

MOSES & SINGER LLP

“How to Outsource Legal Work—Ethically: Authorities Weigh In”
By Devika Kewalramani

08-24-11

It's Sunday night in New York, Monday morning in New Delhi. When the New York lawyer opens her laptop the next morning, the project will be complete and the documents will be in her inbox. Legal process outsourcing maximizes speed, saves costs and manages overflow work. But is it ethical? And if it can be ethical, what must the lawyer do to keep it ethical?

Ethics Authorities

Yes, outsourcing legal work is ethical. Indeed, it is old wine in a new bottle. Lawyers have long been associating other counsel in matters and obtaining nonlawyer services from third parties. The ABA Commission on Ethics 20/20 recently took up the subject and, in its May 2011 report¹ (ABA Report) to the ABA House of Delegates, concluded that it did not need to make any changes in the Model Rules of Professional Conduct to accommodate outsourcing.

However, the delegation of legal tasks to other lawyers, in the United States and abroad, has highlighted concerns about:

- Client awareness of who is doing the work;
- Confidentiality;
- Competence of lawyers and supervision of their work;
- Unauthorized practice of law by out-of-state or foreign lawyers;
- Conflicts.

The dramatic growth of legal process outsourcing has prompted ethics authorities around the country to examine it. The 2011 ABA Report and a 2009 report by the Committee on Professional Responsibility of the New York City Bar² (City Bar Report) are the most recent papers from the ABA and the city bar.

In addition, in 2006, the Committee on Professional and Judicial Ethics of the city bar issued an advisory opinion³ that a New York lawyer may ethically outsource legal support services offshore provided that the New York lawyer (i) rigorously supervise the nonlawyer to avoid aiding in the unauthorized practice of law and to ensure competent representation of the client; (ii) take steps to ensure the preservation of client confidential information; (iii) attend to conflict

checking to avoid conflicts of interest; (iv) bill appropriately for the services provided; and (v) obtain advance client consent when appropriate.

In 2008, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion approving outsourcing of legal services, and concluding that "[t]here is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided the outsourcing lawyer renders legal services to the client with the 'legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,' as required by Rule 1.1 [of the Model Rules]."⁴

Key Concerns

The 2011 ABA Report offers general guidance on outsourcing; the 2009 City Bar Report offers specific procedures. There are no universally applicable rules yet, but a consensus may be emerging as to how to handle the specific areas of concern. The unifying theme is that the outsourcing lawyer remains responsible for the work.

Client consent. The ABA Report said that the client's informed consent should "ordinarily" be obtained before lawyers outside the retained firm provide legal services. Proposed Comment 6 to Model Rule 1.1 ("Competence"). Likewise, the 2009 City Bar Report stated that client consent should be obtained for substantive legal work performed by foreign firms, such as legal research and brief writing. The 2006 advisory opinion by the city bar, analogizing to previous opinions about temporary lawyers, said that client consent should be obtained in some circumstances, but did not clearly define those circumstances.

Confidentiality. The ABA Report concluded that Model Rule 1.6, the rule protecting client confidences, applied to legal outsourcing, but that no new Comment was required. The City Bar Report, on the other hand, required substantial scrutiny of the degree of risk to client information in the outsourced jurisdiction, including review of the laws there, instructing the outsource provider on U.S. ethical obligations, putting protection of confidentiality in the outsourcing contract, and several other specific procedures.

Competence. The ABA Report said that the outsourcing lawyer must satisfy himself that the outsourced lawyer will contribute to the competent and ethical representation of the client and must ensure that the outsourced lawyer's work is performed in a manner consistent with the outsourcing lawyer's own duty of competence. The City Bar Report required checking of the outsourced lawyer's credentials and supervision and review of the outsourced lawyer's product, and imposed a number of other specific supervisory requirements.

Unauthorized practice of law. The ABA Report considered unauthorized practice to be a matter of avoiding the outsourced lawyer's violating his own local unauthorized practice rules. In contrast, the City Bar Report considered unauthorized practice to be a matter of avoiding the New York lawyer's violating New York's unauthorized practice rules, and required the New York lawyer to adequately supervise the outsourced lawyer's work and retain complete responsibility to avoid such violation.

Conflicts. The ABA Report observed that a number of outsource providers themselves use conflicts checking procedures like those of large American and U.K. law firms. That report

concluded that the existing Model Rules on conflicts of interest were sufficient. The City Bar Report generally placed responsibility for conflicts checks on the outsourced lawyer (and law firm), but said that the outsourcing firm must ensure that the outsourced firm understands its obligations concerning conflicts and has satisfactory procedures in place.

The ABA Report

Without recommending changes to the text of the Model Rules, the 2011 ABA Report proposed amendments to some Comments to the Model Rules ("Proposed Comments"): Model Rules 1.1 (Competence), 5.3 (Responsibilities Regarding Nonlawyer Assistants), and 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice). The Proposed Comments in the ABA Report cover both outside lawyers and nonlawyers. Following are some of the highlights of the ABA Report.

Terminology: 'Retain' vs. 'Outsource.' The most striking feature of the ABA Report is that the term "outsourcing" is not used anywhere. The ABA Ethics Commission concluded this would "create unnecessary confusion," as lawyers are already familiar with the concept of "retaining" or "contracting with" rather than "outsourcing," a relatively new term which may become outdated. Consequently, the commission retained the original terminology on the theory that legal process outsourcing is conceptually identical to the retention of nonfirm attorneys or outside nonlawyer services.⁵

Client Consent. The ABA Report states that client consent will usually be required and will almost always be advisable before retaining a nonfirm lawyer on a client matter. An exception is made when a nonfirm lawyer is hired to perform a discrete and limited task not requiring disclosure of confidential client information.⁶

'Assistants' vs. 'Assistance.' The ABA Report also addressed outsourcing of non-legal work. Proposed Comment [3] to Model Rule 5.3 focuses on the use of nonlawyers who work "outside" the firm to remind lawyers to use reasonable efforts to ensure that those outside services are provided in a manner that is compatible with the lawyer's professional obligations. The prescribed standard depends on factors that parallel those recited in Proposed Comment [6] to Model Rule 1.1, regarding nonfirm lawyers.

To clarify that "outside" nonlawyer services are not only performed by individuals but also by entities, the ABA Report recommended a title change for Model Rule 5.3. In the title, "Responsibilities Regarding Nonlawyer Assistants," the word, "Assistants" is to be replaced with "Assistance." For the same reason, Proposed Comment [3] to Model Rule 5.3 expressly includes emerging new technologies, such as cloud-based providers, as examples of entity services.

'Monitor' vs. 'Supervise.' With respect to nonlawyer services, the ABA Ethics Commission draws a distinction as to the level of quality control required. It says that if a client selects the nonlawyer service provider, the lawyer should ordinarily consult with the client regarding the structure of the outsourcing arrangement and the person responsible for "monitoring" the performance of the nonlawyer service provider.

The word "monitoring" was selected by the commission to emphasize that the lawyer may have a duty to remain aware of how the nonlawyer service provider is performing its services, even if the lawyer has not personally chosen the nonlawyer service provider and may not have direct supervisory duties. If it is the lawyer who selects the nonlawyer service provider, the lawyer (or firm) would shoulder the monitoring responsibility, in which case there would likely be no reason for the lawyer to discuss the responsibility for monitoring with the client.⁷

Unauthorized Practice of Law. Model Rule 5.5 prohibits a lawyer from engaging in the unauthorized practice of law, whether through the lawyer's direct action or by aiding another person. The unauthorized practice issue raised by outsourcing is not whether the outsourced lawyer is practicing in the outsourcing jurisdiction, but rather whether the outsourced lawyer is keeping within the unauthorized practice rules in his or her own jurisdiction.

Proposed Comment [1] to Model Rule 5.5 says that "a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction" (emphasis added). Thus, the laws of the outsourced jurisdiction must be considered in determining whether the outsourced lawyer may provide the services. Note that, at least in New York, "nonlawyer" includes foreign country lawyers or out-of-state lawyers, as well as laypersons.⁸

City Bar Report

Unlike some state bar ethics opinions that address only the propriety of legal process outsourcing, the 2009 City Bar Report offered specific procedures to deal with five ethical issues in four outsourcing scenarios. In each scenario, the foreign lawyers are licensed in the foreign jurisdiction only. The ethical issues are client disclosure and consent; confidentiality; competence and supervision; unauthorized practice of law; and conflicts.

In **Scenario 1**, a New York law firm retains a foreign law firm through an intermediary to conduct patent searches for its clients. The New York firm would be required to take two actions: (1) disclose to the client the foreign firm's role in conducting patent searches and (2) obtain advance client consent if confidential data will be disclosed, or the client will be billed on a basis other than actual cost, or if the foreign firm will play a significant role in the representation.

In terms of confidentiality, the New York firm should consider the following steps: (1) assess the level of risk posed to client data by the foreign jurisdiction's laws on data protection, security and privacy, and whether the levels of protection are equivalent to those in the U.S. lawyer's jurisdiction, (2) review the data security procedures of the intermediary and the legal services provider and require notice of any security breach in their contracts, (3) minimize the amount of data shared with the intermediary, especially if there is a significant risk of governmental seizure of data (in which case store data on the U.S. firm's servers with limited access), (4) instruct the intermediary and the legal services provider on relevant ethical/legal obligations of the U.S. lawyer and require compliance with confidentiality obligations (and breach provisions) in their contracts, and (5) advise the client about the risks and advantages of the outsourcing relationship and obtain its informed consent.

Regarding competence and supervision, in Scenario 1, the New York firm should consider the following measures: (1) interview the intermediary and the foreign professionals, check the intermediary's references, require the intermediary to provide foreign worker references and sample work product (for highly sensitive matters, the firm may retain a private investigator for additional background checks on the foreign firm and its personnel), (2) understand the professional credentialing scheme and disciplinary regime in the foreign jurisdiction for legal support work and the business/ethical practices of the foreign firm, (3) supervise the foreign professional's understanding of the assignment and ensure quality of work in a manner compatible with New York's ethical standards, and (4) establish procedures to appropriately communicate with the foreign firm's personnel.

In **Scenario 2**, a New York firm directly hires a foreign firm for legal research and brief writing in a pending matter. Advance client consent is necessary because substantive legal work will be performed.

Confidentiality requirements would be similar as in the first scenario, except that since the outsourcing agent is the legal services provider, depending on the volume of work, the U.S. lawyer may request segregation of its client data from that of the provider's other customers.

In **Scenario 3**, a legal department of a New York company uses an intermediary to hire a foreign firm to perform due diligence for its transactions. In **Scenario 4**, a legal department of a New York company directly retains a foreign firm to draft contracts with vendors.

Since in Scenarios 3 and 4 the client is itself outsourcing its legal work, the legal department may inform the company's business unit of its outsourcing plans.

For purposes of confidentiality, Scenario 3 is analogous to the first scenario, except that the legal department should enter into a retention agreement with the foreign firm, covering the nature and scope of the engagement. In Scenario 4, which is comparable to the third scenario, the legal department should follow its guidelines for retention of foreign counsel.

Scenarios 2, 3 and 4 are similar to the first scenario on competence and supervision, except that in Scenario 3, the in-house lawyers may need to travel to the offshore location to observe the work firsthand or spot-check it.

On the question of unauthorized practice of law, in Scenarios 1 to 4, the New York firm should provide adequate supervision of, and retain complete responsibility for, the work of foreign licensed professionals (not admitted in New York) in order for the New York firm to avoid engaging in the unauthorized practice of law under New York's rules on unauthorized practice.

Regarding conflicts, in Scenarios 1, 3 and 4, if the intermediary and/or the foreign firm acts as co-counsel to the New York lawyer, the intermediary must ensure that the foreign professional (i) has a conflicts checking system that is compliant with New York's conflicts rules and (ii) completes a conflicts questionnaire (to ensure that it's not adverse to the client in the matter or in related/unrelated matters; it does not represent the adverse party in related/unrelated matters; and it did not previously represent the adverse party in substantially related matters). However, if the intermediary acts as a temporary attorney agency and the foreign professional acts as a

temporary employee retained to supplement the New York lawyer's staff, the New York lawyer must conduct a conflicts check and obtain a conflicts questionnaire from the intermediary and the foreign professional, listing recent matters, clients and adverse parties to identify matters substantially related to the New York lawyer's ongoing representations.

In Scenario 2, where the New York firm hires a foreign firm for legal research and brief writing, the conflicts check must be performed directly by the foreign firm, but the New York firm must ensure that the foreign firm understands the obligation to check conflicts and has procedures to confirm that its professionals are not engaged in representations that are adverse to the New York firm's clients such that it would be impermissible for them to work on the matter. Note: under New York Rule of Professional Conduct 1.10(a), if any professional at the foreign firm is conflicted from working on a matter, then all professionals at the firm are also barred.

Conclusion

Legal process outsourcing is ethical, and a consensus is beginning to develop regarding the particular ethical issues it involves. The unifying theme is that the ethical obligations of the outsourcing lawyer remain unchanged regardless of who performs what work, where and when. At the end of the day (whatever the time zone), it is the supervising lawyer who is responsible for the work.

Devika Kewalramani is a partner and Co-Chair of Moses & Singer's Legal Ethics & Law Firm Practice Group. **Kajal Shah Burman**, an associate at the firm, assisted in the preparation of this article. **David Rabinowitz**, a litigating partner at the firm, contributed editorial assistance.

Endnotes:

¹ ABA Commission on Ethics 20/20 Initial Draft Proposal—Outsourcing, May 2, 2011; http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20110502_outsourcing.aut_hcheckdam.pdf.

² Report on the Outsourcing of Legal Services Overseas by the New York City Bar Committee on Professional Responsibility, August 2009; <http://www.nycbar.org/pdf/report/uploads/20071813-ReportontheOutsourcingofLegalServicesOverseas.pdf>.

³ N.Y. City Op. 2006-3 (2006).

⁴ ABA Formal Op. 08-451 (2008).

⁵ Proposed Comment [6] to Model Rule 1.1; Proposed Comment [3] to Model Rule 5.3.

⁶ Proposed Comment [6] to Model Rule 1.1.

⁷ Proposed Comment [4] to Model Rule 5.3.

⁸ See N.Y. City Op. 2006-3 (2006), citing N.Y. State Bar Op. 721 (1999).

Devika Kewalramani

New York, N.Y.

Reprinted with permission from the "August 24, 2011" edition of the "New York Law Journal" © 2011 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com.

MOSES & SINGER LLP

Disclaimer

Viewing this or contacting Moses & Singer LLP does not create an attorney-client relationship.

This is intended as a general comment on certain developments in the law. It does not contain a complete legal analysis or constitute an opinion of Moses & Singer LLP or any member of the firm on the legal issues herein described. This contains information that may be modified or rendered incorrect by future legislative or judicial developments. It is recommended that readers not rely on this general guide in structuring or analyzing individual transactions or matters but that professional advice be sought in connection with any such transaction or matter.

Attorney Advertising

It is possible that under the laws, rules or regulations of certain jurisdictions, this may be construed as an advertisement or solicitation.

Copyright © 2011 Moses & Singer LLP
All Rights Reserved