

OPINION 21-12

APPLICABILITY OF RULE 49 TO DISCOVERY SERVICES COMPANIES

Issued January 12, 2012

Pursuant to District of Columbia Court of Appeals Rule 49, and specifically its section 49(d)(3)(G), the District of Columbia Court of Appeals Committee on the Unauthorized Practice of Law, by a majority vote of a quorum of its members then present, approved the following opinion at its meeting on January 12, 2012:

The D.C. Court of Appeals Committee on Unauthorized Practice of Law has recently received a number of inquiries regarding the applicability of D.C. Court of Appeals Rule 49 to “discovery services companies”—companies that state they offer comprehensive discovery services, including assistance with large scale document review, to legal services organizations.¹ The Committee has previously issued two opinions that bear on this question, both of which also relate to document review: The Committee’s Opinion 6-99 discusses Rule 49’s application to legal staffing services, and Opinion 16-05 provides guidance on the applicability of Rule 49 to the work of “contract attorneys.”

Having investigated the matter, it is the Committee’s opinion that the business practices of discovery services companies have advanced sufficiently beyond the discussion in the Committee’s prior opinions that it would be useful to provide guidance to assist these companies and the legal services organizations that employ them in complying with Rule 49.

¹ “Legal services organizations” refers to law firms, corporate law departments, pro bono legal services organizations, and other organizations that may provide legal services in the District of Columbia.

A. Prior Opinions of the Committee on Unauthorized Practice of Law.

In 1999, the Committee issued Opinion 6-99 to address the applicability of D.C. Court of Appeals Rule 49 to the conduct of legal staffing services—companies that place attorneys on a temporary basis with legal services organizations. That opinion was prompted by the increasing practice of law firms and other legal services organizations seeking to retain attorneys on a temporary basis for particular projects, and the consequent emergence of companies offering to identify attorneys for such temporary placements. More often than not, the projects for which legal services organizations seek the assistance of temporary attorneys involve “document review”—the process of reviewing very large numbers of documents for large scale litigation or investigation matters.

Rule 49 of the District of Columbia Court of Appeals provides, “No person shall engage in the practice of law in the District of Columbia . . . unless enrolled as an active member of the District of Columbia Bar, except as otherwise permitted by these Rules.” Subsection (b)(2)(F) of Rule 49 states that the practice of law includes “[f]urnishing an attorney or attorneys, or other persons” to provide legal services. In Opinion 6-99 the Committee noted that “furnishing,” within the meaning of the rule “involves more than simply recommending a particular attorney.” Rather, “section (b)(2)(F) is generally addressed to the business of providing attorneys in response to a request from a non-lawyer member of the public for representation in a specific, pending legal matter.” Opinion 6-99 (June 30, 1999). “This activity is included in the definition of the ‘practice of law,’ because, properly made, such referrals generally involve the exercise of the trained judgment of a lawyer.” *Id.* The Committee concluded that legal staffing companies do *not* engage in the practice of law by providing attorneys to legal services organizations so long as: (1) an attorney with an attorney-client relationship with the prospective client selects the temporary attorney; (2) the temporary attorney

is directed or supervised by a lawyer representing the client; and (3) the staffing company does not otherwise engage in the practice of law within the meaning of Rule 49 or attempt to supervise the practice of law by the attorneys it places. *See id.*

Six years later, the Committee issued Opinion 16-05 to address another issue related to document review—the applicability of Rule 49 to “contract attorneys,” that is, the attorneys placed by legal staffing companies on temporary assignments or hired temporarily by legal services organizations. The Committee noted that contract attorneys are typically hired to fill temporary staffing needs resulting “from large, document-intensive litigations or investigations.” Opinion 16-05 at 2 (June 17, 2005).

The Committee concluded that “practicing law in the District of Columbia as a contract lawyer is no different than practicing law as a non-contract partner, associate or other employee.” *Id.* at 3. Accordingly, attorneys regularly practicing in the District of Columbia, even as contract attorneys, must be members of the D.C. Bar. *Id.* Nevertheless, the Committee acknowledged that certain document review tasks “seem[] to call for little or no application of legal knowledge, training, or judgment.” *Id.* at 5. The Committee cited as one common example “review of documents for potential relevance or potential privilege, where the ultimate decision to assert the privilege and produce or not produce the document will be made by someone else.” *Id.* The Committee explained that persons performing this work, which is “the same basic function as a paralegal,” must be members of the D.C. Bar if “the person is being held out, and billed out, as a lawyer.” *Id.* Whereas Rule 49 does not apply to persons hired as and performing the work of a paralegal, “[w]hen a person is hired and billed as a lawyer, . . . the person is generally engaged in the practice of law, and is certainly being held out as authorized or competent to practice law.” *Id.*

B. Applicability of Rule 49 to Discovery Services Companies.

In recent years, companies seeking to assist legal services organizations with document review have dramatically expanded the scope of their services. For example, some companies offer not only attorneys to staff document review projects, but also offer the physical space where the document review will take place, computers for conducting the review, and servers for hosting the documents to be reviewed. These companies also offer a host of related services, from e-discovery consulting to database management to the eventual production of documents in litigation.

At the same time, discovery services companies have begun to describe their services in increasingly broad language. They use terms like “one-stop shopping,” “comprehensive review and project management,” and “fully managed document review.” Other statements these companies have made in their promotional materials include the following:

- “We design, develop, and manage the entire review process instead of just providing contract attorneys and software and leaving the rest to the client.”
- “Simply put, our experience in running your project . . . managing a soup-to-nuts document project from process to production – is unparalleled.”
- “[We have] the ability to run every aspect of discovery management and document review with as much or as little involvement as you require.”
- “Our consultants develop and implement methods and manage the overall discovery process to yield efficiency and cost savings.”
- “Our managed services are tailored to specific project needs and include comprehensive project planning, on-site review team supervision, privilege log preparation, e-vender selection, and more.”

In addition, some companies have sought to distinguish their services by promoting the legal expertise or qualifications of their staff. These statements do not appear to refer to the expertise of attorneys that the company seeks to place for document review projects.

Instead, these companies tout the expertise of persons who work for the discovery services company itself. Some companies have described these individuals as “seasoned litigators,” and have promoted particular “practice areas” such as intellectual property, patent litigation, class action lawsuits, and mergers and acquisitions. Statements about discovery services companies’ legal expertise include the following:

- “With significant in-house corporate legal experience, our experts have a deep knowledge of the issues clients face and bring strategies that help clients optimize their review.”
- “[Our] team of attorneys is highly skilled and experienced in handling the complexities associated with litigation. We can readily assist you with any pre-litigation discovery issues, as well as draft discovery requests and responses. [We] can prepare all types of standard litigation related documents including: Preparation of Summons & Complaints, Discovery Requests and Responses.”
- “[O]ur teams are built around the notion that seasoned attorneys provide the best service to our clients because they’ve experienced the issues you face today.”
- “Led by seasoned attorneys, [our] competitive advantage is [our] subject matter expertise and proven ability to manage all aspects of document review, e-discovery and contract attorney placement services.”

Many of these companies have offices in the District of Columbia or state that they serve the Washington, D.C. market.

The expanded scope of services offered by discovery services companies and the way that they are promoted raise questions as to whether their activities constitute the practice of law under Rule 49, and whether the companies’ promotional statements constitute holding out as authorized to practice law in the District of Columbia under Rule 49(a). For example, a statement that a given company “design[s], develop[s], and manage[s] the entire review process” could mean that the company is selecting attorneys to work on a project and supervising the exercise of their legal judgment. If the company does so in the District of Columbia, it would be engaging in the practice of law under Rule 49, as discussed in the Committee’s Opinion 6-99. To the extent the statement is ambiguous as to the scope of services offered, it could also be

construed as holding the company out as authorized to practice law in the District of Columbia. Similarly, statements regarding the legal expertise of discovery services companies could be read to indicate that these companies are offering their staff members to provide legal judgment to members of the public. To the extent these companies are located in the District of Columbia, such statements could imply that the companies are authorized to practice law in the District.

On the other hand, the broad marketing statements made by these companies could also be consistent with services that do not cross the line into legal practice. A company's statement that it "design[s], develop[s], and manage[s] the entire review process" could also mean that the company takes care of all of the administrative and technical tasks associated with document review but none of the legal tasks. This could include locating and interviewing document reviewers, obtaining the physical space where they will work, obtaining computers, servers, and software sufficient to handle the review, handling payroll and taxes, making sure the document reviewers show up to work and work at an appropriate pace, and similar administrative tasks. The discovery services company could leave all of the tasks involving the exercise of legal judgment, such as the final selection of attorneys to work on the project and overseeing project attorneys' legal work, to a lawyer with a client relationship. Indeed, in response to the Committee's inquiries, discovery services companies uniformly stated that, in spite of their promotional materials, this is precisely the scope of services that they provide.

Similarly, the expertise of discovery services companies' staff as litigators or in-house counsel and in particular areas of the law is likely to be useful in managing even the non-legal aspects of document review projects. Cases involving a particular area of the law may share common technical or other administrative requirements that do not involve the exercise of legal judgment. Discovery services companies' promotional statements regarding their staff's

legal expertise could therefore be read not as holding out, but rather as attempting to demonstrate how particular expertise assists with the permissible non-legal services that the company provides. Again, the discovery services companies contacted by the Committee stated that this is the intent of the cited statements.

In order to provide guidance to discovery services companies regarding the permissible scope of services that may be performed without engaging in the practice of law and the extent to which the companies may promote their services without holding out as authorized to practice law in the District of Columbia, the Committee offers the following principles:

First, the Committee notes that some of the largest discovery services companies are not based in the District of Columbia but state that they serve the Washington, D.C. legal market. Rule 49's prohibition on unauthorized practice applies to "the practice of law *in the District of Columbia.*" Rule 49(a) (emphasis added). The rule thus applies specifically to companies that are located in the District of Columbia or that conduct document reviews that take place in the District of Columbia. To the extent discovery services companies located elsewhere conduct document review projects outside of the District, those projects are not governed by Rule 49. However, Rule 49's prohibition on holding out is not likewise geographically restricted. Rather, the Rule prohibits holding out "in any manner," as authorized to practice law in the District, even if the person or entity is not physically within the District of Columbia. D.C. Ct. App. R. 49(a). Thus, to the extent that discovery services use a District of Columbia address, or advertise themselves as available to assist with discovery projects in the District, Rule 49's holding out prohibition does apply.

Second, to comply with Rule 49's unauthorized practice restrictions, companies that provide lawyers for document review in the District of Columbia must abide by Rule 49 and

the Committee's Opinion 6-99. Thus, the final selection of attorneys to staff a document review project must be made by a member of the D.C. Bar with an attorney-client relationship with the client, the attorney's legal work must be directed or supervised by a D.C. Bar member who represents the client, and the discovery services company may not otherwise violate Rule 49 or attempt to supervise the document review attorney.

As Opinion 6-99 made clear, however, the touchstone of Rule 49(b)(2)(F) is the exercise of professional legal judgment. Accordingly, discovery services companies do not run afoul of Rule 49 by handling the administrative aspects of hiring and supervising a document review attorney. This could include interviewing individuals to create a roster of attorneys available to assist with document review projects, providing the lawyer's working space and equipment, ensuring that he or she works a regular day and works at an acceptable pace, providing salary and benefits, and similar supervisory activities that do not require the application of professional legal judgment. Moreover, as the Committee acknowledged in Opinion 16-05, "Rule 49 does not regulate the hiring of a person as a paralegal or a law clerk, even though the person may be admitted to the practice of law in another jurisdiction." Opinion 16-05 at 5. Accordingly, discovery services companies do not violate Rule 49 when hiring persons to perform work that does not involve the application of legal knowledge, training, or judgment, and the person is not held out or billed as a lawyer. *See id.*

Third, discovery services companies that are not otherwise authorized to practice law in the District of Columbia may not provide legal advice to their clients, nor may they hold out themselves or any attorneys on their staff as authorized to practice law in the District of Columbia. The commentary to Rule 49 provides that the holding out provision "prohibits both the implicit representation of authority or competency by engaging in the practice of law, and the

express holding out of oneself as authorized or qualified to practice law in the District of Columbia.” D.C. Ct. App. R. 49 & Commentary, at 11. To avoid running afoul of the holding out prohibition, discovery services companies must avoid making statements in their promotional materials that are ambiguous or misleading regarding their capabilities.

For example, terms like “document review” and “the discovery process” encompass numerous discrete tasks, some of which involve the application of legal judgment and some of which do not. Broad statements that a company can manage the entire document review or discovery process—by providing “soup-to-nuts” or “end-to-end” solutions, *e.g.*—have a serious potential to mislead. Accordingly, discovery services companies should avoid making such broad statements or at a minimum must include a prominent disclaimer stating that the company is not authorized to practice law or provide legal services in the District of Columbia, and that the services offered by the company are limited to the non-legal, administrative aspects of document review and discovery projects. In order to be effective, such a disclaimer must appear on the same page as the potentially misleading claim, must be in the same font size and in close proximity to the claim.

In addition, while marketing statements promoting the legal expertise of discovery services companies’ staff may be intended only to demonstrate that those staff members have backgrounds that enable them to effectively manage the non-legal aspects of document review projects, standing alone such statements can be misconstrued as implying that those persons will apply their legal judgment or expertise in a given project. Accordingly, in order to avoid creating the impression that the company or its staff is authorized to practice law in the District of Columbia, statements regarding the legal experience of the companies’ staff must be accompanied by a prominent disclaimer that the company is not authorized to practice

law or provide legal services in the District of Columbia, and that the company's staff members cannot represent outside clients or provide legal advice.

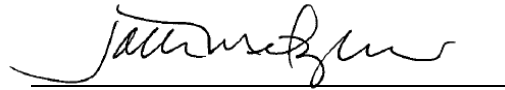
To be clear, the requirement that discovery services companies avoid misleading statements regarding their staff members' authorization to practice law is directed to statements regarding the discovery services company's own staff members, not to attorneys that it places for discovery projects. The requirement applies even if the company's staff members are members of the D.C. Bar. While a D.C. Bar member may individually be authorized to practice law in the District, a company providing such an attorney's legal services would necessarily run afoul of the restrictions placed on attorney referral articulated in the Committee's Opinion 6-99.² The requirement does not apply to a company's description of its roster of attorneys available to be placed on document review projects, so long as the referral of such attorneys complies with Rule 49 and Opinion 6-99.

Consistent with prior opinions of the Committee, this Opinion addresses only the application of Rule 49 to the discovery-related services described above. It does not address the activities of professional search companies that provide different services, nor to the non-discovery services offered by discovery services companies or their affiliated entities.

² In addition, an attorney purporting to represent a client while working for a company that is not itself authorized to provide legal services could raise ethical concerns for the attorney in question. *See* D.C. R. Prof. Conduct 5-4(c). While noting this concern, the Committee expresses no opinion on the applicability of the Rules of Professional Conduct to the activities described in this Opinion.

The staff of the Committee shall cause this Opinion to be submitted for publication in the same manner as the opinions rendered under the Rules of Professional Conduct.

Done this 12th day of January, 2012.

A handwritten signature in cursive script, appearing to read "Jack Metzler", written over a horizontal line.

Jack Metzler
Member
District of Columbia Court of Appeals
Committee on Unauthorized Practice of Law