Strafford Teleconference

Ethical Risks of Offshore Outsourcing of Legal Services

August 5, 2008

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Overview

- Evolution of offshore legal outsourcing
- Ethical obligations in outsourcing
  - Unauthorized practice of law
  - Competence and supervision
  - Privilege and confidentiality
    - Confidentiality
    - Data privacy and security
    - Attorney-client privilege
  - Client notice
  - Conflicts of interest
  - Fee and billing issues
- Best Practices

Evolution of Outsourcing

- Near shoring
- Domestic outsourcing
- Offshoring
- Offshore outsourcing

Orrick in West Virginia

- Orrick, Herrington, Sutcliffe, LLP's Global Operations Center in Wheeling, WV
  - Opened in 2002, this $13 million development was intended to house worldwide help desk, accounts receivable, and human resources facilities
  - Expected to employ 250 with an average salary of $37,000 per year

http://www.redp.org/project_Orrick.php

Then . . .

- *Orrick, Williams Lea Announce Partnership in Wheeling* (Orrick Press Release)
  - "Williams Lea will coordinate all of Orrick's word processing needs, transcription production services and document services work. That work will continue to be conducted out of Orrick's offices – primarily at its centralized operations facility in Wheeling, but also in Orrick's practice offices."
- Wiliams Lea's Role
  - Coordinate all of Orrick's word processing, transcription services, and document services work
  - Offer support services to other law firms and professional services businesses
- Orrick's role
  - Continues to provide "other technology, finance, human resources, Web engineering, benefits, payroll and marketing" from GOC in Wheeling."
  - "The firm also will continue to develop a U.S.-based out-sourcing business for other law firms."
- All Orrick employees in appropriate roles offered their same jobs with Williams Lea

http://www.orrick.com/news_events/releases.asp?action=article&articleID=2427

B&M "Offshoring": Savings ≈$4 million 2000–06

Advertised: 26-10-07 | Closing Date: 24-12-07.

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Our young, dynamic organization provides a variety of support services to more than 70 offices in 38 countries around the world. Our continued growth demands the expertise of professionals for our team. If you see yourself working as apart of a global organization, driven by a passion for excellence, then, we would like to hear from you.

Global Helpdesk Analysts

(National Capital Reg - Bonifacio Global City, Taguig City (The Fort))

Responsibilities:

- This position will be responsible for providing consistent high quality customer service and technical support for the organization's global applications, European Region, Asia Pacific Region and other locations/support opportunities as they arise. Also responsible for resolving issues in a timely and efficient manner, and escalate to support groups when necessary.

Requirements:

- With 1 to 3 years prior technology Help Desk experience in a problem-solving capacity (local applications, web applications, hardware troubleshooting and others).
- With 1 to 3 years experience with incident management tools.
- Good process methodology experience
- Excellent verbal, written, communication skills.
- Must be able to speak and write fluent English with advanced grammar and composition skills
- Excellent Customer Service skills.
- Thoroughness in terms of following defined processes diligently and accurately.
- Drive and ability to see problems through to resolution
- Well-developed interpersonal skills and ability to work in a team environment.
- Ability to quickly learn and understand new technology and applications.
- Willing to work in a shifting schedule and render overtime as necessary
- Able to work in fast paced, stressful environment

ADDRESS:
14th Floor Net One Center

B&M Global Help Desk to Manila

Is this offshoring? B&M is in 70 countries

http://ph.jobstreet.com/jobs/2007/10/default/20/1666930.htm?fr=J

Offshoring

SCHWEGMAN ■ LUNDBERG ■ WOESSNER
Intellectual Property Attorneys

Home
Our Firm
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Education / Training
What's New
FAQs
Contact Us
Client Log-In
Ranked FIRST

IP Resource Center
Articles

National Survey Ranks Minneapolis Patent Law Firm Schwegman, Lundberg & Woessner First in Patent Quality

A recent survey of patent quality published in the March 2005 issue of IP Law & Business showed that Minneapolis-based intellectual property law firm Schwegman, Lundberg & Woessner (SLW) ranked in the top four for five of six categories of technology including Biotech, Electrical, Chemical, Computer/Software, and Medical. SLW received this honor in 2003 and 2004 as well.

Click here to read the entire article.

Schwegman Lundberg has two captive centers for subsidiary Intellevate in India.

80 professionals

International/Offshore Outsourcing

- "The legal industry in the United States does work worth over $200 billion a year, and a lot of it can be outsourced.
- "We help scores of large corporations and law firms save 25 percent to 70 percent on the cost of legal support services by doing the work in India, where we have a large staff of some of the best lawyers in the country.
- "We leverage our deep understanding of the needs of U.S. corporate law departments and law firms with state-of-the-art in-house technology to provide them sophisticated and high-quality legal support services at significantly lower costs than previously available."

- Pangea3 co-CEO David Perla

http://www.pangea3.com/news2.html

What Work Is Outsourced?

- "[Pangea3's] service offerings include:
  - Contract drafting, administration, management and abstraction
  - Patent research, analysis, drafting and prosecution support
  - Litigation support, including document review, briefing and motion writing; and
  - Legal, business information and competitive intelligence research."

http://www.pangea3.com/news2.html

Companies Offshore

- General Electric was the first foreign conglomerate to offshore to India
  - GE Plastics unit hired a lawyer to work in Gurgaon (near Delhi) to write and review contracts with vendors
  - GE executives say the India team saved the company $500,000 in 2001 and $700,000 in 2002

http://www.bmacewen.com/blog/pdf/AsiaLawJulyAugust2005LegalOutsourcingToIndia.pdf

Other Companies Offshoring

- Microsoft
- American Express
- Morgan Stanley
- Cisco
- Oracle

http://www.pangea3.com/news2.html

Outsourcing by Clients

- What portion of a lawyer's clients outsource?

- (Virtually) All of them – use of outside counsel

Law Firms Outsource

- Temporary lawyers
  - Date of ABA opinion on outsourcing – 1988
- Foreign lawyers
  - Thiru & Thiru – Indian firm claims that it has done US patent work out-sourced by US firms since 1996

Magnitude of Outsourcing

- Current US Legal Market $\approx$ $200B (Pangea3)
- Outsourcing by 2015 – $5.8B (or more . . . or less)

Costs for Internationally Outsourced Work (1/2005)

- Electronic document management: $11 to $13/hour
- Legal research: $24-26/hour
- Due diligence services: $24-26/hour
- Contract drafting and proofing: $24-26/hour
- Document discovery: $24-26/hour
- IP Services: $40-$50/hour
  - Including patent application drafting, prior art searching, proof reading, docketing, etc.

http://www.evalueserve.com/Media-And-Reports/WhitePapers/Evalueserve%20Article%20on%20LPO.pdf

Advantages (per Evalueserve)

- Improved quality – Indian professionals are cheaper so they can take more time
- Reduced response time
- Movement of US attorneys up value chain
- Overflow work management
  - More than 50 percent of lawyers at firms with 2 or fewer lawyers
- Better associate retention

- *Plus cost savings . . .*

Potential Disadvantages

- Ethical issues discussed here
- Costs including training and supervision
- More difficult to supervise
- Harder to build "team" approach
- Liability risks

Translation of Purported Advantages to Ethics Rules

- Better quality – Rule 1.1 competency
- Reduced response time – Rule 3.4 (expediting litigation) and 1.3 (diligence)
- Work overflow management – Rule 1.3

Ethics of Outsourcing

Rules (Still) Apply

- "Outsourcing does not alter the attorney's obligations to the client, even though outsourcing may help the attorney discharge those obligations at lower cost."

SD Bar Opinion 2007-1

More on "Rules (Still) Apply"

- "[A]s long as the lawyer's use of the nonlawyer assistant's services is in accordance with the Rules of Professional Conduct, the location of the nonlawyer assistant is irrelevant. Rule 5.3(b) requires lawyers having supervisory authority over the work of nonlawyers to make "reasonable efforts" to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."

NC 2007 FEO 12

Main Authorities on Offshore Outsourcing

- SD Bar Opinion 2007-1 (substantive)
- NY City Bar Opinion 2006-3 (substantive)
- FL Bar Opinion 07-02 (substantive and administrative) (approved July 25, 2008)
- North Carolina 2007 Formal Ethics Opinion 12

- *ABA Standing Committee expected to issue an opinion soon*

San Diego Bar Opinion 2007-1

- Lawyer at 2-lawyer firm accepted defense of IP case despite limited experience
- Lawyer hired Legalworks to perform research and draft pleadings
  - Billed Legalworks at cost as "research" or "preparing pleadings"
- Lawyer reviewed and signed all Legalwork's pleadings
- Lawyer won case at summary judgment

Unauthorized Practice of Law (UPL)

Rules Prohibit UPL and Assisting UPL

- "(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."

Model Rule 5.5

Three Ways UPL Violates Rule 5.5

- Practice in jurisdiction where not licensed
- Assist non-lawyer's practice in jurisdiction where licensed
- Assist non-lawyer's practice in another jurisdiction

What Is the "Practice of Law"

- Some things are clearly the practice of law
  - Appearing in court
  - Taking depositions
- Many other things are, maybe, or sometimes constitute the practice of law

ABA Draft Definition 9/2002 – *Abandoned*

- A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:
  - (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
  - (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
  - (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
  - (4) Negotiating legal rights or responsibilities on behalf of a person.

Lawyer-Supervised Legal Work Generally Not UPL

- Paralegals may perform legal work under lawyer supervision
  - Drafting pleadings
  - Preparing legal memoranda
  - Etc.

- *But paralegals may not appear in court, take depositions, give independent legal advice, etc.*
  - But some states allow certified legal document preparers

Outsourced Work Was Practice of Law

- SD opinion found the work in that case was the practice of law:
- "[I]t 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."

SD Bar Opinion 2007-1

But Outsourced Lawyers Can Work Under Supervision

- Legalworks did work for CA licensed lawyer
- CA licensed lawyer exercised independent judgment in use of work product

Bottom Line

- Nonlawyer "tail" cannot wag lawyer "dog"

SD Bar Opinion 2007-1

NYC Bar Opinion 2006-3 Concurs

- Builds on N.Y. State Opinion 721 (1999), which determined:
  - 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.'
  - "Without proper supervision by a New York lawyer, the legal research firm would be engaging in the unauthorized practice of law."

FL Bar Opinion 07-02 Agrees

- "Law firms frequently hire contract paralegals to perform services such as legal research and document preparation. It is the committee's opinion that there is no ethical distinction when hiring an overseas provider of such 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."

Competency and Supervision

Duty to Provide Competent Representation

- "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Model Rule 1.1

Ways to Provide Competent Representation

- Study
- Association with competent counsel

Model Rule 1.1 cmt [2]

Duty to Supervise Non-Attorney Subordinates

- 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 . . . .

Model Rule 5.3

Supervision Under NYC Bar Opinion 2006-3

- "[T]he lawyer must, by applying professional skill and judgment, first set the appropriate scope for the nonlawyer's work and then vet the nonlawyer's work and ensure its quality."

Supervising International Work

- "Given [the special] 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."

NYC Bar Opinion 2006-3

- "Attorneys who use overseas legal outsourcing companies should recognize that providing adequate supervision may be difficult when dealing with employees who are in a different country."

FL Bar Opinion 07-02

Supervision of Work Abroad

- Distance justifies heightened duty of due diligence
- Lawyer should have adequate understanding of legal training and business practices in jurisdiction where work is performed
  - Assess whether person performing work is akin to US lawyer or nonlawyer
  - Disciplinary history of worker
  - Whether compensation can be adjusted for poor performance
  - Education and legal training
  - Right to review work and ethical practices
  - Right to provide input on performance
  - Right to restrict or confine area of work or scope of responsibility

Supervision Issues May Prevent Outsourcing

- "If physical separation, language barriers, differences in time zones, or inadequate communication channels do not allow a reasonable and adequate level of supervision to be maintained over the foreign assistant's work, the lawyer should not retain the foreign assistant to provide services."

NC 2007 FEO 12

Global Legal Professional Certification Test

- Test of Indian law students interested in working at outsourcing companies
- Developed by LPOs
- Tests lawyers' command of
  - English – Vocabulary, Reading and Writing skills, and Grammar – each with an emphasis on U.S. , U.K. and Indian English
  - Technology and Professional Ethics – Comfort with using workplace technology, online legal databases, data security laws in the U.S. , U.K. and India , and L.P.O. Ethics
  - Personal Effectiveness – Personality assessment, personal effectiveness, interpersonal skills, and familiarity with cultural differences
  - Legal Knowledge and Proficiency – Familiarity with L.P.O.s, Litigation procedure, Paralegal skills, Contract law, Conveyancing, M&As, Intellectual Property, and Legal Writing

- First test in September 2007 in five cities

GLPC Sample Questions

- http://www.glptest.com/samples/GLPTest_IndicativeQs.pdf

Must Be Competent to Supervise

- "The duty to act competently requires informed review, not blithe reliance."
  - Lawyer could outsource only if his experience was sufficient to perform this role

SD Bar Opinion 2007-1

SD Check on Outsourcing Firm

- With outsourcing, possible need to investigate the firm to evaluate quality and reliability
  - Background information such as industry reputation
  - References for firm or individuals assigned to matter
  - Advance interview of firm and possibly individuals
  - Request sample work product
  - Ensure foreign lawyer understands assignment

NYC Check on Outsourcing Firm

- Obtain background information about any intermediary employing or engaging non-lawyers
- Obtain professional resumes of non-lawyers
- Conduct reference checks
- Interview nonlawyers in advance (including by telephone or webcast) to ascertain the particular non-lawyer's suitability for the assignment
- Communicate during assignment to ensure non-lawyers understand and are satisfying the lawyer's expectations

Confidentiality and Privilege

Confidentiality

- Lawyer owes a duty to keep client's information confidential
- Duty of confidentiality (Rule 1.6) generally establishes when lawyer may (or must) disclose information

Rule 1.6

- A lawyer may not disclose "information relating to the representation of the client"
- Exceptions
  - Client informed consent
  - Prevent death or bodily harm
  - Crime/fraud
  - Seeking ethics advice
  - Dispute over fees/services
  - Other law or court order

Violation of Duty of Confidentiality

- Discipline
- Malpractice
- Tort liability

Preserving Confidentiality When Outsourcing

- "Lawyer must be mindful that different laws and traditions regarding the confidentiality of client information obtain overseas."

NYC Bar Opinion 2006-3

Outsourcing Provider Must Commit to Confidentiality Obligation

- Reference in SD Opinion to UCSF Medical Center's outsource partner, which threatened to disclose confidential information if UCSF did not recover funds owed by third party

Responsibility for Outsourcing

- Lawyer is responsible for information sent outside firm
- Responsibilities
  - Let client know as required by Rule 1.4
  - Make sure information remains confidential as required by Rules 1.6, 5.1, and 5.3

Data Security

- When a lawyer sends a document by e-mail, . . . a lawyer must exercise reasonable care to ensure that he or she does not inadvertently disclose his or her client's confidential information.
- What constitutes reasonable care will vary with the circumstances. . . .
- Reasonable care may, in some circumstances, call for the lawyer to stay abreast of technological advances and the potential risks in transmission in order to make an appropriate decision with respect to the mode of transmission.

N.Y. State Bar Op. 782 (2004) (discussing metadata)

- It is the sending lawyer's obligation to take reasonable steps to safeguard the confidentiality of all communications sent by electronic means to other lawyers and third parties and to protect from other lawyers and third parties all confidential information, including information contained in metadata, that may be included in such electronic communications.

Florida Bar Opinion 06-2 (discussing metadata)

Newman McIntosh & Hennessey, LLP *v. Bush*
(D.D.C. filed May 2008)

- Suit for declaration whether sending information overseas to outsourcing lawyers waives Fourth Amendment

- Also seeks clarification whether client consent is required, and whether the government needs to adopt regulations to safeguard attorney outsourcing from government surveillance

Amended Complaint at
http://nmhlaw.com/yahoo_site_admin/assets/docs/AmendedComplaint.13481249.pdf

Data Sharing in Outsourcing

- It is assumed that most information outsourced will be transmitted electronically to the legal service provider. If so, an attorney must be mindful of, and receive appropriate and sufficient assurances relative to, the risks inherent to digital information containing confidential information.
  - Example: Policies and processes are *employed* to protect the data while in transit, at rest, in use, and post-provision of services

Recommended Safeguards

- Restricting access to sensitive client information
- Contractual provisions addressing confidentiality and offering remedies in event of breach
  - Obligation to have adequate safeguards
  - Obligation to keep information confidential
- Periodic reminders regarding confidentiality
- Some information or matters may not be suitable for outsourcing due to risks of disclosure

FL Bar Opinion 07-02 Emphasis on Safeguards

- "Attorney should require sufficient and specific assurances (together with an outline of relevant policies and processes) that the data, once used for the service requested, will be irretrievably destroyed, and not sold, used, or otherwise be capable of access after the provision of the contracted-for service.

- "While the foregoing issues are likewise applicable to domestic service providers, they present a heightened supervisory and auditability concern in foreign (*i.e.,* non-U.S.) jurisdictions, and should be accorded heightened scrutiny by the attorney seeking to use such services."

Attorney-Client Privilege

- The attorney-client privilege protects
  - Communications between
  - Attorney or representative and
  - Client or representative
  - "made for the purposes of facilitating the rendition of professional legal services."

Revised Uniform Rule of Evidence 205

Privilege Not Waived by Outsourcing

- "[T]he attorney-client privilege is not lost where a law firm shares privileged information with its associates, legal assistants, and secretaries. . . . Nor, in this Court's judgment, would the attorney-client privilege be lost if a law firm used an outside document copy service or hired an independent document copy service to copy privileged communications. Likewise, this Court holds that a law firm does not waive its client's privilege by contracting with an independent contractor, such as Compulit, to provide a necessary service that the law firm feels it needs in order to effectively represent its clients"

Compulit v. Banctec, Inc., 177 F.R.D. 410 (W.D. Mich. 1997) (discussing use of litigation services company Compulit)

Document May Implicate Foreign Privilege Law

- "Most, if not all, of the challenged documents are foreign documents; therefore, determination of the applicability of attorney-client privilege or work product protection to many of the challenged documents implicates issues of foreign law."

Astra Aktiebolag v. Andrx Pharmaceuticals, Inc., 208 F.R.D. 92 (S.D.N.Y. 2002)

Privilege in Foreign Countries

- European Union privilege
  - Communication must be made for purpose of and in interest of client's defense
  - Lawyer must be independent
    - Which may not include in-house lawyers

Case No. 155/79, *AM & S Europe Ltd. v. Commission*, 1982 E.C.R. 1575; *Azko Nobel Chemical Ltd. v. Commission* (Euro. Ct. 1st Instance 2007)

- India
  - Privilege recognized under India Evidence Act of 1972
  - But protection generally not afforded to communications with in-house counsel

Lex Mundi, *In-House Counsel and the Attorney-Client Privilege* (2005)

Client Notice/Consent

NYC on Duty to Obtain Advance Client Consent

- "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."

NYC Bar Opinion 2006-3

Need to Seek Consent Turns on Risk

- "The requirement for informed consent from a client should be generally commensurate with the degree of risk involved in the contemplated activity for which such consent is sought."

FL Bar Opinion 07-02

Factors to Consider for Giving Client Notice

- Will nonlawyers will play significant role in matter
  - Example: several nonlawyers hired to do an important document review
- Are client confidences and secrets shared with nonlawyers
  - Then client's informed advance consent should be secured
- Does client expect only personnel employed by the law firm will handle the matter
- Are nonlawyers billed to the client on a basis other than cost
  - Then client's informed advance consent is needed

NYC Bar Opinion 2006-3

NYC Bar – Sharing Confidences Trigger Client Notice Requirement

- "[I]f 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."

NYC Bar Opinion 2006-3

Conflict Checks

Need to Avoid Conflicts

- "[T]he attorney should satisfy himself that no conflicts exist that would preclude the representation. [Cite omitted.] 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."

FL Bar Opinion 07-02 (quoting LA Bar Opinion 518)

Safeguards to Avoid Conflicts

- Ask intermediary about conflict checks and tracking of work performed for clients
- Ask both intermediary and nonlawyer workers whether either is performing or has performed services for any parties adverse to the lawyer's client
  - Pursue further inquiry as appropriate
- Remind intermediary and lawyer (preferably in writing) of need to safeguard client information

NYC Bar Opinion 2006-3

Billing

Billing for Outsourced Work

- Cannot bill outsourced work as if firm lawyer were performing services
- Should charge "no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service

NYC Bar Opinion 2006-3

Do Not Duplicate Charges

- "[T]he lawyer should not in fact or effect duplicate charges for services of nonlawyer personnel, and if those charges are separately itemized, the salaries of such personnel employed by the lawyer should in some reasonable fashion be excluded from consideration as an overhead element in fixing the lawyer's own fee.
- "If that exclusion cannot, as a practical matter, be accomplished in some rational and reasonably accurate fashion, then the charges for nonlawyer time should be credited against the lawyer's own fee."

FL Bar Opinion 07-02

Need to Make Billing Clear

- "If there is a potentiality of dispute with, or of lack of clear agreement with and understanding by, the client as to the basis of the lawyer's charges . . . whether or not the nonlawyer personnel time is to be separately itemized, the lawyer's intention to so use nonlawyer personnel and charge directly or indirectly therefor should be discussed in advance with, and approved by, the client."

- "This would seem especially the case where substantial use is to be made of any kind of such nonlawyer services."

FL Bar Opinion 07-02

Contingency Fee Case: Not Proper to Shift Legal Work to Costs

- "[I]n the case of a contingency fee, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third party provider."

Concluding Remarks

- "In sum, a lawyer is not prohibited from engaging the services of an overseas provider, as long as the lawyer adequately addresses the [various] ethical obligations."

FL Bar Opinion 07-02

Best Practices

How is Offshoring Different?

- Consider existing policies, procedures and practices
- Identify the policies, procedures and practices used in selecting, supervising, and monitoring the lawyers, non-lawyer workers, and outside personnel

How is Offshoring Different?

- Adapt these policies, procedures and practices to the offshore outsourcing workers.
- Existing policies, procedures and practices may be insufficient in light of differences in legal systems and legal education and training of the workers (compared to domestic legal and non-legal staff)

Agency Concepts Set the Scene

- Need for due care in selecting, monitoring and supervising other agents
- Agents who have a duty to appoint and supervise other agents on behalf of the principal are liable for harm to the principal resulting from a breach of duty through lack of care or otherwise in the appointment or supervision of the other agent if harm is incurred in a foreseeable manner
- Generally, an agent is liable to her/his principal if s/he "directs, permits or otherwise takes part in the improper conduct of other agents."

- (Restatement of Agency 2nd)

Potential for Vicarious Liability

- Potential for vicarious liability for malfeasance of work performed offshore
  - If agents "jointly contracted to perform for the principal," one agent may be liable for another agent's failure of performance
  - Vicarious liability may rest on issue of fee sharing
    - If offshore worker and lawyer share fees, offshore worker may be deemed a joint venturer rather than an independent contractor, with the result that the lawyer/law firm would be liable for the negligence of the offshore worker

Due Care in Selection

- Obtain a reliable referral with regard to the offshore worker/firm
- Duty to investigate the offshore firm and its worker(s) with regard to its/their professional integrity and competence
  - Scope of duty to investigate:
    - What sort of information will be shared with the offshore firm/worker(s)?
- The greater the sensitivity of the information, the greater the need for information regarding reliability, reputation, past performance

Due Care in Selection

- How to obtain information?
  - Interviewing the firm's owners and managers
  - Interviewing the workers
  - Professional credentials
  - Checking references
  - Building an understanding of the offshore credential/reputational environment
  - Need for outside investigator in matters of great sensitivity

Duty to Supervise Offshore Workers

- Consider the degree of supervision and monitoring characteristic of personnel within the (domestic) law firm
- Consider what sort of differences exist between offshore workers and internal legal and non-legal staff in terms of education, training and sensitivity to professional rules and discipline
- Adapt domestic practices and supplement them

Duty to Supervise Offshore Workers

- Supervision and monitoring with regard to
  - The offshore worker's understanding of the assignment
  - The substance of the work to be performed
  - Ethical rules and constraints
  - Implementation and enforcement of agreed-upon policies, procedures and practices for safeguarding client information, performing the work, and other matters
- Timing of supervision and monitoring (once is often not enough)
- Balance between close supervision and potential for vicarious liability resulting from a finding of joint venture relationship

Maintain Client Confidences

- Breach of confidentiality may both violate the ethical rules and also result in tort liability
  - Lawyers have been held liable for both inadvertent and deliberate disclosures
- Focus is on securing documents that contain confidential information
  - Securing may include
    - segregation (electronic and physical)
    - Limiting access
    - Preventing copying
    - Assigning tracking numbers to all copies
    - Replacing real names with code names
    - Disguising other identifying markers
    - Shredding policies

Maintain Client Confidences

- Instruct offshore workers on the rules of protecting client confidential information and secrets, emphasizing differences between US and offshore rules
  - Duty of confidentiality extends to information even if it is a matter of public record, and even once the representation relationship has ended
- Consider how the duty to maintain confidentiality impacts hiring practices of offshore firm
  - What is the pool of potential workers from which the firm hires? Awareness of reputation for professional conduct

Maintain Client Confidences

- Consider all policies of the offshore firm/workers
- Consider the substantive law regarding the duty of confidentiality of the offshore jurisdiction
  - Adapt, if necessary, through contract
- Consider the judicial/enforcement system of the offshore jurisdiction
  - Adapt, if necessary, through contract

Client Confidences and Security

- Duty of supervision and monitoring extends to security measures
  - Security policies must be enforced to be effective
- Keep in mind differences in acceptable infringements on personal liberty and how enforcement of security measures might result in embarrassing public relations problems

Check for Conflicts of Interest

- Assume general insensitivity to U.S.-style conflicts of interest
- Communicate expectations and standards regarding conflicts of interest
- Perform conventional conflicts analysis (e.g., opposing and contracting parties)
- Need to evaluate for conflicts throughout the relationship with the offshore worker, not simply a one-time/snapshot consideration
- Knowledge of offshore workers/firm:
  - Does the offshore firm/worker know the identity of the ultimate client? If not, may interfere with ability to identify conflicts

Need to Inform & for Client Consent

- Need for information/consent?
  - What sort of work/role is the offshore worker going to play in the representation? Strategic advice v. legal research/tangential matters
  - What sort of information will be shared with the offshore worker and what risks are associated with the conveyance of this information?
  - What is the understanding/expectation of the client regarding who will perform the work?
- If consent is required, make it formal
  - Written
  - In retainer agreement (LACBA)

Billing Issues

- No sharing of fees without disclosure and consent
  - If the fees paid by the client will be directly shared with the offshore worker, and the offshore worker is performing legal services, the lawyer must not share the fees without disclosure to and consent of the client (Model Rule 1.5)
- Generally, lawyers may charge their clients the actual cost of the offshore work performed, along with a reasonable allocation of overhead charges associated with the work
  - But lawyers also must pass along to their clients the benefit of low fees paid to offshore workers
    - i.e., it is improper to impose a surcharge over and above payments made to third persons on behalf of the client, including payments made for offshore services
    - Markups on pay to offshore workers must be disclosed to the client (ABCNY)

Billing Issues & Disclosure

- Billing may trigger the duty to disclose to the client
  - If the cost of the offshore service is passed along to the client, the offshoring contract may be a significant development or material with regard to the client relationship (see LACBA)
  - In that event, disclosure is required
- Disclosure may be required if any cost of the offshore service is passed along to the client (LACBA)

The Outsourcing Contract

- Incorporate ethical and professional expectations into the contract
  - Consider governing law options
- Do not assume that the offshore workers or firm will have the same understanding of the significance of specific terms of the contract as would a U.S. lawyer
- After instructing individual offshore workers on their ethical and professional obligations pursuant to the contract, seek to obtain an indication of their understanding and assent
- Consider enforcement issues
  - Assess the integrity of the offshore jurisdiction's judiciary and enforcement regime
  - Consider alternative mechanisms for enforcement, including arbitration

References for Further Analysis

- American Bar Association Commission on Ethics and Professional Responsibility, Formal Opinion 88-356 (12/16/88)(Temporary Lawyers)
- American Bar Association Commission on Ethics and Professional Responsibility, Formal Opinion 00-420 (11/29/00)(Surcharge to Client for Use of a Contract Lawyer)
- DC Bar Opinion 304 (2/20/01)(Management of a Law Firm's Human Resources Functions by an Employee Management Company)
- Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion No. 518 (6/19/06) (LACBA)
- Professional Ethics of the Florida Bar Proposed Advisory Opinion 07-2 (9/7/07)
- Restatement of Agency, 2nd, especially section 405
- San Diego County Bar Association, Ethical Opinion 2007-1 (SDCBA)
- The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2006-3 (8/06)(ABCNY)

Thank You

- If you have questions or comments, please contact:

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