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Model Rules

20/20 Group Floats Draft Rule Amendments To Address Growing Reliance on Outsourcing

The ABA Commission on Ethics 20/20 Nov. 23 released a "discussion draft" on outsourcing which asks readers to give their thoughts on possible amendments to the commentary in the Model Rules of Professional Conduct to give better guidance to lawyers who are involved in outsourcing legal services.

"The proposed changes don't introduce anything new or surprising," according to New York solo practitioner Lisa Solomon, "they merely elevate many of the points made in ABA Formal Op. 08-451 [on outsourcing] to the level of Model Rule comments." Solomon runs a legal research and writing service for other attorneys.

In an interview with BNA, Solomon said that neither Opinion 08-451 nor the suggested reshaping of the comments hurts domestic freelance lawyers who perform contract work.

"The ABA is saying 'yes, you can outsource work both domestically and outside the country, but you still have a duty to supervise and act with due diligence,'" Solomon said.

Amendments to Commentary. The discussion draft was developed by members of the commission's Outsourcing Working Group with input from the ABA Standing Committee on Ethics and Professional Responsibility and the ABA Section of International Law.

The draft offers the possibility of amending the official comments to Model Rule 1.1 (competence); Model Rule 5.3 (supervision of nonlawyer assistants); and Model Rule 5.5 (unauthorized practice and multijurisdictional practice).

A new Comment [7] titled "Retention of Other Lawyers" would be added to Rule 1.1, stating that lawyers have a duty to take reasonable steps to assure themselves that outsourced services will be performed competently. Reasonableness would largely be determined by the individual circumstances of the matter. Factors that will come into play in making this determination, the draft states, include: the education, experience, and reputation of the outside lawyers; the nature of the services being outsourced; "and the legal and ethical environment in which the services will be performed."

The comment cautions lawyers to stay within the confines of Rule 5.5(a)'s restrictions on unauthorized practice, and it advises that a lawyer must reasonably conclude that the outside work is up to par. If confidential client information will be disclosed to the outside service providers, the comment adds, the client must give informed consent to the contract work. This could be particularly relevant, the draft comment adds, "if the rules, laws or practices of a foreign jurisdiction provide substantially less protection for confidential client information than that provided in this jurisdiction."

A draft Comment [3] to Rule 5.3 also indicates lawyers' duty to ensure the quality of outsourced legal support services, and it sets out a series of factors for gauging reasonableness that essentially parallel those recited in the suggested new comment to Rule 1.1. If the service provider is chosen by the client, the draft adds, the lawyer should consult with the client to determine how the outsourcing arrangement should be structured and who will be responsible for monitoring the process.

A suggested amendment to Comment [1] to Rule 5.5 simply adds a sentence to the existing commentary emphasizing that lawyers must avoid assisting others in the unauthorized practice of law.

Suggestions, Not Proposals. In a memo accompanying the discussion draft, commission co-chairs Jamie S. Gorelick and Michael Traynor stressed that the commission is not endorsing or rejecting the practice of outsourcing in its suggestions, nor is it advocating adoption of the draft amendments to the Model Rules at this point.

The proposal "was drafted to recognize the growth of outsourcing practices and to suggest ways in which lawyers engaging in the practice can do so ethically and responsibly," the memo states.

The commission said that, contrary to earlier reports, this issue will not proceed to the ABA House of Delegates at its February midyear meeting in Atlanta. The draft is being circulated to get as many comments as possible, and each participating entity has reserved its opinion on the merits pending consideration of comments and suggestions received in response to the circulation of the Draft, Gorelick and Traynor said.

Different Perspective. In an interview with BNA, Melody Kramer, San Diego, said the standard of care articulated in the working group's discussion draft sounds too "company specific" to her. Kramer, a freelance attorney and one of the founders of the National

Association of Freelance Legal Professionals, said she would have liked to see more emphasis “on personally knowing who is working for you.”

Kramer also contended that a significant portion of the comments submitted to the Ethics 20/20 Commission before the draft was issued came from disgruntled U.S. lawyers who are concerned about losing jobs to overseas firms and from large legal process outsourcing (LPO) companies themselves.

“But this focus overlooks the fact that the bulk of outsourcing involves small and solo firms contracting with U.S.-based freelance lawyers,” Kramer said.

In her Legal Research & Writing Pro blog, Lisa Solomon points out that although the commission disclaims any intent to endorse or reject outsourcing by solos and small firms, it notes that domestic outsourcing remains more common than international outsourcing and highlights in the introduction to the draft report a number of benefits of outsourcing.

The working group’s discussion draft will be circulated for comment to ABA member groups, state and lo-

cal bar associations, international bar associations, court systems, law schools, and other interested entities, according to a Nov. 23 news release. The deadline for submitting comments is Jan. 31. Remarks may be sent to Senior Research Paralegal Natalia Vera at veran@staff.abanet.org.

BY LANCE J. ROGERS

The commission’s discussion draft on outsourcing, which includes the suggested rule amendments, is posted on the commission’s website at http://www.abanet.org/ethics2020/pdfs/discussion_draft.pdf.

The commission chairs’ memo is located at http://www.abanet.org/ethics2020/pdfs/commission_chairs_cover_memo.pdf.

An outsourcing questionnaire and the individual comments the commission has received are available on its website at <http://www.abanet.org/ethics2020/outsourcing.shtml>.

Many Sources of Ethics Advice Have Offered Guidance on Lawyers’ Duties Regarding Outsourcing

ABA Formal Ethics Op. 08-451, 24 Law. Man. Prof. Conduct 466 (2008), was neither the first nor the last word on outsourcing. A number of state and local bar associations have weighed in on the subject.

In essence, the ethics opinions these bar groups issued all express the view that lawyers who outsource legal work either domestically or abroad must consider their ethical duties to ensure competence and provide appropriate supervision, preserve confidential client information, check for conflicts of interest, disclose the outsourcing arrangement to the clients in at least some circum-

stances, and avoid assisting the unauthorized practice of law.

See California Formal Ethics Op. 2004-165, 20 Law. Man. Prof. Conduct 359 (2004); Colorado Ethics Op. 121, 25 Law. Man. Prof. Conduct 493 (2009); Florida Ethics Op. 07-2, 24 Law. Man. Prof. Conduct 437 (2008); Los Angeles County Ethics Op. 518, 22 Law. Man. Prof. Conduct 360 (2006); New York City Ethics Op. 2006-3, 22 Law. Man. Prof. Conduct 435 (2006); New York State Ethics Op. 762 (2003); North Carolina Ethics Op. 2007-12 (2008); Ohio Supreme Court Ethics Op. 2009-6, 25 Law. Man. Prof. Conduct 470 (2009); San Diego County Ethics

Op. 2001-1, 23 Law. Man. Prof. Conduct 113 (2001); Virginia Ethics Op. 1850 (2010).

In addition, the New York City bar has published detailed guidance on how lawyers can meet their professional obligations when they outsource legal work to foreign professionals. See “NYC Bar Report on Outsourcing Abroad Gives Advice for Several Common Scenarios,” 26 Law. Man. Prof. Conduct 19. See also Woffinden, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 Brigham Young U. L. Rev. 483.

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