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Outsourcing: From Down the Street to Across the Globe

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“Outsourcing” is not new either nationally or here in Oregon. In 1988, for example, the American Bar Association in Formal Opinion 88-356 discussed the use of contract lawyers in detail. Similarly, in 1995, the Oregon State Bar in Formal Opinion 1995-141 examined the use of third-party recycling services for the disposal of documents. Economic and technological changes, however, have had a powerful effect on the use of outsourcing by firms large and small. The scope of outsourcing today ranges from “down the street” (with the local copy service being a familiar example) to “across the globe” (with cloud computing being an equally ready example). Both the ABA and the OSB, in turn, have refined their guidance to reflect the increasingly integral role outsourcing now plays in virtually every practice. The ABA addressed outsourcing legal and support services in 2008 in Formal Opinion 08-451 and more recently in Report 105C from its 20/20 Commission and corresponding amendments to the comments to the ABA’s influential Model Rules of Professional Conduct. The OSB discussed cloud computing in particular in 2011 in Formal Opinion 2011-188.

In this column, we’ll look at three aspects of outsourcing. First, we’ll review our supervisory duties when we outsource both legal and support

functions. Second, we'll examine conflicts that can come with outsourcing. Finally, we'll survey the confidentiality issues involved in sending work down the street or across the globe.

Supervisory Duties

Oregon's RPCs split supervisory duties into two parallel rules. RPC 5.1 addresses supervision of lawyers and RPC 5.3 deals with supervision of non-lawyer staff. With both, the twin focus is on firm management and non-management lawyers within the firm who have direct supervisory authority over the lawyer or staff concerned. Importantly, our responsibility extends to independent lawyers and staff whom we incorporate into our firm's work on a contract basis. In other words, we can contract out work, but not the ethical responsibilities that go into how our firms represent clients.

Closely aligned with supervision is selection. The OSB's recent opinion on cloud computing, for example, underscores both the importance of "due diligence" in reviewing the qualifications of independent vendors and making sure they understand the professional obligations we as lawyers operate under. These complementary elements are key parts of our overarching duty to competently represent our clients as framed by both RPC 1.1 and the standard of care.

ABA Formal Opinion 08-451 and amended comment 6 to ABA Model Rule 1.1 also note that, depending on the nature of the legal services to be provided

by a lawyer-contractor and the corresponding degree of supervision over the lawyer-contractor, the hiring firm may need to both consult with and obtain the client's advance permission.

Conflicts

Whether an independent contractor's conflicts will be imputed to a firm most often turns on the degree to which the contractor is integrated into the firm. Under RPC 1.0(d), lawyers "working for or with a firm on a limited basis" are not ordinarily considered firm "members" (unless the particular facts suggest otherwise). By contrast, lawyers who are sufficiently integrated into a firm to be designated "of counsel" (or similar terms) are generally considered firm "members" under RPC 1.0(d). OSB Formal Opinion 2005-155 notes that when the association crosses the sometimes indistinct line from "temporary" to "of counsel" the lawyer's conflicts will be imputed to the firm as a whole under RPC 1.10 (the "firm unit rule"). This can be a particularly sensitive issue when, as in the situation addressed in Formal Opinion 2005-155, "of counsel" lawyers have such relationships with more than one firm and may bring with them the possibility of disqualifying conflicts from the other firms with whom they work.

Confidentiality

Client confidentiality is a bedrock principle for lawyers. It follows, therefore, that we must make all reasonable efforts to ensure that independent contractors we use—whether for legal or support services—understand and

operate consistent with this key duty. A local copy service that has client confidential information spread out over the counter in a busy customer reception area should raise as many questions as a cloud computing vendor whose servers are located in a country not known for its respect for privacy.

OSB Formal Opinion 2011-188 also notes that our obligation to review a vendor's procedures is not static. Rather, safeguards that were "cutting edge" when a contractor was first hired may have dulled considerably with technological changes over time. Therefore, just as selection and supervision are watchwords in our competent use of independent contractors, periodic review is equally important in making sure that the vendors we are using are continuing to meet the standards that we as lawyers will be judged.

ABOUT THE AUTHOR

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