



ISBA Professional Conduct Advisory Opinion

Opinion No. 19-04
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Topic: Communicating with Client; Law Firms; Nonlawyer Assistants; and Temporary Lawyers

Digest: An Illinois lawyer may “outsource” legal and legal support services relating to a matter provided the lawyer reasonably believes that the other lawyers’ and nonlawyers’ services will contribute to the competent and ethical representation of the client and reasonable measures are taken to protect client information and to avoid conflicts of interest. Disclosure to, and informed consent by, the client will ordinarily be required. Informed client consent is always required if the lawyer delegates or transfers complete or substantial responsibility for a matter to an unaffiliated lawyer.

References: Illinois Rules of Professional Conduct 1.1, 1.2, 1.4, 1.6, 1.7, 5.1 and 5.3

ISBA Professional Conduct Advisory Opinions No. 98-02 (September 1998); No. 12-09 (March 2012); and No. 16-06 (October 2016)

American Bar Association Formal Opinions 88-356 (December 16, 1988); 08-451 (August 5, 2008); 464 (August 19, 2013); and 477R (May 22, 2017).

New York City Bar Association Formal Opinion 2006-3 (August 2006)

Question

The inquiring lawyer asks whether the “outsourcing” of legal or legal support services in connection with the representation of a client is permissible under the Illinois Rules of Professional Conduct, especially in view of Illinois Rule 1.2(e) and Comment [15] to Illinois Rule 1.2.

Opinion

Stimulated by client demand and internal cost pressures, in recent years many lawyers and law firms have sought to disaggregate, or “outsource,” legal and legal support services traditionally performed within a law firm to outside lawyers and nonlawyers, including lawyers and nonlawyers functioning as temporary or contract workers. In many cases, these outside lawyers and nonlawyers are located in other jurisdictions, including other countries.

The American Bar Association addressed the ethics of outsourcing in Formal Opinion 08-451 (August 5, 2008). That opinion concluded that a lawyer may outsource legal or nonlegal support services to other lawyers or nonlawyers outside the lawyer’s firm, provided the lawyer remained ultimately responsible for those services under Model Rules 5.1 and 5.3 as if the other lawyers or nonlawyers were directly affiliated with the outsourcing lawyer’s own firm. Subsequently, in 2012, the ABA adopted various amendments concerning outsourcing to the comments to Model Rule 1.1: Competence, as well as the comments to Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistance. The 2012 Model Rules amendments did not, however, follow ABA Formal Opinion 08-451 in requiring that an outsourcing lawyer remain ultimately responsible under the Model Rules for outsourced services as if the other lawyers or nonlawyers were directly affiliated with the outsourcing lawyer’s own firm. (See Note 1.)

The 2016 Illinois Rules Amendments

The Illinois Supreme Court adopted the substance of the 2012 ABA amendments concerning outsourcing as part of several changes to the Illinois Rules of Professional Conduct that became effective January 1, 2016. The new 2016 Comments [6] and [7] to Illinois Rule 1.1 provide:

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer’s own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client. See also Rules 1.2(e) and Comment [15], 1.4, 1.5(e), 1.6, and 5.5(a). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

The new and revised 2016 Comments to Illinois Rule 5.3 provide:

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable

assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 and Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1, 1.2, 1.4, 1.6, 5.4(a), and 5.5(a). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

When considering the outsourcing of legal services, Illinois lawyers must also be mindful of Illinois Rule 1.2(e), which is unique to the Illinois Rules. Paragraph (e) provides that after accepting employment on behalf of a client, a lawyer "... shall not thereafter delegate to another

lawyer not in the lawyer's firm the responsibility for performing or completing that employment, without the client's informed consent." Comment [15] to Illinois Rule 1.2 explains:

[15] The prohibition stated in paragraph (e) has existed in Illinois ethics rules and in the prior Code since 1980. It is intended to curtail abuses that occasionally occur when a lawyer attempts to transfer complete or substantial responsibility for a matter to an unaffiliated lawyer without the client's awareness or consent. The Rule is designed to clarify the lawyer's obligation to complete the employment contemplated unless the client gives informed consent to substitution by an unaffiliated lawyer. The Rule is not intended to prohibit lawyers from hiring lawyers outside of their firm to perform certain services on the client's or the law firm's behalf. Nor is it intended to prevent lawyers from engaging lawyers outside of their firm to stand in for discrete events in situations such as personal emergencies, illness or schedule conflicts.

Taken together, these provisions of the Illinois Rules confirm that an Illinois lawyer may "outsource" the performance of legal and legal support services to lawyers and nonlawyers outside the lawyer's firm as long as certain conditions are addressed. These conditions involve competence, disclosure and client consent, the avoidance of unauthorized practice of law, the avoidance or resolution of conflicts of interest, and the protection of client information.

Competence

Among the most important conditions when outsourcing legal services is that the lawyer "must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation" of the lawyer's client. See Comment [6] to Illinois Rule 1.1. That comment further explains that the reasonableness of the decision to involve nonfirm lawyers in the representation will depend on the circumstances, informed by the education, experience, and reputation of the other lawyers; the nature of the services involved; and the legal environment where the services will be performed, including the rules relating to confidential information. However, the obligation of competence should not be interpreted to make the outsourcing lawyer responsible for the conduct of the nonfirm lawyers. (See Note 1.) As further explained in Comment [6], the rules require only that the lawyer reasonably believe that the outsourced services will be performed competently by the nonfirm lawyers.

Disclosure and Client Consent

As noted in new Comment [6] to Illinois Rule 1.1, the lawyer should ordinarily obtain the "informed consent" (see Note 2) of the client before retaining or contracting with lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to the client. This condition is consistent with Illinois Rules 1.2(a) and 1.4(a)(2), which provide that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." In situations, however, where the nonfirm lawyer is a temporary or "contract" lawyer who works under the direct supervision of a lawyer associated with the firm, even if that lawyer may not be physically present in the same office, the fact that the temporary lawyer will work on the client's matter will not ordinarily require notice to or consent by the client. See ABA Formal Opinion 88-356 (December 16, 1988); and ISBA Opinion 98-02 (September 1998).

In any situation where it is contemplated that an unaffiliated lawyer will assume complete or substantial responsibility for a matter, Illinois Rule 1.2(e) expressly requires the informed consent of the client.

Unauthorized Practice

Retaining or contracting with lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client should not ordinarily result in aiding the unauthorized practice of law. This is unlike the situation presented in ISBA Opinion No. 12-09 (March 2012), which concluded that an Illinois lawyer seeking to establish and co-own a law practice to serve Illinois clients with a lawyer not admitted in Illinois, who would therefore "be practicing law in Illinois systematically and continuously," would be assisting the unauthorized practice of law. In the typical outsourcing situation, the involvement of the nonfirm lawyers is limited to a single client or matter. And the work of the nonfirm lawyers is usually undertaken outside Illinois. So there would ordinarily be no practice "systematically and continuously" in Illinois by lawyers not admitted in Illinois.

In this regard, it should be noted that Illinois Rule 5.5(a) provides that "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." Illinois did not adopt the sentence that was added to Comment [1] to ABA Model Rule 5.5 as part of the 2012 ABA amendments discussed above, which reads: "For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction." The omission of the new ABA comment language does not suggest, however, that Illinois lawyers may not have a duty to avoid assisting nonfirm legal services providers retained in another jurisdiction in the unauthorized practice of law. The 2012 ABA comment amendment merely restates the existing Illinois, and ABA, black letter prohibition on assisting unauthorized practice. See also ABA Formal Opinion 08-451 (August 5, 2008) (advising lawyers to be mindful that nonfirm lawyer's activities may constitute unauthorized practice).

However, an Illinois lawyer should not have responsibility for the eventual disposition of legal fees that may be divided with nonfirm lawyers in another jurisdiction. See ABA Formal Opinion 464 (August 19, 2013) (lawyer may divide a legal fee with a lawyer or law firm in another jurisdiction even if the other lawyer or law firm might eventually distribute some portion of the fee to a nonlawyer).

Conflicts of Interest

When outsourcing the provision of legal services, the lawyer must take appropriate measures to assure that the relationship with the nonfirm lawyer does not present or create an impermissible conflict of interest, including imputed conflicts, under Illinois Rules 1.7, 1.9, or 1.10. See also NYC Bar Association Formal Opinion 2006-3 (August 2006) (outsourcing lawyer should inquire into conflict-checking procedures of nonlawyer service providers). The existence, or not, of an impermissible conflict of interest will depend on the circumstances, including the nature of the representation, the identities and relationships among the parties, and the relationships among the lawyers, law firms, and/or nonlawyer legal service providers.

Protection of Client Information

In every outsourcing situation, the lawyer must also take appropriate and reasonable measures to protect client information as required by Illinois Rule 1.6. The duty to protect client information does not end once the lawyer has retained a reputable service provider. ISBA Opinion No. 16-06 (October 2016) (lawyer should regularly monitor compliance of cloud-based information storage service provider). As noted in Comment [3] to Illinois Rule 5.3, for example, a lawyer retaining or directing a nonlawyer outside the firm should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer, particularly with regard to confidentiality. See also ABA Formal Opinion 477R (May 11, 2017) (lawyers should conduct due diligence on vendors providing communications technology); ABA Formal opinion 08-451 (August 5, 2008) (lawyer required to recognize and minimize risk that outside service provider may reveal client information); and NYC Formal Opinion 2006-3 (August 2006) (lawyer should secure client consent to disclose protected information to foreign service provider).

Conclusion

An Illinois lawyer may “outsource” legal and legal support services relating to a matter provided that the lawyer reasonably believes that the services of the other lawyers or nonlawyers will contribute to the competent and ethical representation of the client, and if reasonable measures are taken to protect client information and to avoid conflicts of interest. Disclosure to, and informed consent by, the client will ordinarily be required. Informed client consent is always required if the lawyer delegates or transfers complete or substantial responsibility for a matter to an unaffiliated lawyer.

Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.

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Endnotes

1. ABA Formal Opinion 08-451 assumed that a lawyer retaining or contracting with outside lawyers and nonlawyers in outsourcing situation would always have “direct supervisory authority” over the outside lawyers or nonlawyers as if those persons were directly affiliated in the lawyer’s firm. However, except in the situation of a “contract” lawyer who works as if he or she were an actual associate in the firm, see ABA Formal Opinion 88-356 and ISBA Opinion 98-02, that assumption is usually not accurate. Nor is it consistent with the subsequent changes to the ABA Model Rules in 2012 or the Illinois Rules in 2016.

2. “Informed consent” is defined in Illinois Rule 1.0(e) to denote “... the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”