

PROPOSED FORMAL ADVISORY OPINION NO. 24-1
(In response to FAO Request No. 23-R1)

QUESTION PRESENTED:

May a lawyer use a third-party vendor to request the production of documents from a non-party pursuant to O.C.G.A. § 9-11-34(c) and to follow up on and effectuate such a request to a non-party, and if so, what degree of autonomy may the lawyer allow the third-party vendor?

SUMMARY ANSWER:

Lawyers are authorized to use and rely on nonlawyer assistants to assist in the representation of clients. Under appropriate circumstances, that could include the use of a third-party vendor to request the production of medical records, bills, and other documents from nonparties and to follow up on and effectuate such requests to nonparties on the lawyer's behalf. But such an arrangement would not be appropriate if the lawyer believes, or reasonably should believe, the arrangement, or the particular third-party vendor, will interfere with or inhibit the lawyer's responsibilities under the Georgia Rules of Professional Conduct, most notably including the lawyer's responsibility to oversee the nonlawyer assistant, the lawyer's responsibility to provide competent representation, or the lawyer's ability to exercise professional judgment. Furthermore, such an arrangement would not be permissible if the lawyer does not retain the right and ability to appropriately supervise the third-party vendor's work.

OPINION:

Increasingly, members of the State Bar of Georgia have used third-party vendors to assist them in requesting the production of documents in civil actions. Often, those requests seek the production of medical records of a plaintiff or other party to a lawsuit, with the requests being directed to nonparty medical providers. In some instances, an insurer who has hired and pays the lawyer to represent an insured may direct or require the lawyer to use such a third-party vendor to request the production of medical records. The degree to which such third-party vendors handle the process of drafting, serving, and following up on the request for production may vary widely from one such vendor, case, and request to the next.

The question presented, thus, includes whether the Georgia Rules of Professional Conduct entirely prohibit a lawyer from using such third-party vendors to request the production of documents; and if not, under what circumstances and subject to what restrictions may a lawyer use such third-party vendors for this purpose?

Generally, a client may direct the lawyer on decisions concerning the scope and objectives of the lawyer's representation of the client, including directing the selection of a particular nonlawyer service provider outside the lawyer's firm. Georgia Rules of Professional Conduct 1.2(a) and 5.3, cmt. 5. But when done in the context of a pending civil action, "lawyers and parties may have additional obligations that are a matter of law beyond the scope of" the Georgia Rules of Professional Conduct. Rule 5.3, cmt. 5. These obligations, which are the scope of this opinion, include avoiding the unauthorized practice of law.¹

The Georgia Rules of Professional Conduct permit lawyers to use or rely on nonlawyer assistants to assist the lawyer in rendering legal services to a client. Rule 5.3 cmt. 4. "Assistants" are not limited to those titled as assistants and employed by a lawyer or firm; "assistants" as used here includes any person or entity that assists the lawyer in representing a client in a matter, whether by employment, contract, or other relationship with the lawyer or firm.

When relying on such nonlawyers, a lawyer "shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Rule 5.3(a) and (b). Accordingly, the lawyer must supervise the work delegated to a nonlawyer and "should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." Rule 5.3(a), (b), and cmts. 2 and 4.

In any arrangement in which a lawyer relies on a nonlawyer assistant, the lawyer will retain responsibility for the nonlawyer assistant's work. Rule 5.3 and cmts. 1 and 2. As such, a lawyer will be responsible for any inappropriate conduct of the nonlawyer in the context of his work for the lawyer if the lawyer either orders or ratifies the conduct in question. Rule 5.3(c)(1). Law firm partners and lawyers with managerial authority in a firm must also "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Georgia Rules of Professional Conduct," including as to the use of nonlawyer assistants by lawyers in the firm. Rule 5.1(a); *see* Rule 5.1(a) cmt. 2 (internal policies and procedures).

Additionally, one of a lawyer's chief responsibilities is to provide competent representation to a client. Rule 1.1. Competent handling of a particular matter includes "use of methods and procedures meeting the standards of competent practitioners." Rule 1.1, cmt. 5. In all cases, the lawyer may not initiate or continue with such an arrangement if it interferes with the lawyer's ability to exercise

¹ When or whether a person engages in unauthorized practice of law is beyond the scope of this opinion; however, *see* Rule 5.5(a) and cmt. 2.

professional judgment. *See* Rules 1.7 and cmts. 2 and 10, 1.8(f) and cmt. 5, 2.1, and 5.4(c).

In keeping with these principles, a lawyer may only use or rely on a third-party vendor to request and obtain medical records or any other documents from a nonparty if the lawyer properly complies with his responsibilities under the Georgia Rules of Professional Conduct. Thus, if such an arrangement does not allow the lawyer to exercise sufficient oversight to give reasonable assurance that the third-party vendor's conduct is compatible with the professional obligations of the lawyer, then the lawyer should not undertake or continue with the arrangement. *See* Rule 5.3, cmt. 4.² If a lawyer believes, or reasonably should believe, that such an arrangement would interfere with the lawyer's ability to provide competent representation to the client or the lawyer's ability to exercise professional judgment, the lawyer should not enter into the arrangement. *See* Rules 1.1, 1.8(f), 2.1, and 5.4(c). If a lawyer has entered into such an arrangement and the lawyer believes it has compromised or will compromise the lawyer's ability to provide competent representation to the client or to exercise professional judgment, the lawyer should either terminate the arrangement with the third-party vendor or withdraw from the representation.

Where a lawyer does enter into such an arrangement, the lawyer must supervise the work delegated to the third-party vendor. Rule 5.3(a), (b), and cmt. 1. Ultimately, the lawyer will be responsible for the conduct of the third-party vendor in the context of the representation as the lawyer would be with any other nonlawyer assistant. *See* Rule 5.3.³

²A lawyer would not be permitted to undertake or continue an arrangement in which the lawyer is not permitted or able to appropriately direct the actions of the third-party vendor in carrying out the work of serving, following up on, or effectuating a request for production of documents or things. In that situation, the arrangement would impermissibly inhibit the lawyer's ability to "communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer." Rule 5.3, cmt. 4.

³The use of nonlawyers outside the firm to assist in procuring sensitive or confidential information or documents, such as medical records, may also implicate other considerations under state and federal law (e.g., maintaining confidentiality of protected health information). While outside the scope of this opinion, the lawyer must take steps to ensure that any nonlawyer relied on by the lawyer complies with those requirements. *See* Rule 5.3(a) and (c), cmt. 4.

An additional concern exists where a lawyer has been retained, employed, or paid by a person to represent someone else and the person retaining, employing, or paying the lawyer seeks to impose a requirement that the lawyer use a third-party vendor in the context of that representation.⁴ Rule 5.4(c) prohibits a lawyer from permitting “a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” In the context of such an arrangement, the lawyer would not be permitted to follow a direction to use a third-party vendor to request the production of documents from a non-party if the lawyer believes or reasonably should believe the arrangement will likely interfere with the lawyer’s professional judgment in rendering legal services to the client. Such reasonable belief may be formed on the basis of contract terms, course of conduct, specific instances, or other facts known to the lawyer.

Furthermore, if the client, or insurer, and the lawyer cannot agree on whether the use of a specific third-party vendor or other nonlawyer assistant will allow the lawyer to meet his or her obligations under the Georgia Rules of Professional Conduct, then the lawyer should withdraw from the representation. *See* Rule 1.2, cmt. 2.⁵

⁴ One example is where an insurer retains, employs, or pays a lawyer to represent an insured. However, this potential issue and the related considerations would apply to any situation where the person retaining, employing, or paying the lawyer seeks to require the lawyer to use a particular non-lawyer assistant in representing someone else (e.g., a company paying the lawyer to represent its employee).

⁵ Where a lawyer uses or relies on a third-party vendor as a nonlawyer assistant at the direction of the client or the person retaining, employing, or paying for the representation, the lawyer’s work in supervising the conduct of the third-party vendor requires the lawyer to exercise professional legal judgment. Such supervisory authority is specifically reserved to the lawyer, and time spent exercising that authority is not “administrative,” “secretarial,” or “paralegal” work.