "compatible" with ethics rules, and the hiring firm may be responsible for contractor conduct that violates ethics rules if the hiring firm orders, has knowledge of, or ratifies the conduct.<sup>2</sup>

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<sup>1</sup> Richard Florida, *The Rise Of The Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life* (2002).

<sup>2</sup> Model Rules Of Prof'l Conduct R. 5.3 (2003).

In order to ensure that the use of outsourced workers does not create conflicts of interest for U.S. lawyers and law firms, it is important that all outsourced employees receive only information pertaining to the relevant client matter to which they are assigned. In addition, all law firms engaged in the practice of outsourcing legal work should maintain a complete and accurate record of all matters for which work is outsourced and the particular outsourced employee who worked on each client matter.

### **Other Outsourcing or Off-shoring Companies**

Many countries have less stringent laws for addressing conflicts of interest than the United States and often do not have any tangible repercussions on the foreign worker. Problems also arise where the same outsourcing company is handling legal work for competitors since they would not be bound to avoid conflicts of interest.

### **The Law Clerk Connection Difference**

Since you are in control of the documents provided to each Law Clerk, and only your designated Law Clerk has access to your private on-line Conference Room, you can be sure that pertinent information gets into the right hands and stays there. Further, because each Law Clerk is an independently contracted provider, there is no risk of another person "finding something on the company network or copy/fax machine" or otherwise inadvertently disclosing information to another Law Clerk Connection Law Clerk. Law Clerk Connection maintains accurate and detailed records of each and every lawyer, law firm and uniquely-coded matter that the Law Clerk has provided services for while utilizing Law Clerk Connection. By utilizing this system, Law Clerk Connection can cross check any Law Clerk bidding on your legal projects for potential conflicts.

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### **Maintaining Confidentiality of Information**

Under MRPC 6(a) and (b), a lawyer must protect both confidences (privileged information) and secrets (other information gained in the professional relationship and embarrassing or detrimental to the client).

Each time a Law Clerk Connection Law Clerk agrees to work on a legal project, both lawyer and law clerk sign an agreement setting forth confidentiality obligations and restrictions. Maintaining client confidentiality can also be accomplished by limiting the Law Clerk's access to information. With Law Clerk Connection, the lawyer simply scans and uploads the documents to your secure, private, on-line Conference Room. After the work is completed by the Law Clerk, it is uploaded back to the Conference Room. In these situations, the Law Clerks are given limited access only to the information that is required for them to perform their duties. Furthermore, in many situations, most of the work performed by Law Clerks can be completed with little or no specific identifying detail about a specific client.

## Disclosing to Clients the Outsourcing Arrangement

Although ethics authorities do not require disclosure of the details of the outsourcing arrangement, ABA Formal Opinion 88-356 concluded that the fact of outsourcing should be disclosed:

1. when a temporary lawyer performs without the close supervision of a firm lawyer, "because the client, by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer."
2. when a temporary lawyer's fee is directly billed to the client as a disbursement, instead of the lawyer firm paying the compensation.
3. when the arrangement between the firm and a temporary lawyer involves a direct division of the actual fee paid by the client.

None of these situations are an issue with Law Clerk Connection because you are using the Law Clerk in the same manner as you would if they were in a brick and mortar building with you, therefore, you can incorporate the terms of your Law Clerk use and fees up front in the client's legal services agreement.

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As with all services provided by legal assistants, the supervising lawyer should properly review all work completed by the Law Clerk and be willing to take full responsibility for the final product.

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## Maintaining Professional Independence

When outsourcing legal services to a non-law company, the outsourcing contract should specify that the non-lawyers will not interfere with the independent professional judgment of the contract lawyers. As with all services provided by legal assistants, the supervising lawyer should properly review all work completed by the Law Clerk and be willing to take full responsibility for the final product. Because you dictate the timeframe for completion of each legal project you offer on Law Clerk Connection, you can give yourself the necessary leeway for review of the finished product.

## Supervision Requirements

The New York City Bar has determined that the duty of supervision is actually two separate duties: first, to adequately outline the assignment and monitor the non-lawyer's progress; and second, to review the final work product and amend or revise it as necessary.<sup>3</sup>

By utilizing Law Clerks through Law Clerk Connection, these issues can be addressed both at the outset – with a complete and accurate statement of what the project requirements are, during the final contract negotiation process when the Law Clerk and law firm solidify the requirements and time frame necessary to complete critical milestones, and on an ongoing basis through periodic email and/or telephonic communication.

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<sup>3</sup> N.Y.C Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006), ("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

## Fee Arrangements

ABA Formal Opinion 88-356 concluded that an arrangement whereby a law firm pays to a temporary lawyer compensation in a fixed dollar amount or at an hourly rate, and pays a placement agency a fee based upon a percentage of the lawyer's compensation, does not involve the sharing of legal fees by a lawyer with a non-lawyer in violation of Rule 5.4, distinguishing the payments as follows:

The temporary lawyer is paid by the law firm for the services the lawyer performs under supervision of the firm for a client of the firm. The placement agency is compensated for locating, recruiting, screening and providing the temporary lawyer for the law firm just as agencies are compensated for placing with law firms non-lawyer personnel (whether temporary or permanent).

The same concept applies with Law Clerk Connection because your project fee compensates us for providing the forum for connecting lawyers with Law Clerks and means for carrying out confidential exchanges of information and documentation.

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A lawyer may bill the services of Law Clerks to the client at whatever rates are specified in the contract between law office and client, so long as these rates are accepted by the client, and conform to rule 4-200.

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ABA Formal Opinion 93-379 addressed billing expenses and disbursements in the context of goods or of non-lawyers. The Opinion concluded that lawyers should disclose to their clients the basis for the fee and any other charges to the client, including:

- Fees for legal services should be inclusive of general office overhead in the absence of disclosure, in advance of the engagement to the contrary.
- In the absence of disclosure, it is improper to assess a surcharge on disbursements over and above the actual payment of funds to third persons made by the lawyer on the client's behalf, unless the lawyer incurs additional expenses beyond the actual cost of the disbursement item.
- If a lawyer receives a discounted rate from a third-party provider, it would be improper if he or she did not pass along the benefit of the discount to the client.
- In billing clients for fees and costs in connection with legal services, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is involved in the provision of professional services themselves, absent client consent.

The law office may bill the services of non-lawyers (i.e., Law Clerks) to the client at whatever rates are specified in the contract between law office and client, so long as these rates are accepted by the client, and conform to rule 4-200.<sup>4</sup>

## Conclusion

More and more firms are utilizing off-site legal processing companies to increase their competitiveness. It is important to understand the legal repercussions of outsourcing with a foreign company. By outsourcing with Law Clerk Connection though, many of those legal concerns are a non-issue, making it the superior choice for legal process outsourcing. Protect your practice and your country by choosing Law Clerk Connection.

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<sup>4</sup> The State Bar Of California Standing Committee On Professional Responsibility And Conduct Formal Opinion No. 1994-138.



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