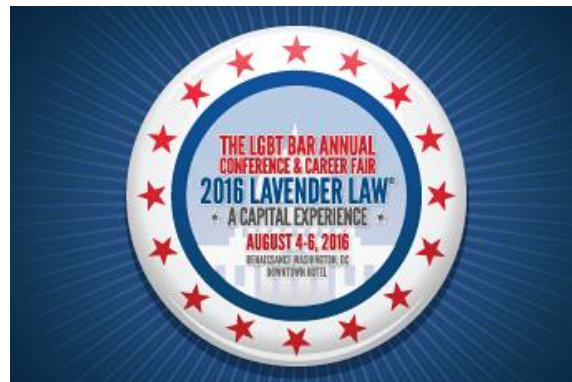




REUTERS/Daniel Munoz

THE ETHICS OF OUTSOURCING LEGAL SERVICES



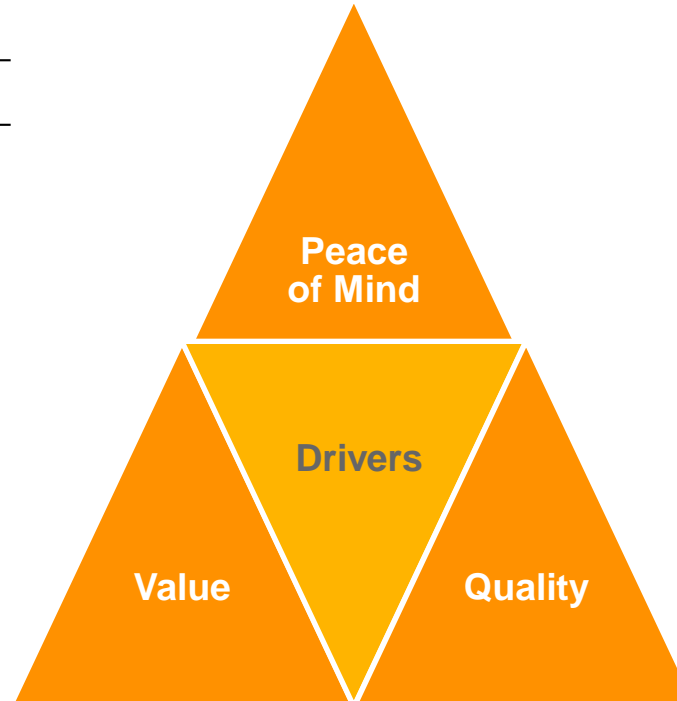
FRAMEWORK FOR THINKING ABOUT LEGAL OUTSOURCING

Value

- Capacity
- Efficiency
- Cost Savings
- Predictability
- Innovation

Quality

- People
- Process
- Technology



Peace of Mind

- Ethics
- Security

TYPES OF OUTSOURCING ENGAGEMENTS

- Document Review, eDiscovery Services & Litigation Support
 - Litigation
 - Government Investigation
 - Merger
 - Internal Investigation
- Contract Lifecycle Management Services
 - Contract Review, Redline, Drafting, Negotiation
 - Contract Abstraction
 - CLM Software Maintenance
- Governance & Compliance
 - Regulatory Mapping
- Research
 - 50-State Surveys
 - Business Intelligence

THE ABA & LEGAL OUTSOURCING: ABA OPINION 08-451

- “The outsourcing trend is a salutary one for our globalized economy. Labor costs vary greatly across the United States and throughout the rest of the world. Outsourcing affords lawyers the ability to reduce their costs and often the cost to the client to the extent that the individuals or entities providing the outsourced services can do so at lower rates than the lawyer’s own staff.”
- “There is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided the outsourcing attorney renders legal services to the client [in compliance with ethical obligations]....”
- American Bar Association Opinion 08-451

ETHICS RULES IMPLICATED BY LEGAL OUTSOURCING

- Competence (Rule 1.1)
- Unauthorized Practice of Law (Rule 5.5)
- Duty to Supervise (Rules 5.1; 5.3)
- Attorney-Client Privilege/Confidentiality (Rule 1.6)
- Client Conflicts of Interest (Rules 1.7; 1.9; 1.10)
- Other considerations include export controls and data privacy

COMPETENCE MR 1.1

- MR 1.1 - “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
- ABA Guidance: The outsourcing lawyer must ensure delegated tasks are being performed by individuals competent to perform them
 - Know your provider
 - Conduct reference checks and background Investigations
 - Interview main project lawyers
 - Review security systems
 - If offshoring, visit facilities, assess legal and educational system, particularly ethics rules regarding maintaining client confidentiality

UNAUTHORIZED PRACTICE OF LAW MR 5.5

- ABA Guidance: “Ordinarily, an individual who is not admitted to practice law in a particular jurisdiction may work for a lawyer who is so admitted, provided that the lawyer remains responsible for the work being performed and that the individual is not held out as being a duly admitted lawyer.”
- But see District of Columbia Court of Appeals Committee on the Unauthorized Practice of Law Opinion 20-12 and DC Bar Ethics Committee Opinion 362
 - Provides clarity regarding the proper scope of services that legal outsourcing companies may offer and how those services may be represented

SUPERVISION MRs 5.1 & 5.3

- An outsourcing attorney must ensure vendor's conduct is compatible with attorney's ethical obligations, including competence
- Active control and supervision
- Frequent Communication
- Documented, defensible process and procedures

ATTORNEY-CLIENT PRIVILEGE MR 1.6

- ABA Guidance: Informed consent to disclose privileged and confidential information to third-party vendor likely required
- Attorney-client privilege applies to a client's communications with, and in the litigation context, to the work product of, a lawyer providing legal services to a client. The attorney-client privilege also extends to lawyer's communications with, and work product of, any vendor providing services to that lawyer under a direct engagement relationship.
- As a result, provider's communications and work product are privileged, since services are provided to lawyers who engage them directly.

CONFIDENTIALITY

- ABA Guidance:
 - Written confidentiality agreements - “Strongly advisable”
 - 3 Tier System of Non-Disclosure Agreements:
 - Client and Provider
 - Provider and It’s Employees
 - Client and Provider’s Employees
- India and U.S. Ethical Obligations: The fiduciary obligation to keep client documents and communications confidential applies, under both Indian and U.S. law.
- Culture of Confidentiality: Better LPOs have a culture of confidentiality in the company that is similar to a law firm.

CONFLICTS OF INTEREST

- Most providers avoid client conflicts of interest and appearances of conflicts of interest through use of industry-standard conflicts checks
- Outsourcing attorneys should investigate providers' conflicts procedures and satisfy themselves that no conflicts exist
- See, e.g., Ass'n of the Bar of the City of New York Comm. On Prof. and Judicial Ethics, Formal Op. 2006-3 (2006); Prof. Ethics of the Florida Bar, Ethics Op.07-02 (2008).

REASONABLE FEE MR 1.5

- Cost Pass Through v. Mark Up
- ABA Formal Opinion No. 00-420: -a law firm engaging a contract lawyer may mark up the cost provided that the total charge represented a reasonable fee for the services provided to the client.
- ABA Formal Opinion no. 08-451: No mark up permissible “[i]n the absence of an agreement with the client authorizing a greater charge”
 - This implies that in the presence of such an agreement that the question reverts back to simply whether the fee is reasonable pursuant to rule 1.5 MRPC
- Whether billing as an expense or as part of legal fees the overarching requirement identified by the ABA is that the fee charged should not be unreasonable and must be in keeping with the general requirements of Rule 1.5

AT LEAST 8 BAR ASSOCIATIONS HAVE WEIGHED IN ON LEGAL OUTSOURCING

- Los Angeles County Bar Association first to tackle the issue in June 2006
- Association of the Bar of the City of New York in August 2006 and in November 2009
- San Diego County Bar Association in January 2007
- Florida Bar Association – draft opinion in September 2007 and confirmed in January 2008
- North Carolina State Bar Association in April 2008
- The Supreme Court of Ohio in August 2009
- Virginia State Bar – draft opinion September 2010
- District of Columbia Bar Ethics Committee Opinion 362 – July 2012

LOS ANGELES BAR OPINION NO. 518

Permits Using Out-of-State Lawyers and Non-Lawyers to Draft Briefs

- Attorney in a civil case charging an hourly rate may use an out-of-state company to draft a brief, provided that ALL of the following conditions are satisfied:
 - The attorney is competent to review the work
 - The attorney remains responsible for the final work product filed with the court
 - The attorney does not charge an unconscionable fee
 - Client confidences are protected
 - There is no conflict between the client and the outsourced provider
- Disclosure to the client of the relationship may be required if either exists:
 - The brief provided is a significant development in representation; OR
 - The work is a cost which must otherwise be disclosed to the client under California law.

NEW YORK CITY BAR OPINION 2006-3

Permits outsourcing legal support services overseas, to a lawyer or non-lawyer, if ALL conditions are satisfied:

- There is rigorous supervision by the in-state lawyer of the foreign lawyer/non-lawyer
 - Background checks
 - Reference checks
 - Interview foreign lawyers/employees of vendor
 - Regular/periodic communication
- Client confidences and secrets are preserved by the in-state lawyer
- Conflicts of interest are avoided by the in-state lawyer
- Client is billed appropriately: cost + reasonable overhead allocation
- Client's advance informed consent is obtained, where required
 - Significance of role of foreign lawyers/non-lawyers
 - Can client/confidences be shared?
 - Client expectation (e.g., does client expect that firm alone will handle the matter)
 - Billing other than cost pass-through

NYC BAR COMMITTEE ON PROFESSIONAL RESPONSIBILITY: NOV 2009 REPORT

Addresses the manner in which lawyers discharge their ethical obligations

- **Competence & supervision:**
 - Ensure tasks are delegated to people who possess the required skills
 - Supervise work and ensure it is executed appropriately
 - Understand material differences between the U.S. legal system and the foreign legal system
 - Establish practices and procedures for supervision
- **Client confidentiality:** Lawyer is required to obtain client consent in advance if an outsourcing assignment requires lawyer to disclose client confidential information. The lawyer must:
 - Understand the differences between rules governing confidentiality in the U.S. and the foreign jurisdiction
 - Instruct foreign professionals on the duty to maintain client confidentiality
 - Obtain sufficient assurances in the transfer of digital information
 - Consider restricting access to sensitive client information
- **Conflicts of interest:**
 - Determine whether services have been provided to adverse parties.
 - Remind the intermediary and foreign professional in writing to protect the confidential information of current and former clients.
 - Give access to confidential information on the immediate matter only
- **Client Disclosure:** Follow Opinion 2006-3 and formalize consent in writing, if necessary.
- **Practice of law:** Retain complete responsibility for the work, use professional skill and judgment to set scope for the work and vet the work to ensure quality.

SAN DIEGO BAR OPINION 2007-1

Permits Outsourcing Research, Brief Writing to Foreign Vendor

- Practice of Law: In-state attorney did not aid the unauthorized practice of law where s/he retained full control over the representation of the client and exercised independent judgment in reviewing draft work of the foreign lawyer.
 - This holds even where the foreign lawyer’s services would have constituted unauthorized practice of law if provided directly to an in-state non-lawyer client
 - Foreign lawyer assisted the in-state lawyer in the practice of law, not vice-versa – and that is permitted
- Duty to Disclose to Client: Must disclose where “the reasonable expectation” of the client is the firm alone will perform the work.
- Duty of Competence: No violation if he enlists others with expertise and makes sufficient inquiry to determine foreign lawyer’s capability to handle outsourced work:
 - Background Info
 - References
 - Interviews
 - Sample Work Product
 - Communication
 - Review of Ethical Standards
- Responsibility for Work: In-state lawyer bears responsibility for all work.
- Supervision: Degree of supervision required is magnified with an offshore vendor.

FLORIDA BAR OPINION 07-2

Permits Using Overseas Attorneys for Document Preparation, Creation of Business Entities

- **Supervision:** A law firm can use a overseas provider if there is adequate supervision by the firm and the following ethical considerations are addressed:
 - The lawyer determines if the activities constitute the practice of law and comply with all applicable rules of law.
 - Nonlawyers do not perform activities that require independent judgment/participation of the lawyer, they are supervised by a Florida lawyer and the Florida lawyer ensures their conduct is consistent with the ethics rules.
 - Florida lawyer ensures that there is no conflict between the client and the outsourcing provider.
 - Law firm preserves client confidentiality and overseas provider's access limited to necessary information.
- **Duty to Disclose to Client: Must obtain the client's consent if:**
 - The client reasonably expects the lawyer or firm to personally handle the matter.
 - Nonlawyers have more than a limited role in the provision of services.
 - Client considers the information material.
 - There no clear agreement as to the basis of the lawyers charges.
- **Billing Nonlawyer Personnel:**
 - Duplicate charges are prohibited.
 - If the nonlawyers charges are separately itemized then the lawyer should credit the nonlawyers time against his fee if the lawyer cannot exclude the nonlawyers salary as an overhead element.
 - Cost pass-through OK unless it would normally be considered overhead elements.

ABA Commission on Ethics 20/20 Reviews Legal Process Outsourcing

Seeks To Answer The Question “What Ethical Obligations Do Lawyers Have When Using Lawyers And Nonlawyers Outside The Firm?”

- **ABA Commission on Ethics 20/20** – Created in 2009 to study the impact of technology and globalization on the legal profession
- **Outcome** – A number of proposed revisions to the Model Rules and comments to the Rules designed to offer lawyers more guidance on how the existing rules apply to the new realities of practicing law in the 21st century.
- **No “sweeping changes”** – Recognition that the “principles underlying the Model Rules of Professional Conduct remain relevant and valid” and the “recommendations are clarifications and expansions of the Model Rules.”
- **August 2012 – ABA amends the Model Rules as recommended by the Commission, namely:**
 - **Model Rule 1.1:** Identifies the factors that lawyers need to consider when retaining lawyers outside the firm to assist on a client’s matter (i.e., outsourcing legal work to other lawyers).
 - **Model Rule 5.3:** Identifies the factors that lawyers need to consider when using nonlawyers outside the firm (i.e., outsourcing work to nonlawyer service providers).
 - **Model Rule 5.5:** Clarifies that lawyers cannot engage in outsourcing when doing so would facilitate the unauthorized practice of law.

TAKEAWAYS

- Know Your Provider
- Proper Supervision
- Client Consent/Disclosure
- Ensure Confidentiality
- Avoid Client Conflicts

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