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Law Firms and Outsourcing: Trust but Verify

More law firms of all types and sizes use outsourcing as a means to help them practice law and to manage their law practices. Outsourcing encompasses the delegation of legal work or administrative tasks to third-party providers outside the law firm. Intellectual technology services, document processing and records management constitute some of the more common administrative tasks outsourced by law firms. Outsourced legal work ranges from legal research and writing to large-scale document reviews and e-discovery compliance.¹

Efficiencies gained through outsourcing can lead to lower costs for clients and increased profit margins for law firms. While the potential benefits may incentivize law firms to consider outsourcing, the risks must be contemplated as well. As delineated below, law firms that mismanage the outsourcing process encourage claims from clients.

An ideal place in which to document the client's informed consent [to using an outsourcing provider] is in the engagement agreement between the law firm and the client.

Obtain Client Consent

Law firms should obtain informed client consent for an outsourcing provider ("OP") that will have access to client information. An American Bar Association ("ABA") ethics opinion addressed this topic, stating that "where the relationship between the firm and the individuals performing the service is attenuated, as in a typical outsourcing relationship, no information protected by ABA Model Rule of Professional Conduct ("ABA MRPC") 1.6 may be revealed without the client's informed consent."² An ideal place in which to document the client's informed consent is in the engagement letter between the law firm and the client. The CNA Lawyers Toolkit 4.0 includes sample language to obtain such consent, noted in sections such as the "Electronic Data Communication and Storage" provision, which attorneys may wish to use in their own engagement letters. If such consent is not captured in the engagement letter, the law firm should memorialize the consent in a separate document to avoid any potential dispute between the law firm and client about whether the client granted consent.

Failing to obtain such consent may expose a law firm to disciplinary sanctions and potential liability, especially if the OP delivers sub-standard work product. For example, in a real estate matter, a lawyer paid another lawyer for a title examination without the client's knowledge or consent. When the title examination proved to be erroneous, which resulted in a foreclosure for the client, she sued her lawyer for legal malpractice. The court found for the client, ruling that absent an express limitation of the scope of representation, the primary attorney was liable for negligence, even though he relied on someone else to perform the title search.³

¹ See CNA's Allied Vendor Program at www.cna.com for a list of potential outsourcing providers that offer legal support and administrative services.

² ABA Formal Ethics Opinion 08-451 (July 9, 2008).

³ *Johnson v. Alexander et al.*, 775 S.E.2d 697 (S.C. 2015).

Remember the Duty to Supervise

The legal profession's insistence on proper supervision of subordinate attorneys and support staff achieves two important goals: it prevents the unauthorized practice of law and prompts lawyers to provide meaningful oversight to client matters. In order to emphasize that supervisory duties applied to third-party vendors outside the law firm, the ABA changed the title of one of its rules of professional conduct from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance" (emphases added).⁴ It also added new language to the Comment section to the Rule, including a new Comment entitled "Nonlawyers Outside the Firm" to explain how law firms should approach this expanded supervisory duty.⁵

Under the ABA Model Rules of Professional Conduct, a lawyer with direct supervisory authority over another lawyer or nonlawyer, which includes entities owned and operated by nonlawyers, must make reasonable efforts to ensure that the conduct of the individuals that she is supervising are compatible with the professional obligations of the supervising lawyer. As a starting point, law firms must exercise due diligence on any OP that they are considering. Such review encompasses making a reasonable effort to evaluate the background of the OP, which includes factors such as education, experience, skill level and reputation.⁶

Once an OP is selected, the duty to supervise continues. The law firm must carefully monitor those providers to ensure that the work is performed competently and in accordance with the lawyers' ethics obligations. In some cases, a lawyer's ability to supervise an OP may be compromised due to language barriers, time zone differences, inadequate communication channels or other reasons. In such circumstances, a lawyer must consider whether the client's best interests would be better served by finding a different OP.

Law firms that neglect their duty to supervise may jeopardize their relationships with clients, have their legal fees reduced, and face disciplinary sanctions. For example, in a Fair Debt Collection Practice Act case, a court reduced the attorneys' fees for the prevailing party by more than 50 percent due to the local counsel's failure to supervise the outside consulting attorneys, who were not licensed to practice law in the court's jurisdiction and failed to seek admission pro hac vice.⁷ In another matter, a court disciplined an attorney who exercised no supervision over the non-lawyer representatives of a document preparation company who used the attorney's name (with the attorney's consent) in targeting elderly widows to pursue expensive estate planning packages.⁸

Protect Client Confidences

Lawyers are not only prohibited from revealing client information absent client consent, they must make reasonable efforts to prevent the inadvertent disclosure of or unauthorized access to client information as well.⁹ Fulfilling this core responsibility requires law firms to explain to OPs the importance of client confidentiality and to perform reasonable due diligence on OPs to confirm that they possess the competencies to assist the supervising lawyers comply with this duty. Various factors to consider when assessing the reasonableness of the lawyer's efforts to prevent the inadvertent disclosure of or unauthorized access to client information include: the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the difficulty of implementing such safeguards, and the extent to which such safeguards interfere with the lawyer's ability to represent clients.¹⁰ Law firms should insist on written agreements with OPs that require OPs to maintain the confidentiality of any client information.

Liability may attach to law firms that fail to fulfill their duty of confidentiality. In one matter, a former client sued its law firm for legal malpractice due to the release of confidential materials. The lawsuit asserted that the law firm's failure to supervise two e-discovery vendors resulted in the production of thousands of documents that should have been withheld due to attorney-client privilege or the work product doctrine.¹¹ The legal malpractice case appears to have settled, and terms of the settlement are not known.

Outsourcing provides many benefits to law firms and their clients if pursued with forethought and by prioritizing the clients' best interests.

⁴ American Bar Association Commission on Ethics 20/20, HOD Report & Resolution 105C (Aug. 2012).
⁵ *Id.*

⁶ See Comment 2 to ABA MRPC 5.3.

⁷ *Bilazzo v. Portfolio Recovery Associates, LLC*, 876 F.Supp.2d 452 (D.N.J. 2012).

⁸ *In re Flack*, 33 P.3d 1281 (Kan. 2001).

⁹ ABA MRPC 1.6.

¹⁰ See Comment 18 to ABA MRPC 1.6.

¹¹ *J.M. Manufacturing Co., Inc. v. McDermott Will & Emery, et al.*, CA Sup. Ct. Los Angeles County—Central Dist., Case No. BC462832, file June 11, 2011.

Prevent Conflicts of Interest from Developing

The conflict of interest rules applicable to attorneys typically address non-lawyer support staff and OPs as well. For example, a law firm should decline contracting with a private investigator who has already performed work for the opposing party on the same matter. In order to discover potential conflicts, law firms should develop and use a conflicts-of-interest questionnaire to determine whether a non-lawyer OP has performed, or is performing, work for any parties adverse to the law firm's client.

Conflict of interest concerns intensify when the OP is a lawyer performing legal work. Even if the OP lawyer works on a matter for a short duration or discrete part of the representation, she is representing the law firm's client and owes that client a duty of loyalty. The supervising attorneys at the law firm, as well as the OP, have a responsibility to ensure that no conflict exists or develops. The law firm's conflicts check of the OP lawyer should include recent and current matters that she has provided or is providing legal services, the clients, the opposing parties, the general nature of the matters, and the law firms that have employed her as either a member of the firm or as an OP. The law firm should inquire about the OP's own conflict checking system and whether running the client's name in the OP's system produced any information that may preclude the outsourcing relationship.

Whether or not the OP lawyer's past and current representations can be imputed to the law firm depends upon the closeness of the association between the OP and the law firm.¹² If the OP lawyer works in the law firm's office and has access to the client files of the law firm's other clients, imputation probably will apply. In jurisdictions that permit screening to cure conflicts of interest, law firms must follow the prescribed methods of their jurisdiction with respect to timely erection and notification of screens. Law firms operating in jurisdictions that do not recognize screens may be required to obtain conflict waivers in order to utilize a certain OP on a case. Where consent cannot be obtained or is not practical, the law firm should consider declining the contracting engagement with the OP or, at a minimum, change the nature of the association with the OP. Lawyers and law firms should review the laws, rules, and ethics opinions of the relevant jurisdiction.

Beware of Vicarious Liability

The strict duty to supervise that law firms must exercise when using OPs has led some courts to find law firms vicariously liable for the OPs negligence, even when the OP is an independent contractor. In one case, an attorney hired an agency to serve process on a doctor in an underlying medical malpractice matter. After the agency failed to serve the doctor within the statute of limitations, which resulted in the case being dismissed, the client sued the attorney for legal malpractice for failing to effectuate service of process. In finding for the client in the legal malpractice case, the court ruled that the attorney had a non-delegable duty to ensure proper service and that outsourcing work related to that duty has its limits.¹³

Charge Reasonable Fees and Expenses for Outsourcing

Lawyers' fees and expenses must be reasonable, which applies to costs associated with OPs as well.¹⁴ The ABA addressed the issue of charging clients for outsourcing services in an ethics opinion. Pursuant to the Opinion, no surcharge or markup is permitted where the law firm invoices the OP's services as an expense or disbursement, absent an express agreement with the client authorizing an increased charge. If, however, the OP's work falls within the legal services billed to the client, the lawyer may charge the client solely for the actual cost "plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies" for the OP.¹⁵ If the OP worked off-site and required little or no infrastructural support from the law firm, the rationale for a surcharge diminishes.

Conflict of interest concerns intensify when the OP is a lawyer performing legal work.

¹³ *Kleeman v. Rheingold*, 614 N.E.2d 712 (N.Y. 1993).

¹⁴ ABA MRPC 1.5.

¹⁵ ABA Formal Ethics Opinion 08-451.

¹² Colorado Bar Ethics Opinion 105, "Opinion on Temporary Lawyers," (May 22, 1999).

Law firms considering a surcharge to clients for the costs associated with OPs should proceed with caution. Some jurisdictions prohibit surcharges, so lawyers must review the laws, rules, and ethics opinions of the relevant jurisdiction. Where allowed, if the law firm wants to levy such a surcharge, it should obtain the client's informed consent, memorialized in the engagement agreement or a separate document. Fee disputes between lawyers and clients constitute a leading cause of legal malpractice lawsuits.¹⁶ In attempting to avoid responsibility for the debt, some clients will contend that the lawyer's negligence caused them to withhold payments. Filing requirements in certain jurisdictions mandate that client/defendants in a collection action file a compulsory legal malpractice counterclaim in order to assert such a defense. Lawyers and law firms, therefore, should weigh whether the benefits of a surcharge to clients outweigh the risks.

Conclusion

Outsourcing provides many benefits to law firms and their clients if pursued with forethought and by prioritizing the clients' best interests. Law firms should pay attention to their duties in selecting and supervising OPs to ensure that the provider adds value to the representation. So long as they delegate the work, but not the concomitant duties, outsourcing will continue to aid lawyers in serving their clients and operating their law practices.

¹⁶ See CNA's "Taking Stock of a Potential Fee Collection Suit" at www.cna.com.

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