

MINUTES

COMMITTEE: Ethics Committee

DATE: March 1, 2001

7. CHAPTER 5: OFF-SITE AND INDEPENDENT CONTRACTORS

In the course of reviewing an issue relating to unauthorized practice, the Unauthorized Practice Committee identified a number of other issues relating to work done for lawyers off-site, and asked for the opinion of the Ethics Committee on the propriety of some of those arrangements. The Unauthorized Practice Committee characterized those arrangements as follows:

One situation which the Unauthorized Practice Committee identified was employees who work off-site. It would appear that, more and more often, some employees are working from home. One of our members noted that this is particularly common with conveyancing and estate paralegals. Are there any special guidelines that apply to such employees particularly with respect to confidentiality? Should employees be allowed to take files out of the office? Does it make any difference if an employee has more than one employer for whom he or she does work?

Another situation the Committee considered involved lawyers subcontracting certain jobs to off-site services. One example given was large photocopying jobs. Did the Committee have any guidelines for lawyers who use these services?

Finally, the Committee noted that occasionally, independent contractors are retained by lawyers to perform certain functions on a file. One example given was a document service company which might be retained on a large file to catalogue, scan, and copy the documents. The Committee noted the possibility that some of the documents might be privileged. Can such a service be used by a lawyer? If so, what guidelines apply?

The Ethics Committee considered the following questions:

1. Are there any special guidelines that apply to employees working at home, particularly with respect to confidentiality? Should employees be allowed to take files out of the office?

The Committee noted that a lawyer's responsibility for matters entrusted to employees is set out in Chapter 12 of the *Professional Conduct Handbook* and that Rule 1 requires the lawyer to assume complete responsibility for all matters entrusted to the lawyer.

It was the Committee's opinion that a lawyer may permit an employee to do work out of the office, provided the lawyer is satisfied that client confidences will not be compromised by permitting that to occur. In determining whether a lawyer can fulfil obligations of confidentiality in these circumstances, the lawyer must have regard to, among other things, the trustworthiness of the employee, the nature and sensitivity of the information the employee will be taking away

from the office, the environment in which the employee will be working and the security that can be accorded to the information when it is out of the office.

2. Does it make any difference if an employee has more than one employer for whom he or she does work?

It was the opinion of the Committee that a lawyer may employ a non-lawyer who also works at another law firm. However, in addition to the ordinary obligations of confidentiality, lawyers who share the services of such an employee with another firm must also exercise due diligence to ensure that the employee does not disclose the other firm's confidential information to them. In giving this opinion the Committee did not mean to suggest that it would be proper for such an employee to work on matters for clients adverse in interest to each other who have retained different law firms.

3. Does the Committee have any guidelines for lawyers who subcontract certain jobs, such as large photocopying jobs, to off-site services?

The Committee approved of American Bar Association Opinion 95-398 that specifically recognises that law firms may use a computer maintenance company that would have access to the firm's clients' files. The Committee noted that Opinion 95-398 recognises that law firms now use outside agencies for numerous functions such as accounting, data processing and storage, printing, photocopying, computer servicing, and paper disposal and that it is proper practice to do so. It was the Committee's view that although lawyers who use the services of outside contractors do not breach their obligations of confidentiality by doing so, they must use due diligence to ensure that the information remains confidential. The due diligence required must take account of all the circumstances but would usually include, at a minimum, giving the contractor written notice of the requirement to preserve confidentiality.

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