904 - Outsourcing/Offshoring First Level Document Review in an Era of eDiscovery

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Mr. Olivas' legal experience has focused on international corporate and transactional disputes both as an attorney working in international jurisdictions, and as an international business U.S. Fulbright Scholar. Mr. Olivas is a member of the Hispanic National Bar Association (HNBA), Association of Corporate Counsel (ACC). Mr. Olivas holds a J.D. from Valparaiso University School of Law, a Bi-National Business Certificate from the MBA program at the Autonomous Technological Institute of Mexico (ITAM) in Mexico City, and a B.A. from Texas State University.

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Barry Werbin is a partner at Herrick, Feinstein LLP, in New York, where he chairs the firm's Intellectual Property/New Media Practice.

Barry concentrates on litigation and transactional matters involving intellectual property (including trademarks, trade dress, copyrights, unfair competition, false advertising, publicity rights, trade secrets, domain names and exploitation rights), technology and e-commerce issues (including software licensing and development, web-site design and hosting, digital rights, EULAs, "click-wrap" agreements, and on-line marketing and promotional programs), and domestic and offshore outsourcing of technology and business process services. He negotiates IP, content and technology licensing and purchase agreements, provides IP due diligence on corporate M&A and other transactions, and litigates IP infringements, technology agreement claims and UDRP arbitrations.

Barry is a member of The Association of the Bar of the City of NY (Committee on Copyright and Literary Property), the NY State Bar Association (Internet Law Committee), American Bar Association (Litigation Section, Forum Committee on the Entertainment and Sports Industries; Sub-Committee on Online Copyright Issues), NY County Lawyers Association, International Trademark Association (Bulletin Editorial Board-Features Sub-committee), and the Copyright Society of the U.S.A.

He received his law degree from Fordham University School of Law, J.D., 1981, where he was on the Law Review. He graduated from Queens College, CUNY, magna cum laude.

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How much of Your Litigation Cost is Attributable to Document Review?: DESIGNING INTERNAL METRICS

*"I keep six honest serving-men (They taught me all I knew); Their names are **What** and **Why** and **When** And **How** and **Where** and **Who**."*

Rudyard Kipling, *The Elephant's Child (1902). British (Indian-born) author (1865 - 1936)*

Abstract:
Studies show that 58 – 90% of litigation costs are associated with discovery and document review. A significant portion of these costs primarily stem from the alarming amount of Electronically Stored Information (ESI) organizations are required to manage and review during discovery. Hence, due to this growing concern and the recent changes to the Federal Rules of Civil Procedure, understanding the "What, Why, When, How, Where and Who" of ESI for review are all critical issues legal departments must consider and measure in order to minimize surprises and skyrocketing costs.

As such, below we establish decisions and metrics in an effort to provide you with resourcefully simple formulas to help identify, quantify and manage the process.

What and Why:
An important first step in the document review process is working with outside counsel in identifying and deciding "What" it is that the document population will be reviewed for (i.e., relevancy, privilege, and issues) and "Why," as these decisions will impact the time and costs.

Key Metrics (When, How, Where[1] and Who):
Legal departments should incorporate the following metrics and iteratively make these simple calculations:

1. Estimating First Level Document Review Costs
2. Measuring Target Rate
3. Measuring Preliminary Accuracy Rate
4. Measuring Productivity Rate

[1] When Kipling penned "I keep six honest serving-men …" a little over a century ago, the concept of a "Flat World" was many years distant. Today, first level document reviews can and do happen in the sub-continent just as easily as Manhattan, provided the proper legal supervision, protocols and secured technologies are in place. With information technology linking us together as if we all lived next door, the "Where" has expanded to a global workforce that has allowed for greater economies and efficiencies.

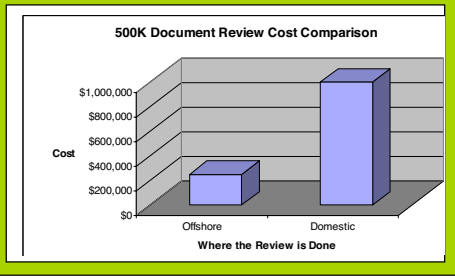
Estimating First Level Document Review Costs (How Much, Who and Where):

Estimating costs - Takes into account several of the metrics of which are defined in more detail below. Utilizing an estimated metric for each litigation matter will allow you to allocate budgets and manage your costs more effectively when performing first level document review.

Estimated number of documents to be reviewed / 50 documents/hour	=	ESTIMATED NUMBER OF HOURS NEEDED FOR REVIEW	x	BILLABLE RATE	=	ESTIMATED COSTS

Hypo: *Company "A"* is involved in litigation where it is estimated that *500,000* documents must be reviewed for privilege and various issues.[2] The document review team has been fully briefed and trained on all issues and case specific nuances. What is the estimated cost of reviewing *500,000* documents at a favorable document review industry average of *50* documents per hour?[3]

Answer: **~$250K (offshore)**
~$1,000,000 (domestically)



500,000 documents / 50 documents/hour	=	~10,000 hours to complete document review	x	$25/hour (offshore) Or $100/hour (domestic)	=	~ $250K (offshore) Or ~ $1,000,000 (domestic)

[2] It is estimated that one (1) gigabyte (GB) of Electronically Stored Information roughly equates to 50,000 pages of data to review and one (1) document averages between 4-7 pages of data. Please note that these are rough industry estimates of which may differ depending upon the actual format and structure of the data. *See* Electronic Discovery Reference Model; Processing Metrics, www.edrm.net
[3] The fifty (50) documents per hour is a favorable industry average that may be significantly affected (higher or lower) by factors such as internet connectivity and the platform and technologies used to perform the review (i.e., Conceptual review vs. Linear review). *See* George L. Paul and Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10 (2007).

Measuring Target Rate (the When):

Target rate - Measures the required daily output needed to successfully accomplish a deadline driven document review and production. It provides data that allows you to measure, estimate and allocate resources necessary to meet the deadline.[4]

$$\frac{\text{Estimated number of documents to review}}{\text{Total number of days available for review (deadline)}} = \text{TARGET RATE PER DAY}$$

Hypo: *Company "A"* is involved in litigation where *500,000* documents must be reviewed for privilege and various issues. The document review team has been fully briefed and trained on all issues and case specific nuances. The production deadline is sixty days *(60)* days. In order to meet the deadline, what is the target rate for review?

Answer: The document review team must review *~8,333* documents per day.

$$\frac{500{,}000}{60} = \text{~8,333 documents/day to meet deadline}$$

[4] Importantly, please remember that weekends must be considered when measuring target rates.

Measuring Preliminary Accuracy Rate:

Preliminary accuracy rate - Measures the level of accuracy attained by the review team after an initial pilot of sample data.[5] It allows you to establish a foundation to measure and estimate problematic areas and possibly preempt potential quality control issues that may be encountered by a document review team.[6]

$$\frac{\text{Total number of incorrectly reviewed documents (misses)}}{\text{Total number of document reviewed}} \times 100 = \text{\% OF TOTAL MISSES (Inaccuracy)}$$

Hypo: *Company "A"* is involved in litigation where *500,000* documents must be reviewed for privilege and various issues. In an effort to measure preliminary accuracy rates, the document review team has been fully briefed and trained on all issues and case specific nuances. The review team performs a pilot review on a total of *5,000 doc*uments from the entire population. The Client performs an internal audit of the documents to identify incorrectly reviewed documents (misses). After the internal audit, the document review team had a total of *60* misses.[7] What is their preliminary accuracy rate? The team inaccurately (misses) reviewed 1.2% of the documents.

Answer: Subtract the 1.2% of misses from 100% = Accuracy rate of 98.8%

$$\frac{60}{5{,}000} \times 100 = \text{1.2 \% inaccuracy}$$

[5] A sample pilot approach is as follows: a) The first level document review team performs a pilot (test review) on a representative sample set of 5,000 documents; b) Upon completion of the pilot, the internal/outside counsel overseeing the review will audit the pilot and identify any and all documents that were inaccurately reviewed by the first level document review team (misses); c) Accuracy rate is calculated.

[6] Please note that this is a preliminary measure on a representative subset of the data prior to full engagement. The preliminary accuracy rate will vary dependant upon the nature of the review, the review tool and technologies used, the level of complexity involved and the number of decisions the reviewers will be required to make per document reviewed. Additionally, the accuracy rate can evolve into a more detailed metric of a) systematic misses b) non-systematic misses.

[7] After the preliminary accuracy rate has been established and the team fully engaged, from that point forward, it is imperative that the review team incorporate "Six Sigma" methodologies in an effort to increase accuracy and productivity.

Measuring Productivity Rate:

Productivity rate - Measures the pace at which the document review team is making decisions. This formula can be accommodated to reflect your target measurement. For example: per day, week, month and etc.

$$\frac{\text{Total number of documents reviewed}}{\text{Number of hours spent reviewing}} = \text{PRODUCTIVITY RATE PER HOUR}$$

Hypo: ***Company "A"*** **is involved in litigation where** ***500,000*** **documents must be reviewed for privilege and various issues. Currently, after one week of review, the team has reviewed** ***50,000*** **documents and spent** ***1,200*** **hours reviewing those documents. What is the team's productivity rate for this week?**

Answer: ~41 documents/hr.

$$\frac{50{,}000}{1{,}200} = \textbf{41.66 documents/hr}$$

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Association of Corporate Counsel
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AGENDA

1. E-Discovery Primer
2. First Level Document Review (FLR)
3. How to Save 70% on Litigation Costs
4. Outsourcing/Offshoring FLR
5. Vetting for a Service Provider
6. Closing Recap

E-Discovery Primer

- Electronically Stored Information (ESI)
  - Any type of information that can be stored electronically
  - >90% of all data is ESI
  - Billions of emails sent on a daily basis

E-Discovery Primer

- **Amendments to Federal Rules of Civil Procedure (FRCP)** [1]
  - ESI is discoverable
  - Obligated to provide early attention to ESI issues within a mandated timeframe
  - Parties must come to agreement on ESI
    - preservation, data systems, methods, target data, legacy data, relevant data, production form, and etc.

[1] Particularly 26(a) and 26(f)

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E-Discovery Primer

- **What is the impact of growing ESI and new FRCP?**
  - More data to be requested and reviewed by parties

Growing ESI and New FRCP

=

More ESI is discoverable

=

More documents to review

=

Significant increase in document review costs

First Level Document Review (FLR)

- **What is it?**
  - Reviewing documents for responsiveness, relevancy, privilege, work-product, confidentiality & issue codes
  - Who typically performs these functions?
  - What are/were the traditional methods of FLR?
    - "War Rooms"
- **Costs associated with First Level Document Review**
  - Between 58-98% of litigation costs

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First Level Document Review (FLR)

- **How are companies managing skyrocketing costs?**
  - Technology
  - Outsourcing/Offshoring FLR

How to Save 70% on Litigation Costs: Technology

- **E-Discovery processing and review technology**
  - Keyword searching, date ranging, de-duplication/near-duplication, clustering and concept review tools
  - Reducing the amount of non-relevant ESI
  - Speeding up document review

How to Save 70% on Litigation Costs: Outsourcing/Offshoring FLR

- **What is outsoucing/offshoring FLR?**
  - Legal Process Outsourcing (LPO)
- **Where is FLR being offshored?**
- **How has technology transformed this function?**

How to Save 70% on Litigation Costs: Outsourcing/Offshoring FLR

- **Key drivers**
  - Economies: Cost compared to domestic review
  - Efficiencies: Dedicated teams to perform review on your documents
    - Avoid the "train & retrain" model and attain consistency
    - Resources to tap into should the litigation strategy shift
  - Around the clock review
  - Concentration of resources on high-level work
    - Have domestic attorneys focus on core-competencies

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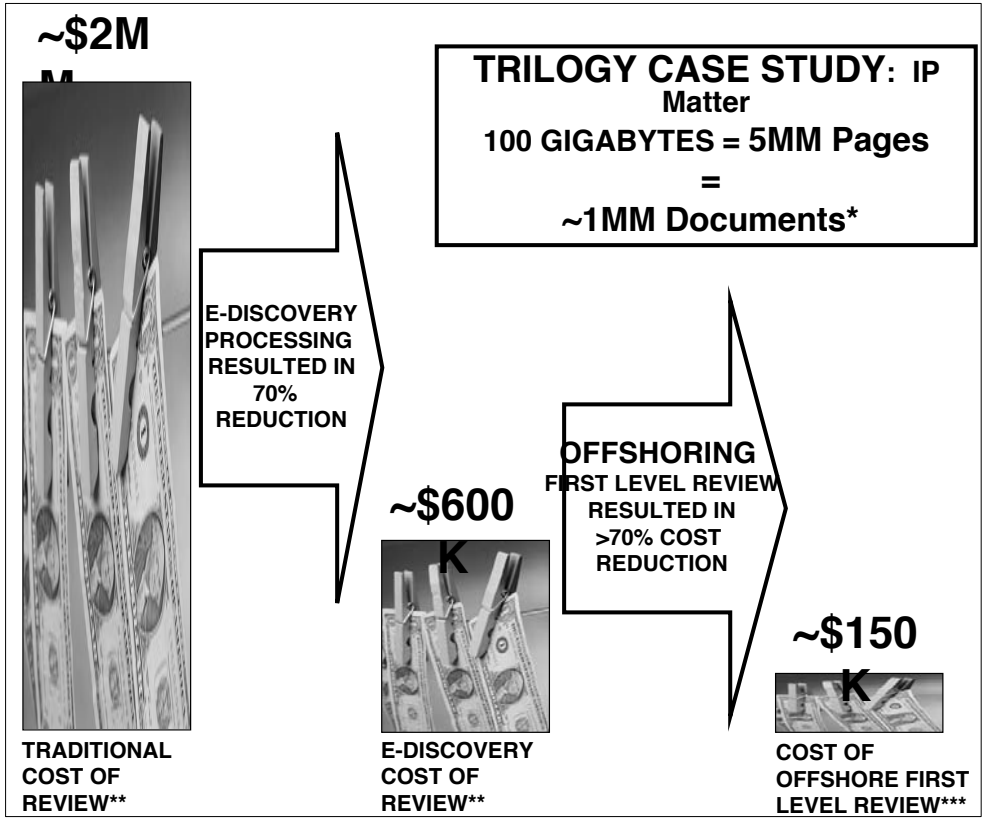
Outsourcing/Offshoring FLR: How has it worked?



*It is estimated that 1GB=50K pages and there are between 5-7 pages/document. See Panel Material: "Document Review Metrics"
**Using a favorable industry standard review average of 50 Documents/HR @ $100/HR
***Offshore costs were $25/HR.

Outsourcing/Offshoring FLR: How has it worked?

DuPont: 2006

5 Document Review Projects

=

$500K net savings

Outsourcing/Offshoring FLR: How has it worked?

DuPont Case Study: Damage Analysis

- Database development to link pages with information on key claims
- Assisted collection team in identifying gaps in documentation
- Prepared litigation team to present evidence

RESULTS:

2MM+ pages analyzed

Entire analysis completed in 3 months

SUCCESSFUL OUTCOME = 1 year

Outsourcing/Offshoring FLR: How has it worked?

- How are companies performing this function?
- How do you set up and engage a document review project? [2]

[2] Please refer to the panel materials: First Level Document Review "Case Briefing/Engagement Checklist"

First Level Document Review: Case Briefing/Engagement Checklist

to full engagement. Below is a checklist that assists in identifying key factors to provide and incorporate into a document review case briefing:

- ☐ Provide overview of the case/type of matter
- ☐ Define the legal issues involved
- ☐ Explain the key elements of the case/define the smoking gun
- ☐ Identify the jurisdiction that will apply to the case/applicable laws
- ☐ Define case strategy
- ☐ Timeline/chain of events/court deadlines/meet & confers
- ☐ Benchmarks/milestones
- ☐ Accommodate rolling production of documents?
- ☐ Info about the client
- ☐ Info about the executives
- ☐ Identify the key players involved ("Cast of Characters")
- ☐ Organizational chart for the Cast of Characters
- ☐ Info about the products, service or the legal point at issue
- ☐ If tailoring the review, please include interrogatories (reference sheet)
- ☐ Identify any potential acronyms that may be encountered
- ☐ If known, provide a "Privilege List," including law firms, in-house counsel, and agents

Outsourcing/Offshoring FLR: How has it worked?

- **Importance of Client Involvement**
  - Communication, Communication, Communication
  - Client supervision
  - One point of contact facilitating instructions (outside counsel/internal counsel)
  - Measure accuracy and productivity: frequent reports & audits [3]

[3] Please refer to the panel materials: "Document review metrics" and resource article "Six Sigma in the legal department," Kelli Brooks, KPMG

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Outsourcing/Offshoring FLR: Ethical Considerations [4]

- Avoiding the unauthorized practice of law
- Conflicts checks
- Attorney-client privilege
- Preserve client's confidences and secrets

Please refer to the panel materials: Legal Process Outsourcing (LPO) "Ethical Considerations and Constraints" and resource article "Ethics Opinions allow Foreign Legal Outsourcing, American Bar Association"

Vetting for a Service Provider

- Does it fall within your corporate strategy and culture?
- Due diligence checklist and review team makeup [5]

[5] Please refer to the panel materials: First Level Document Review: "Due Diligence Checklist

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Vetting for a Service Provider: Due Diligence Checklist

- ☐ Engage a team with a proven track record (request and check all references)
- ☐ Impeccable credentials, confirm that the service provider utilizes attorneys from the best English-speaking law schools
- ☐ Common Law background
- ☐ Staff managing projects both domestically and offshore (utilizing US-licensed attorneys)
- ☐ Intricate understanding of the US legal system, with continuous training and education (trained by experienced US-licensed attorneys)
- ☐ Well-documented procedures
- ☐ Identifiable and measurable quality control practices
- ☐ Accuracy and productivity measurement and formal tracking system
- ☐ High-level management skills and operational experience (executive management, project management, and quality control)
- ☐ Best-in-industry e-discovery technology, tools and processes, with the ability to streamline the process
- ☐ The ability and willingness to stay apprised of e-discovery case developments and nuances
- ☐ Close collaboration with client (corporate legal department/outside counsel)
- ☐ Case-specific legal training
- ☐ Security and confidentiality measures
- ☐ People, process, and technology
  (It is recommended to visit operations and/or request photos and facility specs)

Vetting for a Service Provider: Contract Negotiations Checklist

[6]

- **Who?**
- **What?**
- **Where?**
- **When?**
- **Why?**

[6] Please refer to the panel materials: Legal Process Outsourcing (LPO) "Contract Negotiation Checklist"

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First Level Document Review
DUE DILIGENCE CHECKLIST: BEST PRACTICES

This is a quick due diligence checklist to reference when engaging an offshore service provider to perform first level document review services:

- ☐ Engage a team with a proven track record (request and check all references)
- ☐ Impeccable credentials, confirm that the service provider utilizes attorneys from the best English-speaking law schools
- ☐ Common Law background
- ☐ Staff managing projects both domestically and offshore (utilizing US-licensed attorneys)
- ☐ Intricate understanding of the US legal system, with continuous training and education (trained by experienced US-licensed attorneys)
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- ☐ Case-specific legal training
- ☐ Security and confidentiality measures
- ☐ People, process, and technology
(It is recommended to visit operations and/or request photos and facility specs)

First Level Document Review
CASE BRIEFING/ENGAGMENT CHECKLIST

It is imperative that a first level document review team be thoroughly briefed on a case prior to full engagement. Below is a checklist that assists in identifying key factors to provide and incorporate into a document review case briefing:

- ☐ Provide overview of the case/type of matter
- ☐ Define the legal issues involved
- ☐ Explain the key elements of the case/define the smoking gun
- ☐ Identify the jurisdiction that will apply to the case/applicable laws
- ☐ Define case strategy
- ☐ Timeline/chain of events/court deadlines/meet & confers
- ☐ Benchmarks/milestones
- ☐ Accommodate rolling production of documents
- ☐ Info about the client
- ☐ Info about the executives
- ☐ Identify the key players involved (“Cast of Characters”)
- ☐ Organizational chart for the Cast of Characters
- ☐ Info about the products, service or the legal point at issue
- ☐ If tailoring the review, please include interrogatories (reference sheet)
- ☐ Identify any potential acronyms that may be encountered
- ☐ If known, provide a “Privilege List,” including law firms, in-house counsel, and agents

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Resources & Articles on
Outsourcing/Offshoring First Level Document Review

Click to link to the resources & articles:

1. Ethics Opinions Allow Foreign Legal Outsourcing – American Bar Association (ABA)
2. Let's Offshore the Lawyers – DuPont
3. Legal Process Outsourcing of First Level Document Review
4. First Level Document Review – The Next Legal Service to be sent Offshore
5. Six Sigma in the Legal Department: Obtaining Measurable Quality Improvements in Discovery Management
6. Information Inflation: Can the Legal System Adapt?
7. Association of Corporate Counsel (ACC) Virtual Library: it has a wealth of information regarding Electronic Discovery and Records Retention
8. Sedona Conference

Service Providers:

- Tusker Group
- Office Tiger/RDD
- Pangea
- Mindcrest
- Datamatics Technologies
- Quislex
- LRN
- Intercom
- Irevna
- Quadrant Infotech
- Lexadigm

*For an updated listing of additional vendors, *See* Outsourced Legal Services

ACC ANNUAL MEETING – LITIGATION TRACK

904 Outsourcing/Offshoring First Level Document Review in an Era of eDiscovery

A. Litigation and E-Discovery:
   1. Electronically Stored Information (ESI)
      a. Computers/Laptops (email, documents, spreadsheets, power points, etc.)
      b. Servers
      c. PDAs
   2. 90+% of all data are ESI
      a. Alarmingly, this number is increasing as companies are hosting and storing more and more data.
      b. It is estimated that somewhere around 100 billion emails are sent daily.[1]
   3. New Federal Rules of Civil Procedure (FRCP)
      a. 26(a) explicitly defines ESI as discoverable.
      b. 26(f) mandates early "meet-and-confer" sessions to address ESI. Requiring pre-planning and cooperation between parties.
   4. New FRCP = more data are discoverable = more data to review.
   5. A major portion of litigation costs are incurred during discovery/document review.
   6. Companies have adopted technologies to help address this issue (i.e. Reduction of irrelevant data).[2]

B. First Level Document Review (FLR): What is it?
   1. Define FLR and how it relates to E-Discovery
      a. Reviewing documents for responsiveness: Relevancy, privilege, work-product, & issue coding.
   2. What are/were the traditional methods of Document Review?
      a. "War Rooms?"
   3. Who typically performs document review functions?
      a. Associates
      b. Contract Attorneys
      c. Paralegals
   4. The domestic costs associated with FLR.

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[1] Peter Lyman & Hal R. Varian, *How Much Information?* (2003), http://www.sims.berkeley.edu/how-much-info-2003.
[2] Processing and review technologies have been adopted to reduce the amount of non-relevant ESI, for example: keyword searching, date ranging, de-duplication/near-duplication, clustering and concept review tools.

C. How to save 70% on litigation costs: Outsourcing/Offshoring First Level Document Review.
   1. What is outsourcing/offshoring first level document review?
   2. How are companies performing this function?
   3. Where and why is First Level Document Review being offshored (i.e. India and Philippines)?
   4. Discuss the drivers to performing FLR offshore?
      a. Economies: Cost compared to domestic review.
      b. Efficiencies: Dedicated teams to perform review on your documents.
         1. Avoid "train & retrain" model.
         2. Constant dedicated resource to tap into should the litigation strategy shift.
      b. Time differentials: "around-the-clock" review
   5. Using offshore to strategize future cases.
      a. Multiple cases that may pertain to similar issues and related litigation.
      b. Assembling a library of documents.
   6. Discuss recommendations on how to set up a document review project, and an offshore team.[3]
   7. Discuss how technology has transformed and facilitated this function.

D. Importance of Client Involvement in Offshore First Level Document Review:
   1. Communication, Communication, Communication
   2. Supervision
   3. Measure accuracy and productivity: frequent reports & audits.[4]

E. Offshoring First Level Document Review: Legal/Ethical Considerations
   1. *Unauthorized Practice of Law*
      a. What constitutes the "practice of law" differs and depends on what jurisdiction you are practicing in.
   2. *Conflict Checks*
   3. *Level of Quality an Supervision of Work*
      a. Clients should receive the same or better level of quality from the firm as if associates were performing the document review.
   4. *Attorney Client Privilege*
   5. *Confidentiality*
      a. Duty to maintain client confidences and secrets.
   6. *ABA Rules on Temporary Workers*
      a. Rule 5.3(b) of the Model Rules of Professional Conduct
      b. ABA Formal Opinion 88-356
   7. Ethical Opinions on Outsourcing/Offshoring Document Review.
      a. NYC - http://www.nycbar.org/Ethics/eth2006.htm
      b. LA County Bar Association - http://www.lacba.org/Files/Main%20Folder/Documents/Files/Eth518%20PDF.pdf
      c. San Diego County Bar Association- www.sdcba.org/ethics/ethicsopinion07-1.htm
      d. Is there a common test?
      e. How would the courts potentially rule?

F. Vetting for a service provider:
   1. Does it fall within your corporate strategy and culture?
   2. Due Diligence Checklist: Best Practices[5]

G. Contractual Issues: Terms to look for when negotiating with a service provider.
   1. Key Issues
      a. Who, What, Where, When, & Why
   2. Service Levels:
      a. Define Benchmarks/Milestones/Deadlines
      b. Define a major point of contact.
      c. Define Client involvement: all instructions, including case briefings and review manuals will be finalized, approved and implemented under Client's instructions.
      d. Define that all First Level Document Review will by supervised by Client.
      e. Define the levels of Quality Control before delivery to Client.
      f. Reporting features: daily, weekly and monthly reports.
      g. Define Client auditing protocols.
      h. Define accuracy levels and incorporate internal auditing guidelines.

[3] Please refer to the panel materials: "First Level Document Review Case Briefing/Engagement Checklist"
[4] Please refer to the panel materials: "First Level Document Review Metrics"
[5] Please refer to the panel materials: "Vetting for a Vendor: First Level Document Review Due Diligence Checklist"

BUSINESS PROCESS/LEGAL PROCESS SERVICES OUTSOURCING (LPO)
CONTRACT NEGOTIATION CHECKLIST[1]

1. Chose your Vendor Wisely. ***No amount of contract language can substitute for choosing the right outsourcing business partner. Before any contact is considered, due diligence and "knowing your vendor" is key to success.*** Consider the following:

(a) Vendor's history, market reputation and track record.

(b) Financial stability, capitalization, identity of equity owners.

(c) Stability of vendor's employee base and historical growth.

(d) *Experience and training of vendor personnel. In offshore model, vendor personnel should preferably be foreign attorneys in a common law jurisdiction such as India, who are trained and updated by the vendor's U.S. - based senior management in applicable U.S. legal procedures and law germane to the project (including ethical limitations).*

(e) Talk to vendor's references.

(f) Does the vendor hold any recognized quality process certifications for outsourced services, such as ISO (International Organization for Standardization) standards for information security management (ISO 27001) and quality management systems (ISO 9001:2000)?

(g) SOX and other regulatory compatible systems (as applicable).

(h) Secure facilities for ensuring paper and electronic document delivery, retention. data security, segregation and confidentiality.

(i) *Research offshore jurisdiction's applicable privacy and privilege laws that could impact the project.*

(j) Scalability of vendor workforce as need arises.

(k) *Assess past/present conflicts of interest consistent with U.S. based attorney ethical obligations.*

(l) Price structure that's fair on both sides.

(m) Consider RFP approach to a select group of vendors. RFP should be clear as to qualifications, scope of services, desired pricing structure, term and other important provisions.

(n) Consider retaining a consultant for assistance in evaluating a "short list" of vendor candidates and their proposals, and what the market is at any moment.

(o) Hiring decision should be based on objective criteria and not marketing hype.

2. Define relationship between parties in recitals and introductory sections.

(a) Identify the parties' specific goals - helps define focus.

(b) Non-exclusive/exclusive relationship. Client cannot be locked in to one vendor if problems arise.

3. Scope of services.

(a) Define scope of services to be provided and excluded. Schedule of specific services to be attached (can be done through a separate Statement of Work (SOW) appended to a Master Services Agreement (MSA)). *Do not rely on marketing documents or vendor "proposals" that are not specific to your project and relationship.*

(i) Set applicable milestones and schedules.

(ii) Each party's responsibilities should be clearly delineated (matrix format is useful for this purpose).

(iii) *Schematic of work flow process to track work product through delivery, intake, internal vendor review and oversight until work product is delivered to client.*

(iv) Specify scope and limits of vendor's authority. *Client's U.S. attorneys should not allow the vendor's judgments to be substituted for their own.*

(v) Identify any training process and timetable.

(b) *Preclude the unauthorized practice of law* - scope of services must be constrained by applicable ethics rules and considerations (see related outline on *LPO Ethics*). Client's U.S. counsel must be vigilant in their oversight.

(c) Set forth baseline performance standards and service levels/service level agreement (SLA) supplement. Define remedies for service level non-performance (such as financial credits, multiple failures result in termination, etc).

(d) Specify skill/training levels of personnel who will perform the services.

(e) Specify security systems and protocols, including:

(i) segregating work product of vendors' other clients to avoid conflicts and preserve confidentiality;

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(ii) maintaining separate, secure work areas and file rooms;

(iii) setup of fire-wall and virus protected, secure network and electronic document storage systems.

(f) Specify any software platforms, hardware requirements, formats of vendor reports and database/spreadsheet work product deliverables. Vendor work product and formats must be compatible with client's needs, software and systems and any court requirements.

(g) Provide for back-up/redundancy and disaster recovery plan (see below).

(h) Provide for any anticipated need to modify service and performance levels after agreement is in place. Option to proceed with initial trial or test period.

4. Change Procedures.

(a) Change order process is important to manage changes in the original scope of work and pricing based on:

(i) changes in nature or volume of work;

(ii) changes in regulatory requirements or ethics opinions;

(iii) changes in pricing based on benchmarking.

(b) Form of change order documentation should be agreed upon to provide description of expanded/new scope of work, impact on existing services, timeline and pricing.

5. Vendor Personnel and Relationship Management.

(a) Identify project executives and relationship managers on both sides. (Some law firms are hiring dedicated e-discovery/document managers within their litigation practices.)

(b) *Provide that vendor's senior manager or team leader for the project must be an attorney licensed to practice law in the U.S. and physically present in the U.S. The vendor's U.S. based manager/team leader must closely supervise all LPO services and review all work product before delivery to client.*

(c) Client's reserved right to reasonably approve vendor's personnel and request change of vendor's client manager/team leader if problems arise or communication is inadequate. Client should have input as to change of vendors' initially acceptable relationship manager/team leader based on skills, qualifications, experience and personality.

(d) Provide for emergency access to key management/team leader 24/7.

(e) Provide for open channels of communication, including regular telephonic and/or video conferences to address any issues or suggestions.

(f) Periodic written reports should be provided to review problems/resolutions, suggestions and work flow/volumes in prior period.

(g) Specify vendor staff location(s) - at customer site/domestic off-site/offshore.

(h) Balance vendor's desire to remain semi-autonomous/independent and client's need for oversight and control. *In an LPO situation, the client or its U.S.-based counsel engaging the LSO provider must exercise a higher degree of supervision and oversight due to ethical requirements.*

(i) Scalability of vendor's staff as client's needs expand/contract. A successful outsourcing arrangement will adapt as the customer's needs change.

(j) Provisions concerning vendor employment of client work force and employee transition plan common in BPO deals are generally not applicable in LPO agreement.

6. Term.

(a) Specify initial and renewal terms. Vendor will typically seek longer terms but LPO arrangement will more typically be project or case specific.

(b) Consider automatic evergreen renewal vs. client's reserved right to renew. Potential to negotiate and lock in fee levels in renewal period in advance.

7. Pricing and Costs.

(a) Assess client's baseline costs in performing the legal services itself or through outside counsel (the latter being more typical in a litigation scenario), compared to vendor's cost model. Consider the desired level of cost savings and how much loss of direct control is acceptable, to justify the outsourcing model. The client and vendor should share similar assumptions.

(b) The longer the contract term, the more uncertainty is built in as costs fluctuate. New technologies also affect efficiencies and pricing. The client should share some of the upside benefit from new technology that makes the vendor more efficient without eroding the vendor's reasonable margins, which can affect performance.

(c) Fee types:

(i) Fixed fees.

(ii) Base fee + increments tied to volume of transactions, number of personnel employed, or other considerations.

(iii) Base fee + incentive fees tied to meeting or exceeding milestones or other objectives.

(d) Fee adjustments:

(i) COLA tied to changes in a specified CPI.

(ii) Volume over certain thresholds/baseline.

(iii) Late fees.

(iv) Escrow of *bona fide* disputed amounts.

(v) Change orders.

(vi) Reduced or steady fees enabled through technological or other efficiencies over time.

(vii) "Most favored customer" pricing - need to specify what service/pricing elements are to be considered so all things are equal and you're comparing apples to apples.

(viii) Vendors look for flexibility over time in pricing:

(A) ARCS - "additional resource charges" - additional vendor charges based on increased volumes above a specified baseline.

(B) RRCs - "reduced resource credits" - reduced rates based on decreased volume of in-scope services below a baseline.

(ix) Clients prefer fixed fees or other predicable pricing formulas for certainty and budgets, with "caps."

(x) Benchmarking - A periodic third-party objective evaluation of the pricing of the services received compared to those received by other organizations from other vendors providing comparable outsourcing services.

(A) Can be an effective client tool in longer term complex outsourcing deals to ensure services are being delivered over the term of the agreement at fair and reasonable rates, without punishing the vendor who is entitled to make a fair, competitive, profit.

(B) *May not be easy to assess or find true comparables in LPO deals.* LPO services are relatively new in the market, as opposed to more traditional IT or more established BPO deals.

(C) Allows pricing to be adjusted based on new efficiencies (such as technology).

(D) Must be a "like for like" comparison.

(E) Must be an independent third-party valuation. "Most favored client" pricing is not the same.

(F) Should the vendor have a say in approving the benchmark company?

(G) Will depend on the length of the agreement.

(H) Benchmarking takes time and money to do right so potential benefits need to be assessed. Alternative may be vendor discounts.

(I) Preserve confidentiality. No contingent fees for benchmarker. Consider sharing costs with vendor.

(e) Taxes.

(i) Applicable sales, use, VAT and service-fees related taxes.

(ii) Specify liability for any post-execution taxes that may be imposed.

(iii) Can taxes be triggered based on a change of location of where the vendor provides the services? In offshore deals there may be taxes imposed by the country where the services are provided.

(f) Expenses.

(i) What expenses are advanced by the vendor but invoiced to the client?

(ii) Specify expense controls - need for client approval over certain threshold, schedule of applicable charges to be attached if possible. This includes travel, reproduction costs, scanning costs, etc.

(g) Invoicing and Payment

(i) Invoices must be sufficiently detailed and the content (or format) should be specified. All items must be auditable with backup.

(ii) Expenses should be pass through.

(iii) If client is multi-national, consider ability to invoice through foreign subsidiaries if appropriate to realize any tax advantages.

(iv) Provide for currency in which to pay and any necessary currency conversions.

(v) Should have a provision to challenge invoices in good faith without triggering a default. Monies at issue can be escrowed.

(vi) Provide for invoicing cycle and payment due dates consistent with client accounting protocols.

(vii) Vendor may request corporate guaranty, letter of credit or advance payments.

(h) Audit rights.

(i) Penalties for overcharging to be provided: refund + interest and reimbursement for costs of audit.

(ii) Multiple overcharge events to be cause for client termination.

(iii) Vendor must cooperate with client's external auditors.

(A) Statement on Auditing Standards (SAS) No. 70, "Reports on the Processing of Transactions by Service Organizations," defines how external auditors should assess the internal controls of a client's outsourcing service provider and issue an attestation report to the client or other parties.

(B) Assess any applicable SOX reporting requirements.

8. Business Continuity/Disaster Recovery Scenarios - What happens in a catastrophe or if the vendor shuts down for any reason?

(a) *Consider court ordered discovery deadlines and potential for sanctions if document discovery process is hampered or interrupted without adequate backup and recovery process.*

(b) Potential regulatory impact of applicable laws and regulations.

(c) *Need to establish disaster recovery plan at inception with backup in place. The agreement should allocate costs for implementing a disaster recovery plan.*

(d) *Disaster recovery plan should be tested annually.*

(e) *Need for data backup and retrieval, backup power systems, redundant facility and transition assistance by existing vendor for moving to a new vendor in an emergency*.

(f) *Force majeure (see below) should not be a defense from total non-performance if the risk from any potential disaster can be predicted.* Client is paying for a technologically and environmentally secure process and services location with a solvent vendor.

9. Vendor Facilities (physical plant and security).

(a) Identify all locations where work will be performed. Provide for restricted access and prevent unauthorized access.

(b) Physical security, network security and environmental controls specified.

(c) Segregation and security of client's physical work product and documents.

(d) Segregation and security of client's electronic records and data through firewalls, virus protection, high-level password protection. Has the vendor had any IT audits done of its systems to assess "best of breed" practices and security?

(e) Prohibit unsafe conditions and environmental hazards. Require a safe working environment.

(f) Use of technologically-based security devices to control access - retinal scans, fingerprint i.d., etc.

(g) Conform to client's own security policies.

(h) Immediate reporting of any security breaches. Provide for security audits by client.

(i) Consider permissible "ethical hacking" to test strength of vendor's firewall and IT security system.

(j) If any vendor services will be provided from client's facilities:

(i) Identify all equipment, hardware and software necessary for vendor's use. Vendor access to client software may require software license amendments.

(ii) Identify and schedule any client-owned equipment/hardware that vendor will purchase in transitioning to off-site, including any equipment leases vendor may assume.

(iii) Identify and schedule any client software licenses vendor may assume.

(iv) Specify each party's obligations for maintenance of equipment.

(v) Provide for vendor access to client facilities and compliance with client and facility security procedures.

10. Data Protection, Privacy and Confidentiality.

(a) Provide for confidentiality and non-disclosure of all client materials and data except to limited personnel actually providing the services and only to the extent necessary to provide the services. *This applies not only to attorney-client/work product materials, but also to client records containing trade secrets and other sensitive content of any type.*

(b) Provide for confidentiality and non-disclosure of all work product produced by vendor for client in any form or media.

(c) *Need to preserve attorney-client privilege and set up relationship to preserve protection under the attorney work product doctrine*. Note that Federal Rule of Civil Procedure 26(b)(3) extends "work product" to documents "prepared in anticipation of litigation or for trial by or for another party *or by or for that other party's representative (including the other party's attorney, consultant .... or agent*)...."

(d) *Need to avoid conflicts of interest*. Consider if vendor's personnel working on project can provide similar services to client's competitors. Vendor should maintain conflicts database and system to avoid conflicts.

(e) Consider encryption of all data transmitted to vendor's offshore facility through a secure server under vendor's control.

(f) Assess potential impact under applicable laws and regulations, and court-ordered discovery plans, if data is compromised, lost or destroyed, including state laws governing required notification for unauthorized disclosure of data containing personal information.

(g) Regulatory compliance as applicable (SOX, HIPAA, Gramm-Leach-Bliley).

(h) Applicability of U.S. Export Controls. Such controls generally are not applicable to LPO services, but may apply if exported documents contain sensitive, confidential, restricted information, or non-public, sensitive intellectual property. Both parties must comply where applicable.

(i) *Client must have step-in rights to obtain access to its data at any time, even in case of a client default. Client data and records cannot be held hostage by a vendor under any circumstances.* If LPO is between company's outside legal counsel and vendor, documents delivered to the vendor for review and processing are in most cases owned by the law firm's client, not the law firm.

11. Intellectual Property

(a) LPO will have fewer issues in this area than an IT outsourcing or other broader BPO agreement because the vendor is performing a specific business process and not a technology process. Nevertheless, technology is an integral part of the process and the agreement should be clear on who is responsible for purchasing and paying for any required software licenses and other permissions that may be required (such as if client will have access to vendor's extranet).

(b) All work product emanating from the vendor should be owned by the client. Client should be granted ownership and copyrights in all written reports, summaries, surveys, spreadsheets, databases, etc., generated by the vendor.

(c) Provide for any licenses necessary for vendor to use any client software or other IP and vice versa.

12. Representations and Warranties

(a) Express warranties to be stated.

(i) Services to be provided in a professional and workmanlike manner, in conformance with the SOW or other statement of services.

(ii) Vendor has the legal right to enter into the agreement and provide the services without violating the rights of any other party or any applicable laws or regulations.

(iii) Vendor has no conflicts of interest in performing the services.

(iv) As applicable, vendor personnel are licensed to practice law in their home jurisdiction and have not been sanctioned.

(v) Vendor owns or has proper licenses to use all hardware and software necessary to deliver the services.

(b) Disclaimers to be stated (typically will be a blanket exclusion subject to any express warranties stated).

13. Indemnification

(a) Mutual indemnification provisions. Each party to indemnify the other for any losses and liabilities arising from third party claims based on a breach of representations and warranties, or other acts and omissions of a party.

(b) Also provide indemnification for claims based on personal injury and property damage (apart from client data and documents).

14. Limitations of Liability

(a) Typical vendor agreement will likely contain waiver of right to seek indirect, consequential, incidental and special damages. *This is not "boilerplate" but a serious limitation on damages.* Any such negotiated provision should be mutual.

(b) Vendor agreements often also seek to impose overall caps on total damages, such as the total fees paid to the vendor in a defined time period.

(c) *By removing consequential and incidental damages and also imposing a cap, the client's damage remedy can be severely restricted.* This should be balanced so client at least retains the right to obtain consequential and incidental damages within the range of any damage cap.

(d) Exclusions from limitations:

(i) Indemnification obligations.

(ii) Breaches of confidentiality and intellectual property rights.

(iii) Acts of gross negligence and willful misconduct.

(e) *Limitations of liability and indemnification clauses reflect a balancing of risk of loss between the client and vendor, and may impact price and levels of insurance coverage for either or both parties.*

15. Breach

(a) Specify any cure periods for defaults. Consider need for short-term cures (see ¶16(b) below).

(b) Specify acts/omissions leading to immediate right to terminate w/o cure:

(i) breach of confidentiality and IP provisions;

(ii) insolvency, bankruptcy (generally not enforceable), assignment for benefit of creditors;

(iii) extended event of *force majeure* (see below);

(iv) illegality and acts of moral turpitude; and

(v) any other serious breach that compromises the client's data or reputation that is not effectively curable.

16. Termination

(a) Identify termination events as of right with and without cause, including with cause after specified cure period has lapsed (*see* Breach, above).

(b) The "standard" clause setting a relatively long 30-day cure period for defaults should be reconsidered as 30 days is too long in many cases. *A client cannot suffer through a material default in an LPO vendor's performance for 30 days without a right to terminate, migrate to another vendor and/or assert rights for breach.*

(c) Effect of termination: vendor's return or certified destruction of all client documents and data in any media and format.

(d) Identify and provide for transfer or termination of any applicable software or other licenses.

(e) Specify clauses surviving termination.

(f) Termination assistance:

(i) Vendor to provide such services as may be reasonably necessary over a specified time period to facilitate the transfer of any terminated services back to

the client or to a third-party service provider designated by the client, upon termination for any reason.

(ii) Vendor will likely require payment of its standard fees for such transition services. Client and vendor should develop a mutually acceptable transition plan and pricing in advance.

17. Choice of Law, Forum Selection and Dispute Resolution

(a) Due to high costs of any litigation, provide for initial prompt escalation of any disputes to parties' respective relationship managers under a defined dispute resolution process. Higher levels of escalation can be provided, but avoid any prejudice to client's legal and ethical obligations. Goals of cooperative escalation must be quick resolution and instituting any new controls to avoid repetition of the problem.

(b) U.S. domestic law must govern relationship so there is real recourse. Client should seek applicability of its state law of formation or primary business office location. Alternatively, if outside counsel is contracting with the LPO vendor, the law firm's state of operations may be appropriate.

(c) Provide for domestic dispute resolution forum and U.S.-based personal jurisdiction over the vendor in a suitable state. Forum selection clauses are being scrutinized in federal courts more closely if challenged. There is the need to carefully define the scope of claims subject to any mandatory jurisdiction clause for court action. [*See* Phillips v. Audio Active Ltd., S.D.N.Y., No. 05-7017-cv (July 24, 2007) at http://www.ca2.uscourts.gov:8080/.]

(d) Arbitration as alternative. Consider that in multinational deals, by treaty[2], arbitration awards are widely enforceable throughout the world than court judgments.

(i) Scope of claims to be arbitrated must also be broad enough to encompass all possible claims arising out of the parties' relationship.

(ii) Consider alternatives to standard AAA provision. Private arbitration forums like JAMS may provide faster resolutions with sophisticated retired judges to be selected from panel of neutrals.

(iii) Draft arbitration clauses carefully as they are a product of contract. For example, provide for venue, one or three arbitrators, applicable panel rules as modified by the parties, limitations on arbitrator's powers, reasonable discovery processes with any appropriate limits, written decision of arbitrator(s) to be rendered within a specified time, reasons for decision to be stated if desired, and allocation of arbitration costs and parties' legal fees.

(iv) Carve out for injunctive or other equitable relief to be sought in court under forum selection clause.

[2] New York Convention on Recognition and Enforcement of Arbitral Awards.

(v) Consider carve out from arbitration for breaches of confidentiality or misuse of intellectual property.

(e) In court actions, consider waiver of jury trial and attorneys' fee provision in favor of prevailing party.

18. Assignment/subcontracting.

(a) Restrict vendor assignment without client consent.

(b) Sub-contracting (delegation) of specific tasks should be with client's reasonable approval. Vendor to remain liable for any permitted sub-contractors' acts or omissions.

(c) Possible carve-out for vendor merger with its affiliate (reorganization) or another major, reputable provider, subject to advance notice and meeting specified criteria to ensure continuity and compliance with all vendor obligations. Upon any permissible assignment by vendor, client should ensure continuity of key vendor management.

(d) Consider change of vendor control provision.

19. Insurance requirements.

(a) Client should check with its broker and risk management experts on appropriate coverage levels.

(b) Law firms should check with their malpractice and other applicable carriers.

(c) Insurance levels should factor in risks of loss as provided under limitations of liability clause.

20. Anti-solicitation. Restrictions on soliciting each other's personnel (more applicable where vendor LPO services are provided domestically and not offshore).

21. Force Majeure.

(a) *Do not take this clause lightly as standard boilerplate.*

(b) Consider each event listed. For example, vendor's internal labor/employee issues should not be a *force majeure* event (as opposed to general strikes, etc.);

(c) *Assess what risks are "reasonably" within the control of both parties and draft accordingly. This should be part of the disaster recovery plan. For example:*

(i) If the vendor's facilities are located in a typhoon prone area, the vendor should be expected, using reasonable care, to have facilities that are resistant to storm damage and flooding.

(ii) Similarly, if power outages are common, vendor must be required to have in place uninterrupted power supplies or backup generators that it is responsible for maintaining. Vendor should not then be excused if a power outage occurs and such backup power is not in place or fails due to lack of maintenance by the vendor.

(d) Extended event of *force majeure* should be grounds for termination without cause.

22. Notices. Provide for time periods for when notices are deemed received. Parties are responsible for updating their addresses and contact information.

23. Miscellaneous

(a) Headings for convenience only.

(b) Independent contractor status; vendor has no authority to bind client.

(c) Severability.

(d) Amendments/modifications.

(e) Entire agreement; integration clause.

(f) Publicity restrictions.

(g) No third party beneficiaries.

(h) Execution in counterparts.

Legal Process Outsourcing (LPO) - Ethical Considerations and Constraints[1]

1. Overview. LPO services often cover tasks similar to those typically done in a private law firm by paralegals/legal assistants or first year associates.

(a) Examples: first level document review and coding, deposition summaries, contract and intellectual property "forms" completion, basic research, transcription services and other litigation support services. Some corporations, however, are also outsourcing patent applications.

(b) Guiding rule is continual oversight of strict ethical requirements of U.S. state regulatory bodies overseeing the practice of law

(c) *The unauthorized practice of law ("UPL") must be guarded against vigilantly*.

2. What is UPL?

(a) What constitutes the "practice of law" differs depending on the jurisdiction you are practicing in but there are guiding principles.

(b) UPL is prohibited by ethical rules governing the practice of law (*e.g.*, ABA Model Rule of Professional Conduct 5.5 and Code of Ethical Considerations, Canon 3) and, in many jurisdictions, by statutes that include both civil and criminal sanctions for UPL.

(c) Practice of law is determined on a case-by-case basis, with many courts refusing to propound comprehensive definitions.

(d) Generally, a person not admitted to practice law in a state may not:

(i) establish an office or other systematic and continuous presence for the practice law; or

(ii) hold out to the public or otherwise represent that he/she is a lawyer admitted to practice law in that jurisdiction.

(e) A lawyer is engaged in UPL if he/she attempts to practice law in jurisdictions in which he/she is not admitted or by aiding non-lawyers in UPL.

(f) Examples of activities that have been held to constitute practice of law:

(i) Use of professional legal judgment and/or advising others with respect to legal matters. *See, e.g.*, ABA Model Code of Professional Responsibility EC 3-5 ("the practice of law relates to the rendition of services for others that call for the professional judgment of the lawyer [consisting of lawyer's] ability to relate the general body and philosophy of law to a specific legal problem of a client"); Oregon State Bar v. Smith, 942 P.2d 793 (Or. 1997) ("practice of law" means that exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice, or other assistance).

(ii) Involvement in a direct relationship between a lawyer and client. A non-lawyer generally may not enter into a relationship with a client in which the non-lawyer assumes responsibility for handling the client's legal matters. *See* J.H. Marshall & Associates Inc. v. Burleson, 313 A.2d 587 (D.C. 1973).

(iii) Selection of legal forms and drafting legal documents. Jurisdictions differ as to whether and the extent to which non-lawyers may engage in document preparation.

(g) Activities that are not UPL: A lawyer may delegate tasks to clerks, secretaries, paraprofessionals and other lay persons provided the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product. *See* ABA Model Rule 5.3; *see also* New York State Bar Association Committee on Professional Ethics Opinion 721 - 9/27/99; In re Opinion 24 of Committee on Unauthorized Practice of Law, 128 N.J. 114, 123, 607 A.2d 962 (1992).

(h) Disclaimers are not sufficient: A non-lawyer engaged in UPL cannot avoid the consequences of such actions through disclaimers. *See* In re Herren, 138 B.R. 989 (D. Wyo. 1992) (signed waiver from client acknowledging that no legal services were provided does not insulate a non-lawyer who actually engaged in UPL from liability for such actions).

(i) Sanctions for UPL may be civil or criminal, including fines, injunctions (such as prohibiting the collection of fees) and imprisonment. *See* ABA 1999 Survey of UPL Committees.

(i) In New York, UPL can subject one to *criminal prosecution* under N.Y. Judiciary Law §§478 and 485 (UPL is a misdemeanor punishable by, *inter alia*, 3 years probation and $1000 fine); to *private civil action* under N.Y. Judiciary Law §476-a; or to summary proceeding for *criminal contempt* under N.Y. Judiciary Law §750(B).

(ii) In New Jersey, UPL can also subject one to *criminal prosecution* under N.J.S.A. 2C:21-22, which defines UPL as a disorderly persons offense (punishable by, *inter alia*, up to a $1000 fine and 6 months in jail) or a fourth degree crime (punishable by, *inter alia*, fines up to $10,000 and imprisonment of up to 18 months). Under New Jersey Rules of Professional Conduct 39:2-2, the courts may also hold violators in *contempt* and/or *refuse to enforce a*

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non-lawyer's claim to compensation. Further, under New Jersey law and the law of other jurisdictions (but not New York), UPL can result in the *unenforceability of any work product* achieved through UPL and/or will *void any proceedings* participated in by a person engaged in UPL.

3. Temporary Lawyer Employment Agencies (Provides Guidance)

(a) Generally, lawyers may participate in an employment agency which places temporary lawyers, and law firms may hire lawyers through such an agency so long as temporary lawyers and the employment agency comply with the rules regarding UPL and interference with professional judgment. *See* Model Rules 5.4(c), 5.4 (d)(3) and 2.1.

(b) *To satisfy the requirement of independent professional judgment, a law firm leasing a temporary lawyer must have all supervisory responsibilities over the activities of the temporary lawyer involving the practice of law at the law firm.*

(c) A temporary attorney employment agency is not engaged in the practice of law where the activities of the agency and its non-lawyer employees are limited to administrative functions.

(d) ABA Guidelines for Temporary Agencies: ABA Opinion 87-355 (1987) suggests the following guidelines for temporary lawyer agencies to operate consistent with the Code of Professional Responsibility:

(i) development of suitable fee structure that eliminates any fee-splitting between the agency and the lawyer;

(ii) agreement that the agency not attempt to limit or control the amount of time a lawyer spends on a matter, the kinds of matters a lawyer may handle or the manner in which they are handled (DR 5-107);

(iii) agreement that agency not interfere with lawyer's duty to preserve client confidences and that same not be disclosed to agency (DR 4-101);

(iv) avoidance of any conflict of interest on part of the attorney (DR 5-105);

(v) disclosure of temporary nature of lawyer's employment to the client (DR 5-107(A)(1); and

(vi) agreement that lawyer not be required to handle a matter he/she cannot handle competently (DR 6-101). The onus is on the hiring law firm to investigate the competence of the temporary lawyer and be satisfied of his/her competence (DR 6-101).

4. ABA Rules on Temporary Workers - (Provides Guidance)

(a) Rule 5.3(b) of the ABA Model Rules of Professional Conduct ("Responsibilities Regarding Nonlawyer Assistants") is instructive for LPO arrangements. It emphasizes direct supervisory authority, stating "a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

(b) Under ABA Formal Opinion 88-356 (1988), the following ethical rules are implicated when temporary lawyers are contracted to perform legal work:

(i) avoiding conflicts of interest,

(ii) maintaining confidentiality of client information,

(iii) disclosing to the client arrangements between the firm and the lawyer in some instances (including fee divisions), and

(iv) maintaining professional independence of the lawyer performing the work from the non-law firm to which the fee is paid.

(c) The supervising attorney must closely supervise the outsourced work. Otherwise, the outsourcing company may be engaging in the UPL.

5. Relevant State Ethic Opinions and Committee Advisories Regarding LPO Services [Copies of opinions attached in Appendix I]

(a) New York: Association of the Bar of the City of New York ("ABCNY") Formal Opinion 2006-3 (Aug. 2006). Summary: "A New York lawyer may ethically outsource legal support services overseas to a non-lawyer [which includes both a foreign lawyer and layperson], if the New York lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserves the client's confidences and secrets when outsourcing; (c) avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) when necessary, obtains advance client consent to outsourcing." http://www.nycbar.org/Publications/reports/show_html.php?rid=503

(i) The ABCNY reasoned that in order to discharge the duty to supervise, which is made more difficult in an offshore LPO situation, a New York lawyer should be sure to "(a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the professional resume of the non-lawyer; (b) conduct reference checks; (c)

interview the non-lawyer in advance, for example, by telephone or by voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer's suitability for the particular assignment; and (d) communicate with the non-lawyer in discharging the assignment according to the lawyer's expectations." (Id. at p.3).

(ii) The supervising attorney must also check the final work product to make sure that it meets the standards of the firm or company. *See* N.Y. State Bar Opinion 721 (1999): a NY Lawyer may ethically use a legal research firm staffed by non-lawyers if the lawyer exercises proper supervision, which involves "considering in advance the work that will be done and reviewing after the fact what in fact occurred, assuring its soundness…. Without proper supervision by a NY lawyer, the legal research firm would be engaged in the unauthorized practice of law."

(b) Los Angeles: Los Angeles County Bar Association ("LACBA") Opinion No. 518, June 19, 2006. Summary: "An attorney in a civil case who charges an hourly rate may contract with an out-of-state company to draft a brief, provided the attorney is competent to review the work, remains ultimately responsible for the final work product filed with the court by the attorney on behalf of the client, the attorney does not charge an unconscionable fee, client confidences and secrets are protected, and there is no conflict of interest between the client and contracting entity." http://www.lacba.org/showpage.cfm?pageid=427.

(i) The LACBA recommended "the attorney at all times retain…and exercise…independent professional judgment in connection with the performance of the attorney's legal services for the client." LACBA Opinion No. 518, p.76.

(ii) Thus, an attorney should closely supervise the entire process, including selecting a provider and reviewing (signing) the final work product. The attorney must remain ultimately responsible for any work product on behalf of the client.

(c) San Diego: San Diego County Bar Association ("SDCBA") Ethics Opinion 2007-1 (2007).[2] Summary: "The Committee concludes that outsourcing

[2] As set forth in Opinion 2007-1, the hypothetical facts are stated as follows:

A partner in a two-lawyer California litigation firm was contacted by a business acquaintance to defend a complex intellectual property dispute in San Diego Superior Court. The attorney and his partner had limited experience in intellectual property litigation. The attorney nonetheless took the case and assured the client of his firm's ability to develop a solid understanding of the areas of law involved. Without telling his client, the attorney contracted on an hourly basis with Legalworks, a firm in India whose business is to do legal research, develop case strategy, prepare deposition outlines, and draft correspondence, pleadings, and motions in American intellectual property cases at a rate far lower than American lawyers could charge clients if they did the work themselves. None of the foreign-licensed attorneys at Legalworks held law licenses in any American jurisdiction.

does not dilute the attorney's professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged. Under the hypothetical as we have framed it, the California attorneys may satisfy their obligations to their client in the manner in which they used Legalworks, but only if they have sufficient knowledge to supervise the outsourced work properly and they make sure the outsourcing does not compromise their other duties to their clients. However, they would not satisfy their obligations to their clients unless they informed the client of Legalworks' anticipated involvement at the time they decided to use the firm to the extent stated in this hypothetical. http://www.sdcba.org/ethics/ethicsopinion07-1.htm.

(i) The SDCBA reasoned that "[t]he key issue appears to be the amount of supervision over the non-lawyer: the greater the independence of the non-lawyer in performing functions, the greater the likelihood that the non-lawyer is practicing law." SDCBA Ethics Opinion 2007-1, p.3.

(ii) The SDCBA stated: "An attorney may not, however, rely on [an outsourcing firm] to evaluate its own work. The duty to act competently requires informed review, not blithe reliance." Id. at p.7.

(d) Florida:

(i) Two divisions of the Florida Bar have issued advisory statements that indicate approval of offshore legal services outsourcing under certain conditions. This was prompted in part by a Miami based company, founded by a Florida attorney, sending paralegal and first-year associate level work, primarily research, to attorneys in Bangalore, India, and another attorney seeking to outsource paralegal work to assist his firm's immigration practice.

(ii) The Florida Bar's Professional Ethics Committee set up a subcommittee in early 2007 to draft an advisory opinion on outsourcing of paralegal work to India. A draft ethics opinion (Proposed Advisory Opinion ("PAO") 07-2) was presented in June, 2007 and will be further considered in September 2007.

(iii) Ethics counsel for the Florida Bar's Professional Ethics Committee has stated that the attorney must closely supervise the Indian attorneys and not

The California attorney reviewed the work he got from Legalworks and signed all court submissions and communications with opposing counsel himself. The work of Legalworks was billed to the client at cost, but was classified on the bills in broad categories such as "legal research" or "preparation of pleadings."

Ultimately, the attorney and his partner obtained dismissal of the case on a summary judgment motion. When the client asked how the attorneys developed the theory on which summary judgment was granted, and had done the work so inexpensively, the attorney told him that virtually all of the work was done by India-based Legalworks.

give them anything "that would require the independent professional judgment of a lawyer….They are not members of the Florida Bar."[3]

(iv) The director of the Florida Bar's Unlicensed Practice of Law department has stated that reviewing documents, for example, is fine, but that Indian lawyers, who are licensed to practice law only in India, are not permitted to give legal advice directly to clients in Florida.[4]

(v) Draft PAO 07-2 opined that "there is no distinction when hiring an overseas provider of such [paralegal] services versus a local provider, and that contracting for such services does not constitute aiding the unlicensed practice of law, provided that there is adequate supervision by the law firm."[5]

(vi) Draft PAO 07-2 further cautioned: "Attorneys who use overseas outsourcing companies should recognize that providing adequate supervision may be difficult when dealing with employees who are in a different country. Ethics opinions from other states indicate that an attorney may need to take extra steps to ensure that foreign employees are familiar with Florida's ethics rules governing conflicts of interest and confidentiality…. The law firm should provide no access to information about other clients of the firm [and] should take steps such as those recommended [in a City of New York Bar Association opinion] … to include 'contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality.'"[6]

6. Avoiding Conflicts of Interest

(a) Have the outsourcing company perform a thorough conflict check before processing and sending any documents overseas. A competent vendor will have a comprehensive conflicts database.

(b) As more document review takes place overseas, the risk of conflicts of interest will increase if many law firms use only a few vendors.

(c) ABA Model Rules 1.7, 1.8 and 1.8 describe the circumstances under which an attorney is barred from representing both a former and current client and the attorney's duties to former clients (*see* Appendix II). Under ABA Formal Op. 88-356, the ABA opined that the restrictions in Rule 1.7 apply to temporary attorneys and that absent a client's consent and certain other conditions, a

[3] http://www.floridatrend.com/law_article.asp?cName=Law%20and%20Government&rName=Of%20Counsel&whatID=4&aID=23224335.7187158.614042.728294.2917836.262&aID2=47225

[4] Id.

[5] Florida Bar News, July 15, 2007, at http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/RSSFeed/eeed813dc11d9ed1852573130072d3c1?OpenDocument&Click=

[6] Id.

temporary attorney cannot simultaneously work on matters for clients of different law firms if representation of each is directly adverse to the other. ABA Model Rule 1.9 also restricts a temporary lawyer from working for a client of another firm on the same or a related matter in which that client's interests are materially adverse to the interests of the client of the first firm. The same principles would of course apply with even greater concern to non-lawyers.

(d) The ABCNY stated: "As a threshold matter, the outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients." (ABCNY Formal Opinion 2006-3, p.4).

(e) The LACBA also noted that "[the company] may be working on other matters which conflict with and are potentially or actually adverse to the attorney's client." (LACBA Opinion No. 518, p.78). Even further, the LACBA stated "the attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of [the company] and which could arise from relationships that [the company] develops with others during the attorney's relationship with [the company]." (LACBA Opinion No. 518, p.78).

7. Preserving Client Confidences and Privileges

(a) ABA Model Rule 1.6 addresses the duty of confidentiality and when lawyers may disclose information relating to the representation of a client, regardless of whether the information is privileged or only a client "confidence" or secret.

(b) State and federal laws embody attorney-client privilege and work product protections. Federal Rule of Civil Procedure 26(b)(3) extends "work product" to cover documents "prepared in anticipation of litigation or for trial by or for another party *or by or for that other party's representative (including the other party's attorney, consultant…or agent)*…." (Emphasis added.) Thus, work product protection will extend to the work product of the LPO provider as long as it meets the other qualifications of Rule 26(b)(3).

(c) Courts have regularly upheld the attorney-client privilege where attorneys communicate confidential client information to paralegals and other non-attorneys, such as insurers and accountants, in appropriate situations where the purpose of the communication is to assist the attorney in providing legal advice to the client.[7]

[7] *See, e.g.*, In re Cendant Corp. Securities Litigation, 343 F.3d 658, 661 (3d Cir. 2003) (attorney-client privilege applies to non-lawyers who are employed to assist a lawyer in the performance of any professional legal services); United States v. Kovel, 296 F.2d 918, 922 (2d Cir. 1961) (attorney-client privilege extended to accountant who acted at the lawyer's direction to provide information for the client); Owens v. First Family Financial Services, Inc., 379 F.Supp.2d 840, 848 (S.D. Miss. 2005) (attorney-client

(d) For example, a recent Texas federal district court opinion emphasized that "Communications between an attorney's agent and the attorney's client can be protected by the privilege when the communication is made in confidence for the purpose of facilitating the rendition of legal services." Robinson v. Tex. Auto. Dealers Ass'n, 214 F.R.D. 432, 451 (D. Tex. 2003), *citing* United States v. White, 617 F.2d 1131, 1135 (5th Cir. 1980) (noting that "in appropriate circumstances the privilege may bar disclosures made by a client to non-lawyers who … have been employed as agents of an attorney.")

> Few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. "The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents." [*Citing* United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)]. 214 F.R.D. at 451.

(e) Protections afforded in the U.S. under the attorney-client privilege and work product doctrine may not exist under foreign laws.

(i) For example, an "[a]n in-house counsel is not recognized as an 'attorney' under Indian law. Thus professional communications between an in-house counsel and officers, directors and employees are not protected as privileged communications between an attorney and his client…." (SDCBA Ethics Opinion 2007-1, p.10, quoting lexmundi.com).

(ii) *Thus, protection must be made a matter of contract with applicable U.S. state and federal laws governing the LPO provider's agreement.*

(f) ABCNYC Op. 2006-03 requires lawyers to "sensitize their non-lawyer staff to the pitfalls [of revealing confidential information of a client], developing mechanisms for prompt detection of...breach of confidentiality problems."

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privilege applies with equal force to paralegals who work on behalf of a lawyer representing a client); Lugosch v. Congel, 219 F.R.D. 220 (N.D.N.Y. 2003) (exemption from the general waiver of attorney-client privilege by sharing of communications with third parties accrues if such communications are shared with an agent of the attorney…retained to assist the attorney in rendering legal advice and instructions, under New York common law and federal evidence Rule 501); Gorman v. Polar Electro, Inc., 137 F. Supp.2d 223 (E.D.N.Y. 2001) (attorney-client privilege extends to confidential communications with non-attorney patent agents acting under authority and control of counsel, when communications relate to prosecution of patent application in the United States); People v. Jiang, 131 Cal. App. 4th 1027 (involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation preserves confidentiality of communication).

(g) The New York ethical guidelines provide that if the LPO covers disclosure of client confidences or secrets to the offshore non-lawyer, then the client's informed consent must be obtained in advance.

(h) The Los Angeles ethical guidelines permit disclosure of confidences and secrets provided the LPO provider agrees on behalf of itself and its non-lawyer personnel to keep such information protected, both during and subsequent to the expiration of the LPO engagement. "It is incumbent upon the attorney to ensure that client confidences and secrets are protected, both by the attorney and by [the company], throughout and subsequent to the attorney's contract relationship with [the company]." (LACBA Opinion No. 518, p.78).

(i) The supervising attorney should include a clause in the LPO agreement regarding the scope of attorney-client privilege and work product doctrines. Further, attorneys should research and be aware of cultural and/or legal differences between the U.S. and where the outsourcing company is located.

(j) *Take affirmative measures to protect client secrets apart from privileged communications or information.*

(i) Generally, U.S. attorneys must not reveal any information concerning their representation of a client. (*See* ABA Model Rule 1.6(a)).

(ii) Communications about clients may not be as closely protected abroad, which could expose firms and attorneys to increased liability.

(iii) The SDCBA opinion discusses a situation involving a medical transcription project outsourced to India. "[T]he subcontractor threatened to post confidential patient records on the Internet unless the UC San Francisco Medical Center retrieved money owed to the subcontractor from a middleman." (SDCBA Ethics Opinion 2007-1, p.8). As a result, the committee reasoned that "a duty of heightened due diligence is warranted." (SDCBA Ethics Opinion 2007-1, p.8).

(iv) One safeguard is to obtain written representations and assurances from the LPO vendor, if not its key personnel as well, that the personnel performing the client services have been trained with respect to U.S. laws and principles concerning confidentiality, and will fully comply. This is especially important if the client's records will contain subject matter covered by regulations, such as personal health care information (HIPAA) and financial information (Gramm-Leach-Bliley).

(v) Attorneys should have a contingency plan for what will happen to the client's confidential information if the outsourcing company goes out of business or its security systems are compromised. Records containing personal information of individuals are subject to various state notification laws, such as the New York Information Security Breach and Notification

Act**,** which apply if such data is lost or compromised in any manner. *Apart from backup systems, this requires strict reporting controls to be in place as part of the LPO agreement*.

(vi) Attorneys should also look carefully at the LPO provider's past performance and speak to its client references about their experiences.

(k) *Use a conservative approach to sending any sensitive documents or information outside the U.S.*

(i) Typically a third-party domestic vendor (or domestic division of the LPO provider) scans and uploads documents to a secure LPO provider's Internet site. Completed work is then uploaded from the offshore facility back to the secure site, providing limited access only to that information needed by the foreign LPO personnel.

(ii) Counsel should consider withholding materials containing sensitive information and proprietary trade secrets and leave those for domestic attorney review, sorting and coding.

(iii) Documents and electronic records containing non-public intellectual property and proprietary technology may also be subject to U.S. Export Controls if the data is restricted by statute.

(l) *At end of LPO engagement, insure that all confidential information and client data in any format or media in the possession of the LPO provider is destroyed and that such destruction is certified by a senior officer of the provider*.

8. Providing Adequate Supervision.

(a) *See* ABA Model Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistants"), which provides that the law firm must utilize effective measures to insure that "that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer."

(b) Model Rule 5.3 also requires the lawyer to provide "appropriate instruction and supervision concerning the ethical aspects of [nonlawyers'] employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product."

(c) Offshore legal outsourcing makes direct supervision more difficult. As a practical matter, the U.S. lawyer will have little if any direct contact with the LPO provider's personnel located abroad once the process begins.

(i) The San Diego opinion concluded that the use of offshore Indian attorneys to do legal research on U.S. intellectual, assist in developing case

strategy and prepare pleadings and motions, would only be permissible where the attorney "retains the duty to supervise the work performed competently." Under this hypothetical fact pattern:

> Retaining a firm experienced in American intellectual property litigation does not relieve the attorney from the duty to act competently. The attorney retains the duty to supervise the work performed competently, whether that work is outsourced out-of-state or out of the country.…
>
> Nor does procuring work product from a firm experienced in American intellectual property litigation fulfill the attorney's duty to act competently. To satisfy that duty, an attorney must be able to determine for himself or herself whether the work under review is competently done. To make such a determination, the attorney must know enough about the subject in question to judge the quality of the work…. Whether an attorney has acquired such knowledge will, of course, depend on the facts and issues of the case at hand. An attorney may not, however, rely on the [LPO] firm] to evaluate its own work. (SDCBA Ethics Opinion 2007-1, p.7).

(ii) The San Diego opinion nevertheless concluded that such services by the hypothetical outsourcing provider did not constitute the practice of law by the provider, even though had the provider done the work directly for the U.S.- based client it "would have been engaged in the unauthorized practice of law." The basis for this conclusion was that "the California lawyer in this case retained full control over the representation of the client and exercised independent judgment in reviewing the draft work performed by those who were not California attorneys ….In short,…the company to whom work was outsourced has assisted the California lawyer in practicing law in this state, not the other way around." (Id. at pp. 4 and 5.)

(iii) *Query how, as a practical matter, a U.S. attorney not experienced in particular subject matter can rely on substantive legal research and draft pleadings and motions papers prepared by non-US lawyers and still exercise his/her duty to retain full control of the process without the provider's personnel exercising some independent legal judgment.*

(d) Guidance:

(i) Avoid assisting the non-lawyer in engaging in UPL.

(ii) Non-lawyers' work must contribute to the lawyer's competent representation of the client.

(iii) Lawyer must review and audit the non-lawyer's work product to ensure it is competent and reliable, using the lawyer's professional skill and judgment.

(iv) *An LPO agreement should ideally require the LPO firm's relationship manager to be a U.S. attorney based in the U.S. to insure compliance with this ethical tenet. This then allows the manager to review all LPO work product before it's distributed to the law firm or client.*

(v) Review resumes and do background checks on those offshore personnel who will be performing services.

(vi) Consider interviewing assigned offshore personnel telephonically to asses their comprehension of the need to preserve confidentiality and privilege and overall suitability for the project.

(vii) Review the internal checks, quality controls and training procedures of the LPO provider.

(viii) Do not delegate any tasks that require making judgments, formulating strategy or approving final work product to be used in U.S. courts or other proceedings.

9. Client Disclosure and Consent.

(a) Guidance: *Obtain client consent on process and cost structure before outsourcing document review overseas.*

(i) The ABCNY concluded that "if the outsourcing assignment requires the lawyer to disclose client confidences or secrets to the overseas non-lawyer, then the lawyer should secure the client's informed consent in advance." (ABCNY Formal Opinion 2006-3, p.4).

(ii) Under California law, Business and Professions Code Section 6068 and Rule 3-500 require that attorneys keep clients aware of "significant developments relating to the employment or the representation [of the client]." (LACBA Opinion No. 518, p.76). If outsourcing abroad is considered a "significant development," "the client must be informed of the specifics of the agreement between the attorney and [the company]" possibly even including it in the written retainer agreement. (LACBA Opinion No. 518, p.76).

(iii) Attorneys are generally required to disclose the costs of outsourcing document review to their clients. The LACBA "believes that the attorney must accurately disclose the basis upon which any cost is passed on to the client." (LACBA Opinion No. 518, p.77). Further, "if the attorney marks up the cost of [the company]'s services, the attorney must disclose the mark-up." (LACBA Opinion No. 518, p.77).

(iv) The SDCBA concluded that "if the work which is to be performed by the outside service is within the client's reasonable expectation under the circumstances that it will be performed by the attorney, the client must be informed when the service is outsourced." (SDCBA Ethics Opinion 2007-1, p.6). Attorneys should get their client's consent before outsourcing overseas because the law is uncertain in this area.

(b) ABA Formal Opinion 93-379 addressed billing expenses and disbursements relating to nonlawyer services and concluded that lawyers should disclose to their clients the basis for the fee and any other client charges.

(i) Absent disclosure, a lawyer cannot assess a surcharge on disbursements above the actual payments made by the firm, unless the law firm incurs additional expenses beyond the actual cost of the disbursement.

(ii) Discounted rates obtained from third-party providers should be passed along to the client.

10. Foreign Attorneys' Familiarity With American Law and Process.

(i) Even though the American attorney may be approving the work, the SDCBA stated "in order to satisfy the duty of competence, an attorney should have an understanding of the legal training and business practices in the jurisdiction where the work will be performed." (SDCBA Ethics Opinion 2007-1, p.8).

(ii) The educational backgrounds of lawyers or non-lawyers who are performing the work abroad may differ substantially from lawyers who would perform the work in the U.S. Yet clients expect the same level of quality from firms as if experienced paralegals or first-year associates were performing the work. Attorneys must be aware of this expectation and take steps along the way to prevent increased exposure to liability for failure to perform the same quality of work.

(iii) "In performing services for the client, the attorney must remain ultimately responsible for any work product on behalf of the client and cannot delegate to [the company] any authority over legal strategy, questions of judgment, or the final content of any product delivered to the client or filed with the court." (LACBA Opinion No. 518, p. 77). Thus, the LACBA recommends that "the attorney should ensure that no contractual provision to the agreement gives [the company] control over the final work product produced for the client." (LACBA Opinion No. 518, p. 77). Final approval must come from the supervising attorney.

11. Potential for Increased Risk of Liability.

(i) Outsourcing overseas exposes attorneys to increased liability for a number of reasons: failure to adequately supervise the work of the overseas vendor, different privilege laws, exposure of client confidences, failure to obtain client consent, cultural differences, etc.

(ii) Attorneys should also review ethics rules in their particular state, specifically those that address the obligation of a supervising attorney who contracts for temporary services. The LACBA stated that an attorney would not face liability under California Business and Professions Code Section 6125, for example, "as long as the attorney remains ultimately responsible for the final work product provided to or on behalf of the client." (Section 6125 states that "no person shall practice law in California unless the person is an active member of the State Bar").

(iii) Attorneys should also be aware of the duty of competence and of the potential risk of liability. As stated in SDCBA Ethics Opinion 2007-1, p. 6, "California Rule of Professional Conduct 3-11(A) states, 'A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.' Rule 3-110(B) defines acting with 'competence' to mean applying 'the 1) diligence, 2) learning and skill, and 3) mental, emotional and physical ability reasonably necessary for the performance of such service."

(b) *In the end, U.S. lawyers and clients seeking to outsource legal services offshore must balance projected LPO cost savings and potential risks against the need and additional costs for ongoing U.S. attorney supervision and review.*

APPENDIX I

State Ethics Opinions[8]

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2006-3
August 2006

TOPICS: Outsourcing Legal Support Services Overseas, Avoiding Aiding a Non-Lawyer in the Unauthorized Practice of Law, Supervision of Non-Lawyers, Competent Representation, Preserving Client Confidences and Secrets, Conflicts Checking, Appropriate Billing, Client Consent.

DIGEST: A New York lawyer may ethically outsource legal support services overseas to a non-lawyer, if the New York lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserves the client's confidences and secrets when outsourcing; (c) avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) when necessary, obtains advance client consent to outsourcing.

CODE: DR 1-104, DR 3-101, DR 3-102, DR 4-101, DR 5-105, DR 5-107, DR 6-101, EC 2-22, EC 3-6, EC 4-2, EC 4-5.

QUESTION

May a New York lawyer ethically outsource legal support services overseas when the person providing those services is (a) a foreign lawyer not admitted to practice in New York or in any other U.S. jurisdiction or (b) a layperson? If so, what ethical considerations must the New York lawyer address?

DISCUSSION

For decades, American businesses have found economic advantage in outsourcing work overseas.1. Much more recently, outsourcing overseas has begun to command attention in the legal profession, as corporate legal departments and law firms endeavor to reduce costs and manage operations more efficiently.

[8] Note: Embedded footnotes in the New York and San Diego opinions will link to their respective websites. The footnotes are also reproduced in the opinions themselves without active hyperlinks. The Los Angeles opinion is imaged.

Under a typical outsourcing arrangement, a lawyer contracts, directly or through an intermediary, with an individual who resides abroad and who is either a foreign lawyer not admitted to practice in any U.S. jurisdiction or a layperson, to perform legal support services, such as conducting legal research, reviewing document productions, or drafting due diligence reports, pleadings, or memoranda of law.2.

We address first whether, under the New York Code of Professional Responsibility (the "Code"), a lawyer would be aiding the unauthorized practice of law if the lawyer outsourced legal support services overseas to a "non-lawyer," which is how the Code describes both a foreign lawyer not admitted to practice in New York, or in any other U.S. jurisdiction, and a layperson.3. Concluding that outsourcing is ethically permitted under the conditions described below, we then address the ethical obligations of the New York lawyer to (a) supervise the non-lawyer and ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserve the client's confidences and secrets when outsourcing; (c) avoid conflicts of interest when outsourcing; (d) bill for outsourcing appropriately; and (e) obtain advance client consent for outsourcing.4.

The Duty to Avoid Aiding a Non-Lawyer in the Unauthorized Practice of Law

Under DR 3-101(A), "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law." In turn, Judiciary Law § 478 makes it "unlawful for any natural person to practice or appear as an attorney-at-law . . . without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state and without having taken the constitutional oath ." Prohibiting the unauthorized practice of law "aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions." *Spivak v. Sachs*, 16 N.Y.2d 163, 168, 211 N.E.2d 329, 331, 263 N.Y.S.2d 953, 956 (1965).

Alongside these prohibitions, the last 30 years have witnessed a dramatic increase in the extent to which law firms and corporate law departments have come to rely on legal assistants and other non-lawyers to help render legal services more efficiently.5. Indeed, in EC 3-6, the Code directly acknowledges both the benefits flowing from a lawyer's properly delegating tasks to a non-lawyer, and the lawyer's concomitant responsibilities:

A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

In this context, we have underscored that the lawyer's supervising the non-lawyer is key to the lawyer's avoiding a violation of DR 3-101(A). In N.Y. City Formal Opinion 1995-11, we wrote:

Some jurisdictions have concluded that any work performed by a non-lawyer under the supervision of an attorney is by definition not the "unauthorized practice of law" violative of prohibitory provisions, *see, e.g.*, In re Opinion 24 of Committee on Unauthorized Practice of Law, 128 N.J. 114, 123, 607 A.2d 962 (1992). This committee does not go so far. However, given that the Code holds the attorney accountable, the tasks a non-lawyer may undertake under the supervision of an attorney should be more expansive than those without either supervision or legislation. Supervision within the law firm thus is a key consideration.

The Committee on Professional Ethics of the New York State Bar Association has specifically addressed the unauthorized practice of law in the context of a lawyer's using an outside legal research firm staffed by non-lawyers. In N.Y. State Opinion 721 (1999), that Committee opined that a New York lawyer may ethically use such a research firm if the lawyer exercises proper supervision, which involves "considering in advance the work that will be done and reviewing after the fact what in fact occurred, assuring its soundness." *Id*. Without proper supervision by a New York lawyer, the legal research firm would be engaging in the unauthorized practice of law. *Id.* That Committee also noted that, "other ethics committees in New York have determined that non-lawyers may research questions of law and draft documents of all kinds, including process, affidavits, pleadings, briefs and other legal papers as long as the work is performed *under the supervision* of an admitted lawyer" (citations omitted).6.

In this same vein, the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association recently wrote, "[T]he attorney must review the brief or other work provided by [the non-lawyer] and independently verify that it is accurate, relevant, and complete, and the attorney must revise the brief, if necessary, before submitting it to the . . . court." L.A. County Bar Assoc. Op. 518 (June 19, 2006) at 8-9. We agree.

The potential benefits resulting from a lawyer's delegating work to a non-lawyer cannot be denied. But at the same time, to avoid aiding the unauthorized practice of law, the lawyer must at every step shoulder complete responsibility for the non-lawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality.

The Duties to Supervise and to Represent a Client Competently When Outsourcing Overseas

The supervisory responsibilities of law firms and lawyers in this context are set forth, respectively, in DR 1-104(C) and (D).7 DR 1-104(C) articulates the supervisory responsibility of a law firm for the work of partners, associates, and non-lawyers who work at the firm:

C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which

is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

DR 1-104(D) articulates the supervisory responsibilities of a lawyer for a violation of the Disciplinary Rules by another lawyer and for the conduct of a non-lawyer "employed or retained by or associated with the lawyer":

D. A lawyer shall be responsible for a violation of the Disciplinary Rules by another lawyer or for conduct of a non-lawyer employed or retained by or associated with the lawyer that would be a violation of the Disciplinary Rules if engaged in by a lawyer if:

1. The lawyer orders, or directs the specific conduct, or with knowledge of the specific conduct, ratifies it; or

2. The lawyer is a partner in the law firm in which the other lawyer practices or the non-lawyer is employed, or has supervisory authority over the other lawyer or the non-lawyer, and knows of such conduct, or in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could be or could have been taken at a time when its consequences could be or could have been avoided or mitigated.

Proper supervision is also critical to ensuring that the lawyer represents his or her client competently, as required by DR 6-101 — obviously, the better the non-lawyer's work, the better the lawyer's work-product.

Given these considerations and given the hurdles imposed by the physical separation between the New York lawyer and the overseas non-lawyer, the New York lawyer must be both vigilant and creative in discharging the duty to supervise. Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the professional résumé of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or by voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer's suitability for the particular assignment; and (d) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the non-lawyer is discharging the assignment according to the lawyer's expectations.

The Duty to Preserve the Client's Confidences and Secrets When Outsourcing Overseas

DR 4-101 imposes a duty on a lawyer to preserve the confidences and secrets of clients. Under DR 4-101, a "confidence" is "information protected by the attorney-client privilege under applicable law," and a "secret" is "other information gained in the

professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A). DR 4-101(D) requires that a lawyer "exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client." *See also* EC 4-5 ("a lawyer should be diligent in his or her efforts to prevent the misuse of [information acquired in the course of the representation of a client] by employees and associates.")

In N.Y. City Formal Opinion 1995-11, this Committee addressed a lawyer's supervisory obligations regarding a non-lawyer's maintaining client confidences and secrets. This Committee noted that "the transient nature of lay personnel is cause for heightened attention to the maintenance of confidentiality. . . . Lawyers should be attentive to these issues and should sensitize their non-lawyer staff to the pitfalls, developing mechanisms for prompt detection of . . . breach of confidentiality problems."

We conclude that if the outsourcing assignment requires the lawyer to disclose client confidences or secrets to the overseas non-lawyer, then the lawyer should secure the client's informed consent in advance. In this regard, the lawyer must be mindful that different laws and traditions regarding the confidentiality of client information obtain overseas. *See* N.Y. State Opinion 762 (2003) (a New York law firm must explain to a client represented by lawyers in foreign offices of the firm the extent to which confidentiality rules in those foreign jurisdictions provide less protection than in New York); *Cf.* N.Y. State Opinion 721 (1999) ("[i]f the lawyer would have to disclose confidences and secrets of the client [to the outside research service] in connection with commissioning research or briefs, the attorney should tell the . . . client what confidential client information the attorney will provide and obtain the client's consent"). 8.

Measures that New York lawyers may take to help preserve client confidences and secrets when outsourcing overseas include restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality. 9.

The Duty to Check Conflicts When Outsourcing Overseas

DR 5-105(E) requires a law firm to maintain contemporaneous records of prior engagements and to have a system for checking proposed engagements against current and prior engagements. N.Y. State Opinion 720 (1999) concluded that a law firm must add information to its conflicts-checking system about the prior engagements of lawyers who join the firm. In N.Y. State Opinion 774 (2004), that Committee subsequently concluded that this same obligation does not apply when non-lawyers join a firm, but noted that there are circumstances under which it is nonetheless advisable for a law firm to check conflicts when hiring a non-lawyer, such as when the non-lawyer may be expected to have learned confidences or secrets of a client's adversary.

As a threshold matter, the outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking

procedures and about how it tracks work performed for other clients. The outsourcing New York lawyer should also ordinarily ask both the intermediary and the non-lawyer performing the legal support service whether either is performing, or has performed, services for any parties adverse to the lawyer's client. The outsourcing New York lawyer should pursue further inquiry as required, while also reminding both the intermediary and the non-lawyer, preferably in writing, of the need for them to safeguard the confidences and secrets of their other current and former clients.

The Duty to Bill Appropriately for Outsourcing Overseas

By definition, the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer to include the cost of outsourcing in his or her legal fees. *See* DR 3-102. Absent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service. ABA Formal Opinion 93-379 (1993).

The Duty to Obtain Advance Client Consent to Outsourcing Overseas

In the case of contract or temporary lawyers, this Committee has previously opined that "the law firm has an ethical obligation in all cases (i) to make full disclosure in advance to the client of the temporary lawyer's participation in the law firm's rendering of services to the client, and (ii) to obtain the client's consent to that participation." N.Y. City Formal Opinion 1989-2; *see also* N.Y. City Formal Opinion 1988-3 ("The temporary lawyer and the Firm have a duty to disclose the temporary nature of their relationship to the client," citing DR 5-107(A)(1)); EC 2-22 ("Without the consent of the client, a lawyer should not associate in a particular matter another lawyer outside the lawyer's firm); EC 4-2 ("[I]n the absence of consent of the client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter . . . ."). Similarly, many ethics opinions from other jurisdictions have concluded that clients should be informed in advance of the use of temporary attorneys in all situations. 10.

The Committee on Professional Ethics of the New York State Bar Association adopted a more nuanced approach in N.Y. State Opinion 715 (1999), explaining that the lawyer's obligations to disclose the use of a contract lawyer and to obtain client consent depend upon whether client confidences and secrets will be disclosed to the contract lawyer, the degree of involvement that the contract lawyer has in the matter, and the significance of the work done by the contract lawyer. The Opinion further explained that "participation by a lawyer whose work is limited to legal research or tangential matters would not need to be disclosed," but if a contract lawyer "makes strategic decisions or performs other work that the client would expect of the senior lawyers working on the client's matters, . . . the firm should disclose the nature of the work performed by the Contract Lawyer and obtain client consent." *Id.*

Non-lawyers often play more limited roles in matters than contract or temporary lawyers do. Thus, there is little purpose in requiring a lawyer to reflexively inform a client every

time that the lawyer intends to outsource legal support services overseas to a non-lawyer. But the presence of one or more additional considerations may alter the analysis: for example, if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-lawyer, in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed.

CONCLUSION

A lawyer may ethically outsource legal support services overseas to a non-lawyer if the lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserves the client's confidences and secrets when outsourcing; (c) under the circumstances described in this Opinion, avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) under the circumstances described in this Opinion, obtains the client's informed advance consent to outsourcing.

1.*See*, *e.g.*, Adam Johnson & John D. Rollins, *Outsourcing: Unconventional Wisdom*, Accenture Outlook Journal, (October 2004), at http://www.accenture.com/Global/Services/By_Industry/Travel/R_and_I/UnconventionalWisdom.htm; Fakir Chand, *Business Process Outsourcing Propels the 21st Century*, SME Outsourcing (October 2003), at http://smeoutsourcing.com/viewnew.php?id=9bd912e64b470d2f28ea096a56bdebd0.

2.*See*, *e.g.*, Jonathan D. Glater, *Even Law Firms Join the Trend to Outsourcing*, N.Y. Times, Jan. 13, 2006; Eric Bellman & Nathan Koppel, *More U.S. Legal Work Moves to India's Low-Cost Lawyers*, Wall St. J., Sept. 28, 2005; George W. Russell, *In-house or Outsourced? The Future of Corporate Counsel*, Asia Law (July/Aug. 2005); Ellen L. Rosen, *Corporate America Sending More Legal Work, to Bombay: U.S. Firms Face Challenge Over Outsourcing Legal Work to India*, N.Y. Times, Mar. 14, 2004; Ann Sherman, *Should Small Firms Get on Board with Outsourcing?*, Small Firm Business, Sept. 12, 2005.

3.*See*, *e.g.*, New York State Bar Association Committee on Professional Ethics Opinion ("N.Y. State Opinion") 721 (1999).

4. This opinion concerns outsourcing of "substantive legal support services," which include legal research, drafting, due diligence reports, patent and trademark work, review of transactional and litigation documents, and drafting contracts, pleadings, or

memoranda of law. This is distinguished from "administrative legal support services," which include transcription of voice files from depositions, trials and hearings; accounting support in the preparation of timesheets and billing materials; paralegal and clerical support for file management; litigation support graphics; and data entry for marketing, conflicts, and contact management.

5.*See*, *e.g.*, NYC Formal Op. 1995-11 ("In the two decades since this committee issued its Formal Opinion on paralegals, *see* N.Y. City 884 (1974), much has happened with regard to non-lawyers' involvement in the provision of legal services.") (describing the paralegal field as one of the fastest growing occupations in America).

6.*See*, *e.g.*, Ellen L. Rosen, *Corporate America Sending More Legal Work to Bombay*, N.Y. Times, Mar. 14, 2004 (quoting Professor Stephen Gillers of NYU School of Law as stating that "even though the lawyer [in the foreign country] is not authorized by an American state to practice law, the review by American lawyers sanitizes the process."); Jennifer Fried, *Change of Venue; Cost-Conscious General Counsel Step up Their Use of Offshore Lawyers, Creating Fears of an Exodus of U.S. Legal Jobs*, The American Lawyer, (Dec. 2003) (Professor Geoffrey Hazard, Jr. of University of Pennsylvania Law School stated that if foreign attorneys are "acting under the supervision of U.S. lawyers, I wouldn't think it would make much difference where they are.").

7.DR 1-104(C) requires a law firm, *inter alia*, to supervise the work of non-lawyers who "work at the firm," whereas DR 1-104(D) describes, *inter alia*, the supervisory responsibilities of a lawyer for the conduct of a non-lawyer "employed or retained by or associated with the lawyer." Based on this difference in language, it can be argued that DR 1-104(C) should not apply in the case of an overseas non-lawyer because that person does not "work at the firm," whereas DR 1-104(D) should apply because the overseas non-lawyer is "retained by" the New York lawyer. Nonetheless, the Committee believes that these two phrases were intended to be equivalent. To conclude otherwise and make the individual lawyer, but not the law firm, responsible for supervising the overseas non-lawyer would be difficult to justify and could also easily lead to untoward results. For example, a law firm seeking to cabin responsibility under DR 1-104(D)(2) for the conduct of the overseas non-lawyer could simply refuse to appoint anyone to supervise the non-lawyer.

8.We do not mean to suggest that confidentiality laws and traditions overseas always provide less protection than in New York. *See, e.g.,* M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 Tex. Int'l L.J. 289, 313 (2000) ("Although difficult to imagine, a Muslim party or client may expect a higher degree of confidentiality than a [U.S.] lawyer is accustomed to.").

9.Mary Daly, *How to Protect Confidentiality When Outsourcing*, Small Firm Business, Sept. 12, 2005.

10.See, e.g., Oliver v. Board of Governors, Kentucky Bar Ass'n, 779 S.W.2d 212, 216 (Ky. 1989) (recommending "disclosure to the client of the firm's intention, whether at the commencement or during the course of representation, to use a temporary attorney service on the client's case, in any capacity, in order to allow the client to make an intelligent decision whether or not to consent to such an arrangement."); Ohio Bd. of Comm'rs on Grievances and Discipl. Opinion No. 90-23 (Dec. 14, 1990) (finding a duty under DR 5-107(A)(1) to "disclose to the client the temporary nature of the relationship in order to accept compensation for the legal services"); Los Angeles County Bar Assoc. Formal Opinion 473 (Jan. 1994); New Hampshire Bar Assoc. Ethics Comm. Formal Opinion 1989-90/9 (July 25, 1990).

LOS ANGELES COUNTY BAR ASSOCIATION

PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 518

June 19, 2006

ETHICAL CONSIDERATIONS IN OUTSOURCING OF LEGAL SERVICES

SUMMARY

An attorney in a civil case who charges an hourly rate may contract with an out-of-state company to draft a brief provided the attorney is competent to review the work, remains ultimately responsible for the final work product filed with the court by the attorney on behalf of the client, the attorney does not charge an unconscionable fee, client confidences and secrets are protected, and there is no conflict of interest between the client and the contracting entity. The attorney may be required to inform the client of the nature and scope of the contract between attorney and out-of-state company if the brief provided is a significant development in the representation or if the work is a cost which must be disclosed to the client under California law. Any refund of charges by the out-of-state company to the attorney should be passed through to the client if the client was separately charged for the service.

AUTHORITIES CITED

Statutes:

California Business and Professions Code § 6068

California Business and Professions Code § 6125

California Business and Professions Code § 6126

Cases:

Bushman v. State Bar (1974) 11 Cal.3d 558

Crawford v. State Bar (1960) 54 Cal.2d 659

Farnham v. State Bar (1976) 17 Cal.3d 605

Jones v. State Bar (1989) 49 Cal.3d 273

Simmons v. State Bar (1970) 2 Cal.3d 719

California Rules of Professional Conduct:

Rule 1-100

Rule 1-120

Rule 1-310

Rule 1-320

Rule 1-400

Rule 2-200

Rule 3-110

Rule 3-310

Rule 3-500

Rule 5-200

Opinions:

COPRAC Formal Opinions 1994-138

COPRAC Formal Opinions 2004-165

LACBA Formal Opinions 374

LACBA Formal Opinions 423

LACBA Formal Opinions 473

FACTS

An attorney licensed to practice law in California has filed a notice of appeal in a civil case on the client's behalf. The attorney charges an hourly rate for the appellate services. Shortly thereafter, the attorney receives a solicitation from a legal research and brief writing company to draft the appellant's opening brief for a comparatively low hourly fee. The legal research and brief writing company ("Company") is not located in California, and employs both lawyers (none of whom are licensed to practice law in California) and non-lawyers. Company promises to deliver a ready to file brief, to be signed by the California attorney. Company also promises to refund all fees paid to Company for the brief if the appeal is unsuccessful.

The attorney decides to hire Company to write the brief, but has not decided yet whether to pass the charge through to the client, or to treat payment for the work as an internal cost.

DISCUSSION

In this opinion, we address two fundamental issues. First, is it ethically permissible for a California attorney, in a civil case, to hire an out-of-state legal research and brief writing company to conduct legal research and/or draft legal briefs for the attorney's use in connection with the attorney's representation of the client? Second, if such arrangements are permissible, what must the attorney do to comply with the ethical issues presented by such arrangements? This opinion is not intended to apply to criminal cases, nor does it apply to any case or any matter where the attorney has been appointed by the court.

We conclude that such arrangements may be ethically permissible, with some limitations depending on the specific terms and conditions of the arrangement, and provided that the attorney complies with several ethical requirements. Specifically, the Committee is of the

opinion that the attorney may ethically enter into the arrangement with Company provided that the attorney at all times retains and exercises independent professional judgment in connection with the performance of the attorney's legal services for the client. The attorney must sign the brief and in so doing adopts the work and is ultimately responsible for the accuracy of brief to both the court and to the client. Depending on the facts and circumstances, the attorney may have a duty to disclose to the client the nature and specifics of the contract with Company. The attorney is responsible for determining, and for ensuring, that there is no violation of client confidences or secrets, and that there is no conflict of interest created for the client by the attorney's contracting with Company. Finally, any refund of costs paid by Company to the attorney should be refunded to the client if the client is charged for the cost of the service.

Ethical Issues Involving Financial Arrangements With Company

Several rules address financial arrangements among lawyers, and between members and non-members of the State Bar of California.

California Rule of Professional Conduct [hereinafter "Rule" or "rule"] 1-310 states that a "member[1] shall not form a partnership with a person who is not a lawyer if any of the activities of that partnership constitute the practice of law." A partnership generally involves a joint ownership and can be evidenced by firm name, declarations of co-ownership, or sharing of profits. (*Crawford v. State Bar* (1960) 54 Cal.2d 659, 667.) In this instance, the attorney has not formed a partnership with Company since the attorney has merely purchased services at a specified rate. Therefore, the restrictions contained in rule 1-310 are inapplicable.

Rule 2-200 prohibits the division of "a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member" unless the client has consented in

[1] A "member" for purposes of the California Rules of Professional Conduct "means a member of the State Bar of California." (Rule 1-100 (B)(2).)

writing after full disclosure, and the total fee charged by all lawyers is not increased by reason of the provision for division of the fees, and is not unconscionable as defined in rule 4-200. Rule 2-200 is inapplicable here because Company charges the attorney a specific amount for its service and the contract between Company and the attorney does not involve the division of a legal fee paid by the client.[2]

The work being performed by Company is indistinguishable from other types of services that an attorney might purchase, such as hourly paralegal assistance, research clerk assistance, computer research, graphics illustrations, or other services. Thus, even if the attorney passes the cost directly on to the Client, the arrangement does not violate Rule 2-200.

Rule 1-320 provides that "[n]either a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer." This rule is also inapplicable to the facts presented in this inquiry since the attorney has contracted for services, at an hourly rate, from Company.

Aiding and Abetting in the Unlawful Practice of Law

Business and Professions Code section 6125, which is part of the State Bar Act, states that "[n]o person shall practice law in California unless the person is an active member of the State Bar."[3] Rule 1-120 states that "[a] member shall not knowingly assist in, solicit, or induce any violation of these rules [of Professional Conduct] or the State Bar Act." The practice of law includes giving legal advice and counsel and the preparation of legal instruments. (*Farnham v. State Bar* (1976) 17 Cal.3d 605, 612; *Crawford v. State Bar* (1960) 54 Cal.2d 659, 667-668.) The Committee is of the opinion that attorneys who contract for services which assist the attorneys in representation of their clients do not assist in a violation of Bus. and Prof. Code § 6125, so long as the attorney remains ultimately responsible for the final work product provided to or on behalf of the client.[4]

Duty to Inform the Client

Both Rule 3-500 and Business and Professions Code section 6068, subdivision (m), require that an attorney keep the client reasonably informed of significant developments relating to the employment or the representation.[5] COPRAC Formal Opinion 2004-165 states that a member of the State Bar of California who uses an outside contract lawyer to make appearances on behalf of the member's client must disclose to the client the fact of the arrangement between the member and the outside lawyer when the use of the outside lawyer constitutes a significant development. Whether use of an outside lawyer constitutes a "significant development" is based upon the circumstances of each case. The opinion states that if, at the outset of the engagement, the member anticipates using outside lawyers to make appearances on the member's behalf for the client, that situation should be addressed in the written fee agreement which would also

[2] Several ethics opinions discuss when a payment constitutes a division of a fee. *See, e.g.*, LACBA Formal Opinion 457 (discussing fee arrangements with non-lawyers) and State Bar of California Standing Committee on Professional Responsibility and Conduct ["COPRAC"] Formal Opinion 1994-138. COPRAC Formal Opinion 1994-138 concluded that the criteria to determine whether there is a division of fees is whether: (1) the amount paid to the outside lawyer is compensation for the work performed and is paid whether or not the law office is paid by the client; (2) the amount paid by the attorney to the outside lawyer is neither negotiated nor based on fees which have been paid to the attorney by the client; and (3) the outside lawyer has no expectation of receiving a percentage fee. If all three criteria are met, there is no division of fees. See also *Chambers v. Kay* (2002) 29 Cal.4th 142, 154.

[3] It a misdemeanor to hold oneself out as practicing or entitled to practice law or otherwise practicing law when not an active member of the State Bar of California. (Bus. and Prof. Code § 6126.)

[4] Attorneys continually contract for assistance in legal research, preparation of documents, and expertise, be it from lawyers or non-lawyers, in furtherance of the representation of the client. It is the opinion of the Committee that where an attorney contracts for these types of services, it does not involve the unlawful practice of law. The same would apply under this inquiry.

[5] The language of rule 3-500, and the language of Business and Professions Code section 6068, subdivision (m), are slightly different. However, the disclosure requirements to the client under both provisions are the same. Rule 3-500 states: "[a] member shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." Business and Professions Code section 6068, subdivision (m), states that it is the duty of an attorney "[t]o respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

include specifying any costs of the appearance relationship which are billed to the client. That COPRAC opinion quotes relevant language in COPRAC Formal Opinion, 1994-138:

> Depending on the circumstances, rule 3-500 and Business and Professions Code section 6068 (m) will generally require the law office to inform the client that an outside lawyer is involved in the client's representation if the outside lawyer's involvement is a significant development. In general, a client is entitled to know who or what entity is handing the client's representation. However, whether use of an outside lawyer constitutes a significant development for purposes of rule 3-500 and Business and Professions Code section 6068 (m) depends on the circumstances of the particular case. Relevant factors, any of which may be sufficient to require disclosure, include the following: (i) whether responsibility for overseeing the client's matter is being changed, (ii) whether the new attorney will be performing a significant portion or aspect of the work, or (iii) whether staffing of the matter has been changed from what was specifically represented to or agreed with the client. (See L.A. Cty. Bar Assn. Formal Opn. No. 473.) The listed factors are not intended to be exhaustive, but are identified to provide guidance.

The relationship with Company may be a "significant development" within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m), and, if a "significant development," the client must be informed of the specifics of the agreement between the attorney and Company.[6] If possible, and where disclosure is required, disclosure of the nature and extent of the attorney/Company relationship should be made in the written retainer

[6] In most instances, the filing of an appellate brief will be a "significant development."

agreement. (COPRAC Formal Opinion 2004-265.[7] See also LACBA Formal Opinion 473 which requires disclosure to the client where the expectation of the client is that the retained attorney alone will be acting as attorney for the client.)

Duty of Competence and Duty to Exercise Independent Judgment

An attorney has a duty to act competently in any representation. Rule 3-110 (A) - (C). "If the member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required." Rule 3-110 (C). Since the instant arrangement does not involve associating with or professionally consulting another lawyer, this arrangement cannot be the basis of the member's competence in this representation.

The discussion to rule 3-110 states that compliance with that rule "include[s] the duty to supervise the work of subordinate attorney and non-attorney agents. [Citations omitted.]"[8] Therefore, the attorney must review the brief or other work provided by Company and

[7] The following language, found in COPRAC Formal Opinion 2004-165, is applicable to this inquiry:

> ["[T]he attorney bears the responsibility to be reasonably aware of the client's expectations regarding counsel working on client's matter because the responsibility can be readily discharged by the attorney through a standard written retainer agreement or disclosure before or during the course of the representation."]; compare Cal. State Bar Formal Opn. No 1994-138 at fn.8 ["it would be prudent for the law firm to include the disclosure to the client in the attorney's initial retainer letter or make that disclosure as soon thereafter as the decision to hire is made."]. If Lawyer charges [contract lawyer's] fees and costs to the client as a disbursement, Business and Professions Code sections 6147 and 6148 require Lawyer to state the client's obligations for those charges in the written fee agreement, if contemplated at the time of the initial fee agreement, to the same extent as other costs charged to the client."]

[8] Rule 1-100, subdivision (C), states with respect to the purpose of "Discussions" to the rules: "Because it is a practical impossibility to convey in black letter form all of the nuances of the disciplinary rules, the comments contained in the Discussions of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them."

independently verify that it is accurate, relevant, and complete, and the attorney must revise the brief, if necessary, before submitting it to the appellate court.

In addition to being competent, an attorney must also exercise independent professional judgment on behalf of the client at all times. (*Beck v. Wecht* (2002) 28 Cal.4th 289, 295 (fundamental duty of undivided loyalty cannot be diluted by a duty owed to some other person, which would be inconsistent with lawyer's duty to exercise independent professional judgment); *Dynamic Concepts Inc. v. Truck Insurance Exchange* (1998) 61 Cal.App.4th 999, 1009 (imposition of restrictions by third party on attorney's decisions may interfere with lawyer's duty to exercise independent professional judgment); *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 (holding that "[a]n attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority").) Therefore, in performing services for the client, the attorney must remain ultimately responsible for any work product on behalf of the client and cannot delegate to Company any authority over legal strategy, questions of judgment, or the final content of any product delivered to the client or filed with the court.

It follows that if a term of the agreement between the attorney and Company delegates to Company a decision-making function that is non-delegable, then the attorney may be assisting Company in the unauthorized practice of law or violating the ethical duties of competence and obligation to exercise independent professional judgment. An improper delegation might also affect the application of rule 1-310 (prohibition against forming partnerships with non-lawyers), rule 1-320 (sharing of legal fees with a non-lawyer) and rule 2-200 (division of legal fees). For example, if Company contractually required the attorney to accept and use any work product delivered "as is" and without change, then the attorney might be improperly delegating the attorney's fundamental obligation to exercise independent professional judgment on behalf of the

client. In this case, Company has promised a full refund of its fees if the appeal is unsuccessful. If a condition of that guarantee is that the attorney must accept and use the work product (for example, a legal brief) as written, or obtain Company's approval of any changes to the work product, then the attorney might be put into the position of having to elect between employing independent professional judgment on behalf of the client and losing a contractual guaranteed right which the attorney values. The Committee is of the view that provisions of a guarantee which have the possibility of creating such a dilemma for the attorney could be considered a violation of the duty to exercise independent professional judgment on behalf of the client. Thus, the attorney should ensure that no contractual provision in the agreement gives Company control over the final work product produced for the client.

Ethical Duties to the Court

An attorney is responsible for all of the attorney's submissions to the court. Any inaccuracies in the materials submitted to the court could not only be a violation of rule 3-110, but also could be a violation of rule 5-200(A) and (B),[9] and a violation of Business and Professions Code section 6068, subdivision (d).[10]

Charging the Cost to the Client

The attorney may elect simply to pay Company for the cost of the legal research or brief without passing on any of the cost to the client. In such a case, the Committee believes that the attorney could keep any refund that might be received from Company under any otherwise

[9] Rule 5-200(A) and (B) state: "In presenting a matter to a tribunal, a member

(A) Shall employ, for the purposes of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law."

[10] Business and Professions Code section 6068, subdivision (d), states that it is the duty of an attorney "[t]o employ, for maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law."

ethical guarantee provision. However, the attorney may also elect to: (a) pass the cost directly on to the client for payment; (b) mark up the cost and pass the marked up cost on to the client or (c) charge the client a flat fee. These scenarios have different consequences.

Sections of the California Business and Professions Code address an attorney's duty to advise a client about costs. Section 6147(a)(2) requires an attorney with a contingency fee agreement to disclose how disbursements and costs incurred in connection with the prosecution or settlement of the client will affect the contingency fee and the client's recovery. Section 6148 addresses many fee agreements not coming within the scope of section 6147 in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars. Under section 6148(a)(1), the attorney must disclose any basis of compensation, including standard rates, fees, and charges applicable to the case. The attorney must also render bills that clearly identify the costs and expenses incurred and the amount of the costs and expenses. (See Bus. and Prof. Code §6148(b).)

Whether or not there is a written fee agreement between the attorney and the client, disclosure of the arrangement with Company may be required. See rule 3-500 and Bus. and Prof. Code § 6068, subdivision (m), which require that the client be kept reasonably informed about significant developments relating to the representation and in regard to which the attorney has agreed to provide legal services. The Committee is of the opinion that if the client pays both the attorney's fees and costs of the contract with Company, the contract is a "significant development" within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m), since the client has hired the attorney to prepare and submit the appellate brief.

The Committee believes that the attorney must accurately disclose the basis upon which any cost is passed on to the client. If the cost of Company's services is simply passed through to the client, the client should be so informed. The client should also be informed of the possibility of a refund of the cost if offered by the Company. If the attorney marks up the cost of Company's services, the attorney must disclose the mark-up. (Rule 3-500, Bus. and Prof. Code § 6068 (m).)

Illegal or Unconscionable Fee

Rule 4-200 subdivision (A) states that "[a] member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee." Rule 4-200 explains that "[u]nconscionability of a fee shall be determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except where the parties contemplate that the fee will be affected by later events." Factors relevant to this inquiry in determining the conscionability of a fee include, but are not limited to:

"(1) The amount of the fee in proportion to the value of the services performed.

(10) The time and labor required.

(11) The informed consent of the client to the fee."[11]

A fee which "shocks the conscience" is unconscionable. (*Bushman v. State Bar* (1974) 11 Cal.3d 558, 564.) Charging a fee and not providing substantial services has been determined to be grounds for discipline. (*Jones v. State Bar* (1989) 49 Cal.3d 273, 284.) Therefore, whether there is a violation of rule 4-200 depends on the facts and circumstance of each specific situation as determined at the time the fee agreement is initiated. (Rule 4-200(A) and (B).)

[11] See rule 4-200(B) for the entire list of eleven "factors to be considered, where appropriate, in determining the conscionability of a fee . . . ."

The ethical issue presented here is whether the attorney's fee to the client could be deemed unconscionable because of the attorney's reliance on the work of the Company. The Committee believes that the amount paid by the attorney for Company's work is not determinative on the question of whether a fee is unconscionable. (*Shaffer v. Superior Court* (1995) 33 Cal.App.4th 993 (in legal malpractice action, the amount of money paid to a contract attorney by a law firm was found irrelevant to the question of whether law firm had charged client an unconscionable fee; nothing in rule 4-200 suggests that the attorney's profit margin is relevant to the issue. What is relevant to the issue of conscionability is the fee which the client paid to the law firm as measured by the factors listed in rule 4-200).)

Duty to Preserve Client Confidences and Secrets

COPRAC Formal Opinion 2004-165 explains the duty to preserve inviolate client confidences and secrets:

> Business and Professions Code section 6068(e) states: "It is the duty of an attorney [t]o . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." The scope of the protection of client confidential information under Section 6068(e) has been liberally applied. (See *People v. Singh* (1932) 123 Cal.App. 365 [11 P.2d 73].) The duty to preserve a client's confidential information is broader than the protection afforded by the lawyer-client privilege. Confidential information for purpose of section 6068 (e) includes any information gained in the engagement which the client does not want disclosed or the disclosure of which is likely to be embarrassing or detrimental to the client. (Cal. State Bar Formal Opn. No. 1993-133.) The duty has been applied even when the facts are already part of the public record or where there are other sources of information. (See L.A. Cty. Bar Assn. Formal Opn. Nos. 267 & 386.)

Confidential information can be disclosed to outside contractors so long as the outside contractors agree to keep the client confidences and secrets inviolate. (See LACBA Formal Opinions 374, 423 (use of centralized computer billing requires compliance with Business and Professions Code section 6068, subdivision (e)).) It is incumbent upon the attorney to ensure that client confidences and secrets are protected, both by the attorney and by Company, throughout and subsequent to the attorney's contract relationship with Company. (Rule 3-310, "Discussion"; LACBA Formal Opinion 374.)

Conflicts of Interest

Company may be working on other matters which conflict with and are potentially or actually adverse to the attorney's client. Rule 3-110, subdivision (A), imposes upon an attorney a duty to supervise the work of legal assistants, which includes the duty to "'give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment. . . .'" (*Hu v. Fang* (2002) 104 Cal.App.4th 61, 64, quoting ABA Model Rules Prof. Conduct, rule 5.3, com.) Therefore, the attorney should satisfy himself that no conflicts exist that would preclude the representation. See, e.g., Rule 3-310. The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney's relationship with Company.

Rule 1-400 and Standard (1)

Rule 1-400 is directed to disciplinary restrictions on attorney advertising and solicitation.[12] Standard (1) of the rule creates a presumption of a violation of rule 1-400 where a "communication" contains a guarantee or warranty regarding the result of the representation.[13] A "communication" within the meaning of rule 1-400 is "[a]ny unsolicited correspondence from a member [of the State Bar of California] or law firm directed to any person or entity." (Rule 1-400 (A)(4).) Company offers to refund to the attorney all its charges if the appeal is not successful. Since the representation of a contingent refund is made by Company to the attorney, it is not a "communication" within the meaning of rule 1-400 (A)(4) as defined above since Company is not a member of the State Bar of California, nor is Company a law firm.[14] However, the attorney must consider the unconscionability of accepting any refund from Company which is not paid over to the client. (See discussion of rule 4-200, supra.)

This opinion is advisory only. The committee acts on specific questions submitted ex parte, and its opinion is based on the facts set forth in the inquiry submitted.

[12] "The Rules of Professional Conduct are intended to establish the standards for members for purposes of discipline." (Rule 1-100, "Discussion.")

[13] Standard (1) of rule 1-400, for which there is a presumption of impropriety in violation of that rule, "Advertising and Solicitation," states: "[a] 'communication' which contains guarantees, warranties, or predictions regarding the result of the representation."

[14] Were Company a "law firm," then the Standard would apply if the communication respecting the refund was deemed to be a guarantee or warranty regarding the result of the representation. However, that would be a concern of Company, and not the attorney to whom the communication was made unless the attorney was also to communicate the same representation to the client. It is assumed that is not the case under the facts of this inquiry. Since the focus of this opinion is solely upon the ethical obligations of the attorney, the application of the Standard to Company is not addressed.

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SAN DIEGO COUNTY BAR ASSOCIATION

Ethics Opinion 2007-1

I. FACTUAL BACKGROUND

A partner in a two-lawyer California litigation firm was contacted by a business acquaintance to defend a complex intellectual property dispute in San Diego Superior Court. The attorney and his partner had limited experience in intellectual property litigation.

The attorney nonetheless took the case and assured the client of his firm's ability to develop a solid understanding of the areas of law involved. Without telling his client, the attorney contracted on an hourly basis with Legalworks, a firm in India whose business is to do legal research, develop case strategy, prepare deposition outlines, and draft correspondence, pleadings, and motions in American intellectual property cases at a rate far lower than American lawyers could charge clients if they did the work themselves. None of the foreign-licensed attorneys at Legalworks held law licenses in any American jurisdiction.

The California attorney reviewed the work he got from Legalworks and signed all court submissions and communications with opposing counsel himself. The work of Legalworks was billed to the client at cost, but was classified on the bills in broad categories such as "legal research" or "preparation of pleadings."

Ultimately, the attorney and his partner obtained dismissal of the case on a summary judgment motion. When the client asked how the attorneys developed the theory on which summary judgment was granted, and had done the work so inexpensively, the attorney told him that virtually all of the work was done by India-based Legalworks.

II. QUESTIONS

A. Did the attorneys violate RPC 1-300 by aiding Legalworks in the unauthorized practice of law?

B. Did the attorneys have a duty to inform the client of the firm's arrangement with Legalworks before or at the time of entering the contract with Legalworks?

C. Did the attorneys violate RPC 3-110 by the extent to which that firm relied on Legalworks to provide substantive expertise that the attorneys lacked to defend the suit? Specifically, may a California lawyer with limited experience in the subject matter of the service to be undertaken outsource important responsibilities

in performing the service to a "lawyer" reasonably believed to be competent who is not licensed or otherwise authorized to practice in California? Does the answer differ if the other lawyer is licensed to practice law in another U.S. state rather than in another country?

III. AUTHORITIES CITED

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Superior Court (1998) 17 Cal.4th 119
Bluestein v. State Bar (1974) 13 Cal.3d 162
Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.
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Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal.App.3d 1142
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Gafcon, Inc. v. Ponsor & Associates (2002) 98 Cal.App.4th 1388
Matter of Phillips (Rev.Dept. 2001) 4 Cal.State Bar Ct. Rpt. 315
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Statutes
California Business and Professions Code §6067
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California Business and Professions Code §6125
California Business and Professions Code §6126
California Evidence Code §912

Rules
ABA Model Rule 1.1
ABA Model Rule 5.1
ABA Model Rule 5.3
Rule of Court 227
Rule of Court 965
Rule of Court 983
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IV. DISCUSSION

As an initial matter, the Committee emphasizes that a California attorney has a duty under the applicable law and rules to act loyally and carefully at all times. Outsourcing does not alter the attorney's obligations to the client, even though outsourcing may help the attorney discharge those obligations at lower cost.

A. Did the Attorneys Aid the Unauthorized Practice of Law?

California Business and Professions Code section 6125, part of the State Bar Act, states: "No person shall practice law in California unless the person is an active member of the State Bar." RPC 1-300(A) states: "A member shall not aid any person or entity in the unauthorized practice of law." Leading or assisting the layman in his or her unauthorized practice of law is considered aiding and abetting in California. (Bluestein v. State Bar (1974) 13 Cal.3d 162 ; Cal. Bus. & Prof. Code §§ 6125 and 6126.)

The State Bar Act does not define the practice of law. In 1922, the California Supreme Court defined the practice of law as "the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure." (People ex rel. Lawyers' Institute of San Diego v. Merchants Protective Corp. (1922) 189 Cal. 531, 535, internal quotation marks and citation omitted.) The practice of law "includes legal advice and counsel and the preparation of legal instruments and contracts by

which legal rights are secured although such matter may or may not be pending in a court." (Ibid., internal quotation marks and citations omitted.) The definition delineates "those services which only licensed attorneys can perform." (Baron v. City of Los Angeles (1970) 2 Cal.3d 535, 543.)

The California Supreme Court has refined the scope of the unauthorized practice of law to include legal work by New York attorneys in connection with prospective private arbitration in California. (Birbower, Montalbano, Condon & Frank, PC v. Superior Court (1998) 17 Cal.4th 119 ("Birbower").) In that fee collection/malpractice action, the Court rejected the New York attorneys' argument that section 6125 is not meant to apply to out-of-state attorneys. "Competence in one jurisdiction does not necessarily guarantee competence in another. By applying section 6125 to out-of-state attorneys who engage in the extensive practice of law in California without becoming licensed in our state, we serve the statute's goal of assuring the competence of all attorneys practicing law in this state." (Id. at 132.)

In Birbower, the Court focused on what is meant by the practice of law "in California" for purposes of section 6125. The Court concluded that the New York attorneys "clearly" had practiced law "in California" in violation of section 6125 by: (1) traveling to California on several occasions over a two-year period to discuss with the client and others various matters pertaining to the dispute; (2) "discuss[ing] strategy for resolving the dispute and advis[ing] [the client] on this strategy" in California; (3) meeting with the client "for the stated purpose of helping to reach a settlement agreement and to discuss the agreement that was eventually proposed"; (4) and traveling to California "to initiate arbitration proceedings before the matter was settled." (Id. at p. 131.)

The Court further made it clear that section 6125 could be offended by actions taken by the attorneys when they were not physically present in the state. "The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state or created a continuing relationship with the California client that included legal duties and obligations. [] Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. . . . For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means." (Id. at pp. 128-129.) Conversely, the Court rejected a rule that "a person automatically practices law in California' whenever that person practices California law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite." (Id. at p. 129, emphasis in the original, citations omitted.) In other words, physical presence in the state is neither necessary nor sufficient to engage in activities constituting the practice of law "in California" in violation of section 6125. Instead, California courts "must decide

each case on its individual facts." (Ibid.)

Nonetheless, it is clear from the nature of the work Legalworks performed that, if Legalworks had done the work directly for the client, Legalworks would have been engaged in the unauthorized practice of law.(1) The question is whether Legalworks' act of contracting to do the work for a California attorney, who in turn exercised independent judgment(2) in deciding how and whether to use it on the client's behalf, rendered the services that Legalworks provided something other than the practice of law. We conclude that it did.

While there is no case law on point(3), there is instructive case law in analogous contexts. In Gafcon, Inc. v. Ponsor & Associates (2002) 98 Cal.App.4th 1388, an insured sued an insurer's captive law firm seeking a declaration, among other things, that the insurer had engaged in the unauthorized practice of law by using the captive firm briefly to defend the insured. Both the trial court and the Court of Appeal rejected the contention. The insurer did not "influence or interfere" with the attorney's ability to represent the insured or direct or control the attorney's representation in any way. (Id. at 1415.)

In further determining that the insurer had not engaged in the impermissible corporate practice of law, the Court of Appeal favorably discussed State Bar Opinion 1987-91, even while emphasizing it was not bound by State Bar Opinions. That State Bar Opinion concluded that in-house counsel does not aid an insurer in engaging in the unauthorized practice of law by representing insureds in litigation as long as, among other things, "the insurance company does not control or interfere with the exercise of professional judgment in representing insureds. . . ." (Gafcon, Inc., 98 Cal.App.4th at 1413, citing State Bar Opinion 1987-91 at *1.) The State Bar Opinion further concluded that use of salaried employee attorneys within an insurer's law division to represent insureds does not violate the corporate practice of law "as long as [inter alia] attorneys within the law division (1) do not permit the division to 'become a front or subterfuge for lay adjustors or others unlicensed personnel to practice law;' [and] (2) adequately supervise nonattorney personnel working under the attorneys' supervision. . . ." (Gafcon, Inc., 98 Cal.App.4th at 1413, quoting State Bar Opinion 1987-91. See also Orange County Bar Formal Opinion No. 94-002 (1994) (opining that a paralegal who does work of a preparatory nature, such as drafting initial estate planning documents, is not engaged in the unauthorized practice of law where the attorney supervising the paralegal maintains a "direct relationship" with the client, citing ABA Ethical Consideration 3-6.) The key issue appears to be the amount of supervision over the non-lawyer: the greater the independence of the non-lawyer in performing functions, the greater the likelihood that the non-lawyer is practicing law.

Thus, the attorney does not aid in the unauthorized practice of law where he retains supervisory control over and responsibility for those tasks constituting the

practice of law. The authorities make it clear that under no circumstances may the non-California attorney “tail” wag the California attorney “dog.”(4) The California Supreme Court in Birbower specifically rejected the trial court’s implicit assumption that the New York attorneys may have been able to perform the legal work that they did in California had they simply associated California counsel into the case. There is “no statutory exception to section 6125 [that] allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar.” (Birbower, 17 Cal.4th at 126, note 3. Compare Rule of Court 983, authorizing pro hac vice admission to practice of law in California of out-of-state attorney in good standing in his jurisdiction who associates an active member of the California bar as attorney of record and subjects himself to the California Rules of Professional Conduct.)

The California lawyer in this case retained full control over the representation of the client and exercised independent judgment in reviewing the draft work performed by those who were not California attorneys. His fiduciary duties and potential liability to his corporate client for all of the legal work that was performed were undiluted by the assistance he obtained from Legalworks. In short, in the usual arrangement, and in the scenario described above in particular, the company to whom work was outsourced has assisted the California lawyer in practicing law in this state, not the other way around. And that is not prohibited.(5)

B. Did the Attorneys Have the Duty to Inform the Client of the Firm’s Arrangement with Legalworks?

The only published California opinion which addresses this issue, LACBA Opinion No. 518, concludes that the use by a California lawyer of the services of non-lawyers (commonly referred to as "outsourcing") "may be a 'significant development' within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m)", and that, when it is a “significant development”, rule 3-500 and Section 6068 require that the California attorney inform the client prior to utilizing the outsourcing service. Opinion 518 applies COPRAC's analysis in Formal Opinion 2004-165 (this opinion holds that the use of a contract lawyer may be a "significant development" which would require that the client be informed) to services provided by non-lawyers. Formal Opinion 2004-165, in turn, relies upon the rule established in Formal Opinion 1994-138, in which COPRAC found that the use of an outside lawyer can constitute a "significant development".

Formal Opinion 2004-165 holds that the use of a contract lawyer may be a "significant development" but acknowledges that the determination of whether the use of a contract lawyer is a "significant development" is based upon the circumstances of each case. Opinion No. 518 considers the somewhat different issue of whether the client must be informed of a decision to "outsource" the

drafting of an appellate brief to a non-lawyer outsourcing company, but relies upon Formal Opinion 2004-165 to conclude similarly that "[t]he relationship with [the outsourcing company] may be a 'significant development' within the meaning of both rule 3-500 and Business and Professions Code section 6068, subdivision (m)". Although Opinion No. 518 further states that "[i]n most instances, the filing of an appellate brief will be a 'significant development'," it does not provide specific guidance under other facts.

Although an issue may once have existed as to whether the decision to use the services of lawyers outside of the attorney's firm could constitute a "significant development" which required that the client be informed, that issue appears settled by both COPRAC Formal Opinions 1994-138 and 2004-165. Formal Opinion 1994-138, recognizes that the use of another attorney is a "significant development", but states that the determination of “whether it is a significant development” should be made by considering the following factors: (1) whether responsibility for overseeing the client’s matter is being changed; (2) whether the new attorney will be performing a significant portion or aspect of the work; and (3) whether staffing of the matter has been changed from what was specifically represented to or agreed to by the client. In Formal Opinion 2004-165, COPRAC held that the determination as to whether a development is “significant” is not only a function of the three factors discussed in Formal Opinion 1994-138, but also whether the client had a "reasonable expectation under the circumstances" that a contract lawyer would be used to provide the service. To determine whether the "outsourcing" of services to non-lawyers is a "significant development," Opinion No. 518 merely extends COPRAC's analysis in “contract lawyer” cases to that factual scenario. Although the factual scenarios are different in each case, all of these decisions clearly are founded upon a recognition that the determination of whether and when to inform the client as to the use of outside services can be a "significant event" is a function of the client's expectations with respect to the services which are to be provided by the attorney.

We agree with Opinion No. 518 that the factors addressed by COPRAC in Formal Opinion 2004-165 should not be limited to the use of outside attorneys, and will also determine whether the client must be informed when a service is "outsourced" by an attorney to a non-attorney. The analysis of Formal Opinion 2004-165 should not be limited to whether the service to be "outsourced" technically involves the practice of law; to the contrary, the duty to inform the client is determined by the client's reasonable expectation as to who will perform those services. Therefore, if the work which is to be performed by the outside service is within the client's "reasonable expectation under the circumstances" that it will be performed by the attorney, the client must be informed when the service is "outsourced". Conversely, if the service is not a service that is within the client's reasonable expectation that it will be performed by the attorney, the attorney is not necessarily required to inform the client immediately, absent other

requirements compelling disclosure.

We believe that, in the absence of a specific understanding between the attorney and client to the contrary, the "reasonable expectation" of the client is that the attorney retained by the client, using the resources within the attorney's firm, will perform the work required to develop the legal theories and arguments to be presented to the trial court, and that the attorney will have a significant role in preparing correspondence and court filings.(6)

C. Did the Attorneys Violate RPC 3-110 by the Extent to which the Firm Relied on Legalworks to Provide Substantive Expertise that the Attorneys Lacked?

1. Duty of Competence

Section 6067 of the California Business & Professions Code recites the attorney's oath "to faithfully discharge the duties of an attorney at law to the best of his knowledge and ability." California Rule of Professional Conduct 3-110(A) states, “A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” Rule 3-110(B) defines acting with “competence” to mean applying “the 1) diligence, 2) learning and skill, and 3) mental, emotional and physical ability reasonably necessary for the performance of such service.”

An attorney may, consistent with the duty of competence, enlist the services of others when they are unfamiliar with the area of law at stake. Specifically, RPC 3-110(C) states, “If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.” (See also ABA Model Rule 1.1, Comment 1 – competent representation can be provided by associating with counsel that established competence in a particular field.)

An attorney unfamiliar with the area of law in a case must acquire the knowledge and skill necessary to act competently in the case. The attorney may acquire that knowledge and skill by learning the area of law, associating experienced counsel who already knows the law, or other means suited to the case. Failure to acquire such knowledge can be the basis for sanctions. (See CRC 227.) Overall, the duty to act competently requires an attorney to know whether they can handle a particular case and, if they are unable to do so, the attorney must choose a suitable alternative to protect the client’s interests.

Retaining a firm experienced in American intellectual property litigation does not relieve the attorney from the duty to act competently. The attorney retains the duty to supervise the work performed competently, whether that work is outsourced out-of-state or out of the country.(7) An attorney’s duty to act

competently in a supervisory role is highlighted in the discussion section of rule 3-110, which states, “The duties set forth in rule 3-110 include the duty to supervise the work of subordinate attorneys and non-attorney employees or agents.” (See Crane v. State Bar (1981) 30 Cal.3d 117, 123 (“An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority;” see also ABA Model Rule 5.1(b) – “a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to insure that the other lawyer conforms to the rules of professional conduct.”)

Nor does procuring work product from a firm experienced in American intellectual property litigation fulfill the attorney’s duty to act competently. To satisfy that duty, an attorney must be able to determine for himself or herself whether the work under review is competently done. To make such a determination, the attorney must know enough about the subject in question to judge the quality of the work.

As noted above, there are various ways an attorney may acquire the knowledge needed to perform such a review. Whether an attorney has acquired such knowledge will, of course, depend on the facts and issues of the case at hand. An attorney may not, however, rely on a firm such as Legalworks to evaluate its own work. The duty to act competently requires informed review, not blithe reliance.

In addition to knowledge of the legal and factual issues in a case, and regardless of the attorney’s level of expertise and experience in the subject matter of the assignment, the duty of competence may require an attorney to learn enough about a firm such as Legalworks to evaluate its general quality and reliability. The degree to which the duty requires such an inquiry will depend on the facts of the case. Factors relevant to (though not exhaustive of) discharging the duty could include inquiry into (a) pertinent background information about the firm (such as industry reputation), and the individuals (such as qualifications), who will perform the work; (b) references of the firm or individuals assigned to perform the work. The duty also could require that the attorney (c) interview the firm in advance; (d) request a sample of the firm’s work product that is comparable to your project; (e) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and executing it to the attorney’s expectations; and (f) review ethical standards with individuals who will perform work and incorporate the ethical standards into the terms of the contract with the firm. (See ABCNY Formal Op. 2006-3; Marcia Proctor, Considerations in Outsourcing Legal Work, Mich. Bar Journal, September 2005, at 24.)

In the hypothetical scenario, whether the attorney discharged his duty of competence – or even whether he was capable of discharging his duty of competence without further study before accepting the representation – turns on how “limited” his experience was in intellectual property litigation at the time of the outsourcing. There is plainly a point at which an attorney will lack sufficient

understanding of a kind of legal work that he will be unable to accept the work and outsource aspects of it at all because he will be incapable of critically and independently evaluating the work product he receives. The outsourcing posited by the hypothetical may constitute "professionally consulting another lawyer reasonably believed to be competent" for purposes of RPC 3-110 only if the attorney's "limited" experience was sufficiently substantial to enable him to perform that indispensable evaluative function.

2. Responsibility for Work

In addition to bearing a duty to competently supervise the performance of the outsourced work, an attorney also retains ultimate responsibility for that work. (Vaughn v. State Bar (1972) 6 Cal.3d 847, 857; Matter of Phillips (Rev.Dept. 2001) 4 Cal.State Bar Ct. Rpt 315, 335-336; Cal. State Bar Form. Opn. 1982-68; ABA Model Rule 5.3). By retaining responsibility for the work, the supervising attorney is subject to the ABA Model Rules that hold a lawyer responsible for another lawyer's violation of professional responsibility rules where: 1) the lawyer orders or ratifies the misconduct; or where 2) the lawyer has supervisory authority over the other lawyer and knows of the conduct at the time when the consequences could have been avoided or mitigated but failed to take remedial action. (ABA Model Rule 5.1(c) & Comment 5.)(8)

3. Considerations in Supervising Work Performed Abroad

The degree of supervision warranted for outsourced work was magnified by the work being performed in India rather than a United States jurisdiction. A number of obstacles can arise when work is assigned to foreign companies. An attorney acting with competence will foresee and understand such obstacles and will weigh them against the client's interests. Some legal ethics experts, like Stephen Gillers, believe that "[t]here is no problem with offshoring, because even though the lawyer in India is not authorized by an American state to practice law, the review by American lawyers sanitizes the process." (Ellen Rosen, Corporate America Sending More Legal Work to Bombay, NY Times, March 14, 2004.) We agree only to a point. In order to satisfy the duty of competence, an attorney should have an understanding of the legal training and business practices in the jurisdiction where the work will be performed.

One factor should be considered when outsourcing work is the educational background of those persons performing the work. While an attorney in another U.S. state will have a legal educational background comparable to that of the assigning attorney, an attorney abroad may not. The necessary training to become a lawyer differs around the world. In order to determine the applicable ethical rules, a lawyer must first determine whether the worker is a "nonlawyer" or "lawyer" within the foreign jurisdiction. In order to do so, the U.S. lawyer must know something about the requirements of lawyering where the work will be

performed and the credentials of those who will actually perform the work. In cases where the attorney is supervising nonlawyers, reasonable steps must be taken to ensure that the nonlawyer's conduct meets the assigning attorney's professional obligations. (ABA Model Rule 5.3(b).) In the instant scenario, this means the lawyer should make sure that anyone who assists on the case will not expose the assigning attorney to a possible violation of the professional responsibility rules in the attorney's jurisdiction. (ABA Model Rule 5.1(b).)

Other questions the State Bar may consider in determining the adequacy of supervision of non-California lawyers include: i. whether the non-attorney be disciplined, perhaps even terminated, by the attorney for improper conduct; ii. whether the non-attorney's compensation be adjusted by the attorney for poor performance by the non-attorney; iii. whether the non-attorney has been educated and/or trained in any way by the attorney; iv. whether the attorney has the ability to review the non-attorney's work ethics and practices; v. whether the attorney regularly provides input to the non-attorney on his/her performance; and vi. whether the attorney has the ability or discretion to restrict or confine the non-attorney's areas of work or scope of responsibility. In the case of a paralegal or other employee, the answer to these questions would be yes, but for an overseas lawyer the answers would be no. Those distinctions as well, then, justify a heightened duty of supervision under the hypothetical facts.

In addition, part of acting competently in the case of outsourcing work is ensuring other duties are fulfilled as well. An additional duty of an attorney who outsources work, whether within the U.S. or abroad, is to "maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, or his or her client." (See Business & Professions Code section 6068(e).) This is especially important as the legal and ethical standards applicable to foreign lawyers may differ from those applicable to domestic lawyer, particularly with respect to client confidentiality, the attorney-client privilege, and conflicts of interests.(9) One unfortunate example of a breach of confidentiality involving an outsourced project concerns a medical transcription project that was subcontracted to India. There, the subcontractor threatened to post confidential patient records on the Internet unless the UC San Francisco Medical Center retrieved money owed to the subcontractor from a middleman. (David Lazarus, Looking Offshore: Outsourced UCSF notes highlight privacy risk. How one offshore worker sent tremor through medical system, S.F. Chron., March 28, 2004.)

Legalworks was not retained as an attorney but to provide law-related assistance. Thus, there would be an argument that the attorney-client privilege that applies in the outsourcing company's jurisdiction would be irrelevant. Instead, the applicable rule is that the attorney-client privilege is not waived for disclosure of information "reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted . . . ." (Cal. Evid. Code §912(d).) As the

above example shows, it is not clear that California privilege law would apply to a threatened breach of confidentiality by the outsourcing company. Given the uncertainty – not to mention the substantial geographical distances -- imposing a duty of heightened due diligence is warranted.

V. CONCLUSION

The Committee concludes that outsourcing does not dilute the attorney's professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged. Under the hypothetical as we have framed it, the California attorneys may satisfy their obligations to their client in the manner in which they used Legalworks, but only if they have sufficient knowledge to supervise the outsourced work properly and they make sure the outsourcing does not compromise their other duties to their clients. However, they would not satisfy their obligations to their clients unless they informed the client of Legalworks' anticipated involvement at the time they decided to use the firm to the extent stated in this hypothetical.

1. The important effect of that conclusion is that corporations, at least, may not directly contract with non-California attorneys to represent them in court in California absent pro hac vice admission of the attorney by the court. "As a general rule, it is well established in California that a corporation cannot represent itself in a court of record either in propria persona or through an officer or agent who is not an attorney." (Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd. (2002) 99 Cal.App.4th 1094, 1101, citations omitted. See also Rule of Court 965, requiring registration of non-California in-house counsel advising corporations with California contacts and prohibiting their appearance in court absent pro hac vice admission.)

2. See discussion, infra, at Section C(1) regarding the attorney's duty of competence to be able to evaluate Legalworks' work product.

3. Through a somewhat different route, we reach the same general conclusion on this point as our colleagues in the Los Angeles County Bar Association. (See LACBA Professional Responsibility and Ethics Committee Opinion No. 518 (June 19, 2006) pp. 5-6 ("LACBA Opinion"). See also, Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2006-3 (August 2006).)

4. See LACBA Opinion at p. 9: "[I]n performing services for the client, the attorney must remain ultimately responsible for any work product on behalf of the client and cannot delegate to [outsourcing] Company any authority over legal strategy, questions of judgment, or the final content of any product delivered to

the client or filed with the court. [] It follows that if a term of the agreement between the attorney and Company delegates to Company a decision-making function that is non-delegable, then the attorney may be assisting Company in the unauthorized practice of law or violating the ethical duties of competence and obligation to exercise independent professional judgment." We differ only in not qualifying the conclusion that such an abdication of a non-delegable duty would constitute assisting in the unauthorized practice of law in violation of RPC 1-300.

5. We do not address the interesting and perhaps fact-specific question whether an attorney who is incompetent to evaluate the work of an outsourced contractor, even if he retains control over the matter and exercise such independent judgment as he can, would indeed violate the prohibition on assisting the contractor in the unauthorized practice of law. For a discussion of the duty of competence, see infra Section (C)(1).

6. The client's reasonable expectation does not preclude use of employees of the attorney's firm, including partners, associate attorneys and paralegals, to perform work on the case, including research and drafting of documents. It should not ordinarily preclude other attorneys of the firm from making appearances on behalf of the client.

7. We note that California Rule of Professional Conduct 1-100 (B)(3) defines the term "lawyer" to include members of the State Bar of California, attorneys licensed in other state, the District of Columbia, and United States territories, "or is admitted in good standing and eligible to practice before the bar of the highest court of, a foreign country or any political subdivision thereof."

8. In this case, of course, the ABA Model Rule is only applicable by analogy. As set forth in part II.A above, the work was not delegated and the person doing the work was not a California attorney. That, however, imposes more of a supervisory burden on the attorney not less of one.

9. Under India's attorney-client privilege, no attorney may: "(i) disclose any communication made to him in the course of or for the purpose of his employment as such attorney, by or on behalf of his client; (ii) state the contents or condition of any document with which he has become acquainted in the course of and for the purpose of his professional employment; or (iii) disclose any advise [sic] given by him to his client in the course and for the purpose of such employment." (Indian Evidence Act of 1972, quoted at www.lexmundi.com, India.) The attorney-client privilege is more limited than in America. For example, "[a]n in-house counsel is not recognized as an 'attorney' under Indian law. Thus, professional communications between an in-house counsel and officers, directors and employees are not protected as privileged communications between an attorney and his client. . . ." (lexmuni.com, India. Compare: "In Upjohn Co. v. United States (1981) 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584,

the United States Supreme Court expanded the previous 'control group test' and held that all confidential communications concerning the scope of their employment between corporate employees and the corporation's in-house counsel are covered by the attorney-client privilege." Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal.App.3d 1142, 1151 holding, however, that attorney-client privilege did not apply where in-house counsel merely acted as a negotiator, gave business advice, or otherwise acted as company's business agent. (Ibid).)

APPENDIX II

ABA Model Rules - Relevant Sections[9]

Client-Lawyer Relationship

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

[9] Source: http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

(6) to comply with other law or a court order.

Client-Lawyer Relationship

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Client-Lawyer Relationship

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Client-Lawyer Relationship

Rule 1.9 Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Counselor

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Law Firms And Associations

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants - Comment

[1] 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.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Law Firms And Associations

Rule 5.4 Professional Independence Of A Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Law Firms And Associations

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) 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.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is

authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.