

Legal Ethics

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A Lawyer's Obligations When Outsourcing Services

Lawyers and law firms have traditionally outsourced nonlegal support services to vendors for purposes ranging from photocopying and document management to expert opinions. However, there is a growing trend toward the outsourcing of legal services, as lawyers respond to clients' efforts to reduce their costs for legal services.

The outsourcing of services by both law firms and Fortune 500 companies is becoming big business, particularly for India. Earlier this year, *Time* magazine reported that revenues from the outsourcing of legal services to India (also called legal process outsourcing, or LPO) should reach \$640 million by 2010. (Susan Barlyn, *Call my Lawyer...in India*, *Time*, April 7, 2008, <http://www.time.com/time/magazine/article/0,9171,1727726,00.html>). This trend could move as many as 50,000 legal jobs overseas by 2015. (Cynthia Cotts and Liane Kufchock, *U.S. Firms Outsource Legal Services to India*, *International Herald Tribune*, August 21, 2007, <http://www.ihf.com/articles/2007/08/21/business/law.php>).

There are presently about 100 third-party legal services providers in India, some of which are based or have offices in the United States. Some U.S. companies also have legal departments in India. Recognizing this trend, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 08-451, *Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services*, on August 5, 2008.

Formal Opinion 08-451 primarily addresses specifically a lawyer's obligations under the Model Rules of Professional Conduct, as amended through February 2008. The current Illinois Rules of Professional Conduct were adopted effective August 1, 1990, and were based largely on the American Bar Association's Model Rules of Professional Conduct that were first published in 1983. The opinion primarily addresses Rules 5.1(b) and 5.3(b), which are substantially the same as the corresponding Illinois Rules of Professional Conduct. Accordingly, Formal Opinion 08-451 can provide guidance to Illinois lawyers who are or may be considering the outsourcing of services, particularly legal services.

Illinois RPC 5.1 addresses the responsibilities of a lawyer who has direct supervisory authority over another lawyer. RPC 5.1(b) states: "Each lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer's conduct conforms to these Rules."

Illinois RPC 5.3 refers to a lawyer's responsibilities with respect to nonlawyer assistants "employed or retained by or associated with a lawyer." RPC 5.3(b) states: "each lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."

Neither provision presupposes that the lawyer or nonlawyer assistant being supervised is a member of the same firm or directly employed by the lawyer. Similarly, neither provision directly regulates a lawyer's professional conduct. The supervising attorney is not required to guarantee that no malfeasance will occur. Rather, the lawyer is required only to make "reasonable efforts" to comply with the provisions of these rules.

The Illinois Rules of Professional Conduct do not specifically define the term “reasonable efforts.” However, “reasonable” is defined as “the conduct of a reasonably prudent and competent lawyer.” Formal Opinion 08-451 recognizes, however, that “there is no unique blueprint for the provision of competent legal services.” The concerns for a lawyer who is outsourcing either legal or nonlegal services are (1) to ensure that the work is delegated to individuals who possess the knowledge, skills, and experience necessary to perform them, and (2) to exercise appropriate and adequate supervision over the performance of the work.

Where the lawyer or nonlawyer assistant is a member of the lawyer’s firm, or directly hired by the lawyer, these concerns are lessened. Presumably, the lawyer has personal knowledge of the individual’s competence to perform the assigned tasks and has the ability to supervise the individual directly. The outsourcing of services, however, particularly to a foreign country, increases the difficulty for the lawyer to properly supervise the work assigned, although modern means of electronic communications may reduce concerns over the lack of proximity to the person performing the services.

Before outsourcing services to an individual in a foreign country, it would seem to be necessary, at a minimum, to compare the legal system in which the individual was trained to Illinois’ system, in addition to ascertaining the individual’s personal qualifications. The breadth of the lawyer’s inquiry might depend on the nature of the work and the type of confidential information to be disclosed. Under some circumstances, personal interviews of those involved might be required, in addition to checking references, and conducting an investigation into the procedures employed to ensure confidentiality.

One Indian company discloses that its attorneys are searched to be certain that they are not carrying flash drives or laptop computers, and that they work on computers without disc drives and that cannot download or print data. Some of its attorneys work solely for specific clients in secure areas that are accessible only via fingerprint scan.

Depending on the level of supervision provided by the lawyer, there may be circumstances under which the lawyer must disclose the outsourcing arrangement, or obtain the client’s consent, in order to comply fully with the Rules of Professional Conduct. At a minimum, a written confidentiality agreement might be advisable. Similarly, the lawyer must consider whether the charges for the outsourced services are to be billed to the client at cost, or may be marked up based on the level of supervision required or other factors.

The outsourcing of legal and nonlegal services may well provide a financial benefit to the client. However, the lawyer or law firm doing so must be aware of all of the different provisions of the Rules of Professional Conduct that may be applicable under the particular circumstances.

About the Author

Michael J. Progar is a partner with the firm of *Doherty & Progar, LLC*. He practices in both the Indiana and Illinois offices. A trial attorney with more than 20 years of civil jury trial experience, Mr. Progar has tried over 50 jury trials to verdict in both state and federal courts. Areas of special concentration include complex product liability and toxic tort litigation, insurance coverage, fraud and bad faith litigation, construction litigation, premises liability and employers’ liability. He received his J.D. from DePaul University College of Law in 1981 and his B.A. in American Studies from the University of Notre Dame. Mr. Progar is a member of DRI, IDC, Defense Trial Counsel of Indiana, Indiana State Bar Association, State Bar of Wisconsin and the Lake County, Indiana Bar Association. He has served on various bar association committees in the areas of tort and insurance litigation and alternative dispute resolution.