Globalization's Impact on Legal Services: The American Bar Association Weighs In

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Technological developments are continuing to transform the world's economy, with few, if any, industries in the United States, or elsewhere, unaffected.[1] Globalization even has led to changes in the ways in which lawyers provide legal services, with a growing number of US lawyers and law firms now outsourcing work to lawyers and nonlawyers located overseas, or to lawyers based and licensed in the United States and to nonlawyers in the United States who are not affiliated with the outsourcing lawyers or law firms.[2]

Many process-driven legal services, including litigation support, legal research, and patent applications, are considered to be prime candidates for legal outsourcing[3] by US lawyers and law firms because of outsource providers' technological efficiencies and the push by clients for lower fees. As a result, legal outsourcing is growing quite rapidly,[4] and it appears to many that the trend can only increase.[5]

The American Bar Association (ABA) has taken notice. For example, four years ago, the group's Standing Committee on Ethics and Professional Responsibility (the Committee) issued Formal Opinion 08-451, "Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services," which explored the ethics of outsourcing and offered guidance to lawyers and which, in the process, declared that "[t]he outsourcing trend is a salutary one for our globalized economy" because it allows lawyers to reduce their costs, and often client costs, and can help lawyers provide services beyond their in-house capabilities.[6]

Now, at this year's annual meeting, the ABA is poised to consider changes to the ABA Model Rules of Professional Conduct (Model Rules) filed by the ABA Commission on Ethics 20/20 (the Commission)[7] that would provide further guidance to lawyers regarding the ethical implications of outsourcing, that is, of retaining lawyers and nonlawyers outside a firm to work on client matters.[8]

This article first will review Opinion 08-451. It then will discuss the proposed revisions to the Model Rules and the implications for both lawyers and clients.

Opinion 08-451

In Opinion 08-451, the Committee interpreted a number of rules and comments of the Model Rules as were then in effect. The Committee included the portion of Rule 1.1 that requires that a lawyer render legal services to a client with the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The opinion also referenced Comment [1] to Rule 1.1:

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> In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

In addition, the Committee referred to Rule 5.1(b), which states that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct," and to Rule 5.3(b), which requires that lawyers who employ, retain, or associate with nonlawyers "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[9]

With these provisions of the Model Rules in mind, the Committee explained that Rule 1.1 does not require that lawyers provide legal services in only one way, only that they render legal services "competently." Within that limitation, the Committee observed, a lawyer may do all of the work himself or herself, may delegate work to associates or nonlawyers, or may outsource work to "independent service providers that are not within their direct control."

Rules 5.1 and 5.3 come into play, the Committee pointed out, because of the obligations imposed on lawyers who have "direct supervisory authority" over other lawyers and over nonlawyers. With respect to outsourcing, the Committee stated, a lawyer must make certain that outsourced tasks are given to lawyers or nonlawyers who are "competent" to perform them, and then the lawyer must adequately, and appropriately, oversee the execution of the project.

The Committee recognized that tasks can be delegated to "remote locations." It acknowledged that technology—in the form of electronic communications—can close the gap, but it stated that that might not be enough for a lawyer to effectively monitor the outsourcing professionals. The Committee then declared that, at a minimum, a lawyer outsourcing services for ultimate provision to a client "should consider conducting reference checks and investigating the background of the lawyer or nonlawyer providing the services as well as any nonlawyer intermediary involved, such as a placement agency or service provider." The Committee added that the outsourcing lawyer also "might consider interviewing the principal lawyers, if any, involved in the project" to find out about their education, among other things. Moreover, the Committee said, when dealing with an intermediary, an outsourcing lawyer "may wish to inquire into its hiring practices to evaluate the quality and character of the employees likely to have access to client information."

The Committee highlighted other issues as well. It stated that an outsourcing lawyer, depending on the sensitivity of the information involved in the outsourced matter, "should consider investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures." Interestingly, the Committee also declared that, in "some instances" (although it did not specify what those instances are), an outsourcing

lawyer might find it "prudent" to pay a personal visit to the intermediary's facility, notwithstanding what it referred to as that facility's "location" or "the difficulty of travel," so that the outsourcing lawyer could make his or her own personal judgment about the intermediary's business and the "professionalism" of the lawyers and nonlawyers the intermediary hires.

In addition, the Committee stated, an outsourcing lawyer who is retaining lawyers trained in a foreign country "first should assess" whether that country's legal education system is "comparable" to the US system, noting that some countries permit people to claim that they are "lawyers," despite having only minimal training. In these situations, an outsourcing lawyer should evaluate the country's regulatory system to determine whether its lawyers "have been inculcated with core ethical principles similar to those in the United States," and whether "bad apples" are effectively disciplined.

On the one hand, the Committee imposed these obligations on outsourcing lawyers. On the other hand, it stated that an absence of "rigorous training" or "effective lawyer discipline" would not bar foreign lawyers from working on a particular project. Rather, the Committee stated that, in these situations, it would be "more important than ever" for an outsourcing lawyer to scrutinize a foreign lawyer's work before relying on it to provide legal services to the client.

Opinion 08-451 also stated that an outsourcing lawyer should consider whether client confidentiality rules would permit documents or other property sent to a foreign lawyer or nonlawyer to be seized in judicial or administrative proceedings, and the effectiveness of the remedies available in those situations.

Finally, the Committee discussed some other issues under the Model Rules that an outsourcing lawyer must take into account, stating that it "may be necessary" for an outsourcing lawyer to inform the client about the outsourcing work, and "perhaps," even to obtain the client's informed consent to the retention of lawyers or nonlawyers who are not associated with the outsourcing lawyer or the outsourcing lawyer's law firm, adding that in a "typical outsourcing relationship," an outsourcing lawyer may not reveal confidential client information without the client's informed consent. Additionally, the Committee stated, an outsourcing lawyer may not make "affirmative misrepresentations" to a client regarding the status of lawyers and nonlawyers who do not work for the lawyer or the lawyer's firm. With respect to the need to protect confidential client information, the Committee also said that written confidentiality agreements are "strongly advisable" in outsourcing relationships, and that an outsourcing lawyer should verify that the outside service provider does not also do work for a client's adversaries on the same or substantially related matters.

Opinion 08-451 also explained that fees charged by an outsourcing lawyer must be reasonable and otherwise comply with the requirements of Rule 1.5; generally required that outsourced services be billed at cost, plus a reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services; and emphasized that an outsourcing lawyer should be careful not to "practice law in a jurisdiction in violation of the

regulation of the legal profession in that jurisdiction."

Notwithstanding the various issues the Committee considered and the warnings and concerns that it expressed, the bottom line of Opinion 08-451 was quite clear: "A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1" and provided the outsourcing lawyer complies with Rules 5.1 and 5.3.

This is the context within which the ABA is now going to consider the Commission's outsourcing proposals.

Current Proposals

The Commission's outsourcing proposals to the ABA do not provide for amendments or changes to the Model Rules but rather focus exclusively on proposed changes to comments to Rules 1.1 (Competence), 5.3 (Responsibilities Regarding Nonlawyer Assistants), and 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) to clarify how the Model Rules apply to the particular context of outsourcing.

As noted above, Rule 1.1 requires that lawyers perform legal services "competently." With the frequency with which lawyers now outsource work, the Commission decided that the comments to Rule 1.1 should refer specifically to outsourcing. Toward that end, the Commission proposes two new comments to Rule 1.1. It should be noted that the new comments do not use the word "outsourcing," although the comments are intended to address outsourcing. The Commission's rationale for not using the word "outsourcing" is that lawyers are more familiar with the concept of "retaining" or "contracting with" a nonfirm lawyer and the word "outsourcing" would create unnecessary confusion. Moreover, it suggests that the word "outsourcing" may become dated and replaced by a new term.

The first new comment, Comment [6], would state:

> Retaining or Contracting With Other Lawyers
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> [6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

The first sentence of the proposed new Comment [6] restates the position that the outsourced services will be performed competently and that they

contribute to the overall competent and ethical representation of the client. That sentence also explains that, "ordinarily," a lawyer should obtain a client's informed consent before outsourcing client work. The Commission says that it was "reluctant" to conclude that consent is always necessary, noting that consent may not be necessary when a nonfirm lawyer is hired to perform a discrete and limited task, especially if the task does not require the disclosure of confidential information. Nevertheless, the Commission concluded that consent will "typically" be required, and will "almost always be advisable" when a nonfirm lawyer is retained to assist on a client matter.

Following the first sentence is a list of other Model Rules that lawyers should consult when retaining nonfirm lawyers. The Commission suggests that these Model Rules are commonly implicated in this context and that lawyers should be aware of their potential application.

As the Commission indicates in its report, the next sentence lists several factors that lawyers should consider when retaining nonfirm lawyers, including the education, experience, and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information. The Commission observed that this list is "not intended to be exhaustive," but rather is intended to give lawyers some guidance regarding some of the most important considerations to take into account when outsourcing.

It should be emphasized that proposed Comment [6] does not require that outsourcing lawyers reasonably believe that a nonfirm lawyer's work is competently performed. The Commission decided that such a requirement would impose "unnecessary, costly obligations" to determine the competency of work performed by other lawyers in different firms to whom work is outsourced. Instead, the Commission decided that the level of oversight by outsourcing lawyers over the lawyers who perform the work should be addressed in an ethics opinion rather than in a comment to the Model Rules; toward that end, it asked the Committee to address this issue either in a revised version of Opinion 08-451 or in a separate formal opinion.

The second new Comment to Rule 1.1 proposed by the Commission, a new Comment [7], would read as follows:

> [7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Proposed Comment [7] emphasizes that multiple firms working together on a client matter ordinarily should consult with the client and each other about the scope of each firm's work and the firm's responsibilities.

Comments To Rule 5.3

With respect to Rule 5.3,[10] the Commission is proposing that Comment [2], which offers an overview of Model Rule 5.3, be moved to Comment [1] and that it should make clear that Rule 5.3 applies to outsourcing. The new Comment [1] would state:

> [1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

The Commission also proposes new Comments [3] and [4] to Rule 5.3:

> Nonlawyers Outside the Firm
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> [3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer 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.
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> [4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.

> See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Proposed Comment [3] recognizes that nonlawyers can provide many different services, including cloud computing. Proposed Comment [3] also states that a lawyer is obliged to ensure that nonlawyer services are performed in a manner compatible with the lawyer's professional obligations, setting forth the factors that determine the extent of the lawyer's obligations. Comment [3] ends by emphasizing that lawyers have an obligation to give appropriate instructions when retaining or directing nonlawyers outside the firm. It should be emphasized that the proposed comment does not describe whether a lawyer must obtain consent when disclosing confidential information to nonlawyer service providers outside the firm; the Commission decided that consent often is not needed in those circumstances, and it suggests that the Committee consider this question in a formal opinion.

Proposed Comment [4] includes a new concept: "monitoring." The Commission decided that a lawyer may not be able to directly supervise a nonlawyer to whom work is outsourced, but that the lawyer and client must agree on who will have to monitor the nonlawyer.

Comment To Rule 5.5

Finally, the Commission is proposing to add a new last sentence to Comment [1] to Rule 5.5, which would read as follows:

> [1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

The purpose of the addition of this sentence is for outsourcing lawyers to make sure that lawyers and nonlawyers to whom they outsource work are not engaging in the unauthorized practice of law.

Conclusion

The Commission's proposed changes to a number of comments to the Model Rules are not particularly controversial. In fact, the most controversial thing about them, especially given the existence of Opinion 08-451, is that the Commission is proposing to make them at all—and to deal with outsourcing by lawyers (even if the Commission refuses to use the term "outsourcing" in the proposed comments).

The Commission says that it knows that "certain" outsourcing is controversial in light of the current job market for lawyers[11] and emphasizes that its proposal is "neither an endorsement nor a rejection of the practice of outsourcing." Indeed, it is quite apparent that the proposals are a response to the existence—and

continuing growth—of outsourcing by lawyers and law firms, a wave that cannot be restrained. For lawyers, and for clients, the proposals reinforce that the world has changed, and that globalization and outsourcing affect even the practice of law.

Notes

[1] *See, generally*, Thomas Friedman, *The World Is Flat 3.0: A Brief History of the Twenty-first Century (*2007).

[2] An outsourcing lawyer in the United States who sends work to lawyers or nonlawyers outside the United States is "offshoring" that work. When a US lawyer outsources work to a lawyer or nonlawyer who is in the United States, the outsourcing lawyer is engaged in "onshoring," "insourcing," or "homesourcing."

[3] Shawn *C. Helms & Jason D. Krieser, Outsourcing: Law & Business*, (Law Journal Press 2011) at 1-11. *See also*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) (hereinafter Opinion 08-451) ("Outsourced tasks range from the use of a local photocopy shop for the reproduction of documents, to the retention of a document management company for the creation and maintenance of a database for complex litigation, to the use of a third-party vendor to provide and maintain a law firm's computer system, to the hiring of a legal research service to prepare a 50-state survey of the law on an issue of importance to a client, or even to the engagement of a group of foreign lawyers to draft patent applications or develop legal strategies and prepare motion papers in U.S. litigation.").

[4] *See* "Passage to India: The Growth of Legal Outsourcing," *The Economist*, June 28, 2010, at 69.

[5] Stephen Gillers, "A Profession, If You Can Keep It: How Information Technology and Fading Borders are Reshaping the Law Marketplace and What We Should Do About It," 63 *Hastings L.J.* 101, 132 (May 2012).

[6] Opinion 08-451, *supra* note 3. This was not the first opinion by the ABA Ethics Committee on outsourcing. In 1988, in Formal Opinion 88-356, the Ethics Committee decided that a lawyer who retained a temporary lawyer, a form of outsourcing, had an obligation to inform his or her client of that retention; moreover, a lawyer would have to obtain the client's consent when the lawyer intended for the temporary lawyer to perform independent work without the close supervision of a lawyer from the hiring firm; ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 88-356 (Dec. 16, 1988) (Temporary Lawyers). Outsourcing issues also have been the focus of opinions by a number of state and local bar associations. *See, e.g.*, Colo. Bar Ass'n, Formal Op. 121 (2009); Ass'n of the Bar of the City of NY Comm. on Prof'l Responsibility, Report on the Outsourcing of Legal Services Overseas (2009), *available at www.nycbar.org/pdf/report/uploads/20071813-ReportontheOutsourcingofLegalServicesOverseas.pdf*; Ohio S. Ct. Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 2009-06 (2009); Fla. State Bar Prof'l Ethics Comm., Ethics Op. 07-2 (2008); NC State Bar, 2007 Formal Op. 12 (2008); NY State Bar Ass'n. Comm. on Prof'l Ethics, Ethics Op. 762 (2003); NYC Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006); and State Bar of Cal., Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-165 (2004). *See, also*, Council of

Bars and Law Societies of Europe, CCBE Guidelines on Legal Outsourcing (2010), *available at* *www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Guidelines_on_leg1_1277906265.pdf*.

[7] *See* *www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html*.

[8] Opinion 08-451 describes the forms of outsourcing contemplated by the opinion as follows: "Many lawyers engage other lawyers or nonlawyers, as independent contractors, directly or through intermediaries, on a temporary or an ongoing basis, to provide various legal and nonlegal support services."

[9] Perhaps going beyond the actual text of these provisions, the Committee decided that they apply whether or not the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm, explaining that, although Comment [1] to Rule 5.1 states that it applies to lawyers who have supervisory authority over the work of other lawyers "in a firm," the Committee did "not believe" that the drafters of the Model Rules intended to restrict the application of Rule 5.1(b) to the supervision of lawyers within "firms." As the Committee reasoned, a contrary interpretation would lead to the "anomalous result" that lawyers who outsource have a lower standard of care when supervising outsourced lawyers than they have with respect to lawyers within their own firms.

[10] Rule 5.3 states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[11] *See, e.g.*, *www.nalp.org/uploads/Classof2011SelectedFindings.pdf*.