

ABA addresses foreign outsourcing of legal work

by

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Lawyers sometimes outsource legal work to another lawyer or law firm on a temporary or project basis. This phenomenon is known as legal outsourcing. Lawyers may also outsource to foreign lawyers who are not admitted to practice in any jurisdiction in the United States or to nonlawyers outside the United States to perform legal work for U.S. clients.

India is a major hub for foreign outsourcing due to an abundance of affordable English-speaking lawyers and similarities in India's legal system, which is based on English common law.

Since the U.S. federal courts adopted e-filing in 2006, a growing number of foreign outsourcing providers have emerged to offer law firms the services of foreign lawyers to handle the most labor-intensive aspects of legal matters. Foreign outsourcing providers are increasingly sophisticated and offer a broad range of services that include legal research, litigation support, discovery services, and contract and patent drafting, all at a fraction of the U.S. cost.

Legal services may also be coupled with other consumer services that make the foreign outsourcing provider an even more attractive option to U.S. law firms. Foreign outsourcing is expected to continue to grow as the costs of discovery rise and as sophisticated clients seek a vehicle to keep legal costs down. Despite the prevalent acceptance of legal outsourcing within the U.S., foreign outsourcing continues to remain controversial.

The American Bar Association waded into the debate by issuing Formal Ethics Opinion 08-451 in August 2008. The ABA found outsourcing, including to foreign lawyers, ethically permissible so long as the lawyer handling the outsourcing takes steps to ensure the protection of confidential information, that foreign lawyers are suitably trained and competent, and that bills for outsourced work be reasonable.

The ABA noted that legal outsourcing "affords the lawyers the ability to reduce their costs and often the cost to the client to the extent that the individuals or entities providing outsourced services can do so at lower rates than the lawyers' own staff."

Despite the ABA allowing legal outsourcing, many lawyers and clients remain wary of foreign outsourcing providers' ability to maintain confidentiality, quality control, and how to provide adequate supervision.

Last August, the ABA adopted revised Comments [6] and [7] to Model Rule 1.1 (competency) to specifically address some of the ethical concerns with legal outsourcing.

New Comment [6] reaffirms the position of Opinion 08-451 that a lawyer must take reasonable steps to ensure that outsourced legal services are performed competently and in compliance with the lawyer's ethical obligations. Comment [6] goes further by stating that a lawyer should obtain the client's informed consent prior to retaining a nonfirm lawyer and that the reasonableness to outsource legal work is dependent upon various factors, including the education and experience of the nonfirm lawyer, the nature of the services assigned to the nonfirm lawyer, and "legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information." This last sentence in Comment [6] appears to directly address foreign outsourcing.

New Comment [7] addresses when lawyers from more than one law firm are providing legal services to a client on the same matter. Comment [7] emphasizes that multiple firms working together should consult with the client and each other about the scope of their work and the allocation of responsibility between the firms. Although Minnesota Rule 1.1 is identical to ABA Model Rule 1.1, Minnesota does not have the equivalent of Comments [6] or [7]. Currently, the MSBA is evaluating the August 2012 ABA Model Rule amendments.

While it does not yet appear that foreign outsourcing is commonplace in Minnesota, lawyers considering utilizing a foreign outsourcing provider should be aware of their ethical obligations under not only Rule 1.1 (competency) but also correlating ethical obligations under Rules 1.2 (allocation of authority), 1.4 (communication), 1.5(e) (fee sharing), 1.6 (confidentiality), 5.1 (supervision), 5.3 (supervision of nonlawyer staff), and 5.5(a) (UPL), Minnesota Rules of Professional Conduct.

In a market-driven economy, whether the law proves less amenable to outsourcing than other businesses, which have set up call centers and technical support abroad, will depend on whether the difficulties of supervision, confidentiality concerns and quality control outweighs the economic benefit.