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**Outsourcing:
From Here to There**

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A key facet of the American Bar Association's recent "Ethics 20/20" amendments to the Model Rules of Professional Conduct addresses outsourcing of both legal and support services. "Outsourcing" in law practice is nothing new. Contract lawyers are a ready example of outsourced legal services that firms have used for many years. Local file storage vendors are an equally ready example of support services that have also long been outsourced. What has changed more recently, however, is that technology now allows us to outsource legal and support services literally across the world rather than simply down the street. Today's contract lawyer, for example, may be someone we only interact with electronically. Similarly, our documents may now be stored "in the cloud." The impact of technology on outsourcing hasn't changed our fundamental duties. But, it has certainly sharpened the focus.

In this article, we'll first survey the fundamental duties that have long been at the core of outsourced legal or support services. Next, we'll examine how the ABA's Ethics 20/20 amendments approach those duties in the context of today's technology-driven practice environment.

Fundamental Duties

It is important to underscore at the outset that although we can outsource services, we cannot outsource our ethical and fiduciary duties to our clients. RPCs 5.1 and 5.3 address our ethical responsibilities for supervising, respectively, lawyers and staff who work with us—whether in-house or outsourced. *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 854 P.2d 280 (1993), in turn, touches on supervisory duties in the civil liability context. ABA Formal Ethics Opinions 88-356 (1988) and 95-398 (1995) applied these supervisory concepts to, respectively, domestically outsourced legal and support services and ABA Formal Ethics Opinion 08-451 (2008) did the same for services outsourced internationally. Summing up these authorities, we remain responsible to our clients regardless of whether a particular service—legal or support—is performed directly by our firm or an outside vendor working with us.

In the outsourcing context, three core duties often come into play: competence; loyalty as reflected in the conflict rules; and confidentiality.¹

Competence. RPC 1.1 sets the regulatory benchmark for competent representation and *Stephen v. Sallaz & Gatewood, Chtd.*, 150 Idaho 521, 526, 248 P.3d 1256 (2011), applied the same standard for legal malpractice liability: “In order to provide competent representation, an attorney must use the ‘legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.’” (Quoting RPC 1.1; emphasis omitted.) ABA Formal Ethics

Opinion 08-451 (at 3) highlights both the central components of the duty of competence when outsourcing and the difficulties posed when the service provider is geographically distant:

“The challenge for an outsourcing lawyer is, therefore, to ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately. When delegating tasks to lawyers in remote locations, the physical separation between the outsourcing lawyer and those performing the work can be thousands of miles, with a time difference of several hours further complicating direct contact. Electronic communication can close this gap somewhat, but may not be sufficient to allow the lawyer to monitor the work of the lawyers and non-lawyers working for her in an effective manner.”

Conflicts. ABA Formal Ethics Opinion 88-356 (at 2), which was issued in 1988 and was the first opinion from the ABA that dealt comprehensively with outsourced legal services, put potential conflicts front and center: “It is clear that a temporary lawyer who works on a matter for a client of a firm with whom the temporary lawyer is temporarily associated ‘represents’ that client for purposes of Rules 1.7 (governing current client conflicts) and 1.9 (governing former client conflicts).” The potential conflict problem is twofold. First, by their nature, contract lawyers ordinarily work for more than one law firm. Second, their personal conflicts may be imputed to the law firms with whom they are working.² Although court decisions are not uniform (*compare Lord Elec. Co. Inc. v. Titan Pacific Const. Corp.*, 637 F. Supp. 1556 (W.D. Wash. 1986) (no disqualification) with *People v. Speedee Oil Change Systems, Inc.*, 980 P.2d 371 (Cal. 1999) (disqualification ordered)), conflicts imputed to the hiring firm flowing from

outsourced lawyers (or staff) at least create the risk of potential disqualification. Further, the Idaho Supreme Court in *Blough v. Wellman*, 132 Idaho 424, 426, 974 P.2d 70 (1999), made plain that a violation of the conflict rules reflects a breach of the fiduciary duty of loyalty and, therefore, a firm with an unwaived conflict may also be exposing itself to a civil damage claim.

Confidentiality. The duty of confidentiality can come into particularly sharp focus when outsourcing because we are relying on a nonlawyer vendor to understand and comply with our bedrock obligation to our clients. ABA Formal Ethics Opinion 95-398 put it this way (at 2):

“[A] lawyer retaining . . . an outside service provider is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information. Thus when a lawyer considers entering into a relationship with such a service provider he must ensure that the service provider has in place, or will establish, reasonable procedures to protect the confidentiality of information to which it gains access[.]”

Ethics 20/20 Amendments

The Ethics 20/20 amendments were the product of a special commission appointed to assess the ABA Model Rules in light of continuing developments in law practice since the last comprehensive review of the professional rules by the earlier ABA “Ethics 2000” Commission. The Ethics 20/20 Commission issued a number of reports on discrete topics, including outsourcing, that were forwarded to the ABA House of Delegates in support of recommended amendments to the ABA Model Rules and the accompanying comments. Report 105C addresses

outsourcing generally, Report 105F discusses associated conflict check information and Report 105A focuses on related confidentiality issues.³ The Ethics 20/20 Commission's recommendations in these areas were approved by the ABA House of Delegates at its 2012 annual meeting and have now been added to the ABA Model Rules. Like the earlier ABA ethics opinions, the amendments dealing with outsourcing focus on competence, conflicts and confidentiality. By being part of the Model Rules themselves, however, the amendments more directly incorporate the principles involved into what the Idaho Supreme Court in *Stephen* noted is essentially the standard of care for both regulatory and liability purposes.

Competence. The Ethics 20/20 amendments address two baseline elements of the duty of competence in outsourcing through two new comments to ABA Model Rule 1.1. New Comment 6 notes that a hiring firm should “ordinarily” consult with the client involved regarding the need to use an outsourced lawyer and should evaluate whether the professional rules and other standards in the outsourced lawyer’s location are consistent with the duties of the hiring firm. New Comment 8, in turn, places an obligation on a lawyer using technology to keep current on both the benefits and risks of the particular technology involved. Similar comments (as amended Comment 1 and new Comments 3 and 4) were added regarding supervisory duties for outsourced services under Model Rule 5.3.

Conflicts. The Ethics 20/20 amendments do not directly alter the principal conflict rules, RPCs 1.7 on current client conflicts and 1.9 on former client conflicts. Importantly for both contract lawyers and hiring firms, however, the Ethics 20/20 amendments do confirm that lawyers are normally allowed to share information necessary for conflict checks when a lawyer is associating with a firm. The amendments include a new provision in the confidentiality rule—Model Rule 1.6(b)(7)—and accompanying comments (new Comments 13 and 14) that facilitate this key risk management function.

Confidentiality. The Ethics 20/20 amendments amplify two comments to the Model Rule 1.6: Amended Comments 18 and 19, which are aptly titled: “Acting Competently to Preserve Confidentiality.” The amended comments underscore that we as lawyers bear the ultimate responsibility for taking reasonable precautions to protect our clients’ confidentiality. The amended comments also highlight that, although particular steps will vary with the circumstances and the relevant sensitivity of the information involved, this duty extends to both our selection and supervision of outsourced legal and support services. Further, the amended comments explain that they apply to two common electronic elements of practice today—data storage and communications.⁴

Summing Up

As both the human and technological sides of our practices have become more “virtual,” the Ethics 20/20 amendments offer important guidance on how we can continue to meet our fundamental duties of competence, loyalty and confidentiality.

ABOUT THE AUTHOR

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¹ This is not intended to be an exclusive list. For example, issues can arise on properly billing for outsourced legal and support services. ABA Formal Ethics Opinion 00-420 (2000) discusses billing for outsourced legal services and ABA Formal Ethics Opinion 93-379 (1993) addresses billing for outsourced support services.

² RPC 1.0(c) defines the term “firm” relatively elastically. ABA Formal Ethics Opinion 90-357 (1990) addresses “of counsel” designations in particular.

³ These reports and other Ethics 20/20 Commission materials are available on the ABA’s web site at:
http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.

⁴ ABA Formal Ethics Opinions 99-413 (1999) and 11-459 (2011) deal with electronic communications in detail. Closer to home, Oregon and Washington both recently issued ethics opinions addressing cloud computing: OSB Formal Ethics Opinion 2011-188 (2011); and WSBA Advisory Opinion 2215 (2012). They are available on the respective bar web sites at www.osbar.org and www.wsba.org.