ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL RESPONSIBILITY

REPORT ON THE OUTSOURCING OF LEGAL SERVICES OVERSEAS

I. Introduction

Legal services may be outsourced pursuant to a contractual relationship in which a lawyer agrees to pay for legal support services provided by an individual who resides in a foreign country and is not admitted to practice in any United States jurisdiction.[1] The services may include conducting legal research, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, performing due diligence, or drafting contracts.

For several years, law firms and corporate law departments have outsourced work to foreign law firms and legal support businesses, which allowed firms and law departments to enjoy significant cost savings, reduce response time, and efficiently manage overflow work.[2] Outsourcing has expanded as corporate legal departments and law firms have faced growing pressure from clients to reduce costs and manage operations more efficiently.

There are many variations on contractual outsourcing arrangements. These include: (i) a U.S. law firm or law department entering into a contract with a U.S. or foreign "outsourcing" intermediary company that retains and manages foreign lawyers to undertake certain aspects of its work for its U.S. law firm client; (ii) a U.S. law firm or law department entering into a contract with a foreign law firm to provide legal support services (the U.S. law firm does not enter into a co-counsel relationship with the foreign law firm, and thus retains full responsibility for the work performed); (iii) "captive outsourcing," in which the legal department of a major corporation directly hires foreign lawyers who are admitted in their local jurisdictions to provide

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[1] *See* N.Y. City Formal Op. 2006-3 (August 2006).

[2] *See, e.g.*, Strafford Teleconference, "Ethical Risks of Offshore Outsourcing of Legal Services" (August 5, 2008).

direct legal support services; and (iv) a U.S. law firm entering into an arrangement with a foreign law firm to outsource certain aspects of U.S. legal work to a foreign law firm, with the understanding that the work will be completed in the foreign jurisdiction. The individuals performing the services include lawyers admitted to practice in the foreign jurisdiction but not admitted in any U.S. jurisdiction, and non-lawyers.

In 2006, the Committee on Professional and Judicial Ethics of the New York City Bar issued an advisory opinion concluding that a New York lawyer may outsource legal support services offshore ethically provided that the lawyer (i) rigorously supervises the non-lawyer to avoid aiding in the unauthorized practice of law and to ensure competent representation of the client; (ii) takes steps to ensure the preservation of client confidential information; (iii) attends to conflict checking to avoid conflicts of interest; (iv) bills appropriately for the services provided; and (v) obtains advance client consent when appropriate.[3]

Recently, the American Bar Association issued an opinion similarly approving outsourcing of legal services, noting that "[t]here is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided the outsourcing lawyer renders legal services to the client with the 'legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation' as required by Rule 1.1 [of the ABA Model Rules of Conduct]."[4] Ethics opinions issued in other states have also concluded that outsourcing legal services is permissible

[3] N.Y. City Op. 2006-3 (2006).

[4] ABA Formal Op. 08-451 (August 5, 2008).

provided that the outsourcing lawyer complies with his or her other ethical obligations under the governing ethics code or rules.[5]

Although these various bar opinions address the propriety of outsourcing legal work abroad, they do not address the *manner* in which lawyers can discharge their ethical obligations in situations in which a U.S. law firm outsources substantive legal work to foreign professionals. This paper will do so. In Part II, we identify five specific ethics issues raised by the outsourcing of substantive legal work. In Part III, we suggest several common outsourcing scenarios, and provide guidance for the practitioner in each scenario.

II. Specific Ethics Issues Raised by Outsourcing

Lawyers engaged in the outsourcing of substantive legal work must consider their ethical obligations to do the following: (1) ensure competence and appropriate supervision; (2) preserve the client's confidential information; (3) check for conflicts of interest; (3) disclose the outsourcing arrangement to the client; and (4) avoid assisting in the unauthorized practice of law.[6]

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[5] *See, e.g.*, Fl. Bar Op. 07-2 (January 18, 2008) ("A lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing," and should be "mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties"); North Carolina 2007 Formal Eth. Op. 12 (April 25, 2008) ("lawyer may outsource limited legal support services to a foreign lawyer or a nonlawyer (collectively, "foreign assistants") provided the lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the clients' advanced informed consent."); San Diego Bar Op. 2007-1 ("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"; lawyers must "have sufficient knowledge to supervise the outsourced work properly," "make sure the outsourcing does not compromise their other duties to their clients," and inform clients of the anticipated involvement of the company providing the outsourced services at the time they decide to use the firm).

[6] We note that similar considerations apply to domestic outsourcing.

A. Competence and Supervision

Lawyers have a duty to be competent in the representation of clients, and to ensure that those who are working under their supervision perform competently. A lawyer should "strive to become and remain proficient in his or her practice and should accept employment only in matters which she or he is, or intends to be (either directly or through associated counsel), competent to handle."[7] A lawyer is prohibited from handling a matter that the lawyer knows or should know she or he is not competent to handle without associating a lawyer who is competent, and should not handle a legal matter without the preparation adequate in the circumstances.[8]

To satisfy the duty of competence, a lawyer who outsources work offshore must ensure that the tasks in question are delegated to individuals who possess the skills required to perform them, and that the individuals are appropriately supervised to ensure competent representation of the client.[9] A lawyer can satisfy his or her ethical duty of competence based on his or her own experience and mastery of the area or law, competent study of the area of the law, or by association with competent counsel who has the experience or knowledge to practice in the relevant area of law.[10]

When a lawyer or law firm outsources work to a foreign lawyer or nonlawyer, the lawyer and law firm also have an ethical duty to supervise the work and ensure that it is executed

[7] Lawyer's Code of Professional Responsibility, EC 6-1.

[8] New York Rules of Professional Conduct, Rule 1.1(b). This report will cite the New York Rules of Professional Conduct (the "Rules"), adopted as of April 1, 2009.

[9] ABA Op. 08-451 (August 5, 2008).

[10] *See, e.g.*, S.D. Bar Opinion 2007-1 ("The duty to act competently requires informed review, not blithe reliance; " a lawyer may outsource only if his or her experience is sufficient to perform the work).

appropriately.[11] While New York law firms are accustomed to supervising lawyers and non-lawyers alike when those lawyers are located in the same office, or in a different office of the same law firm, supervision may become more difficult when the individuals being supervised are in a different firm, in a different country, have been trained in the rules of a different legal system, and do not speak English as their first language.

When delegating tasks to lawyers in remote locations, the physical separation between the outsourcing lawyer and those performing the work can be thousands of miles, with a time difference of several hours further complicating direct contact. Electronic communication can close this gap somewhat, but may not be sufficient to allow the lawyer to monitor the work of the lawyers and non-lawyer working for her in an effective manner.[12]

As noted by one ethics committee, "[i]f 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."[13] In addition, the lawyer must understand any material differences between the U.S. legal system and the foreign legal system in which the foreign professional has been trained, including the extent to which any differences may affect the protection of confidences and supervision of the legal services to be provided.

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[11] *See* New York Rules of Professional Conduct, Rule 5.3(a) ("A law firm shall ensure that the work of nonlawyers who work at the firm is adequately supervised as appropriate"); New York Rules of Professional Conduct, Rule 5.3(b) (" A lawyer shall be responsible for the work of a nonlawyers employed or retained by or associated with the lawyer that would be a violation of these rules if engaged in a lawyer" where the lawyer exercises supervisory authority over the nonlawyer and knew or should have known of the conduct and could have prevented it).; *see also* ABA Op. 08-451 (August 5, 2008).

[12] ABA Op. 08-451 (August 5, 2008).

[13] North Carolina Formal Ethics Op. 12 (April 25, 2008).

Accordingly, the New York law firm should establish practices and procedures for the supervision of offshore legal support that are sufficiently adaptable to the specific offshore entity and compensate for the physical separation, time zone differences, and any differences in legal systems and legal education and training. This requires the law firm to become sufficiently familiar with the professional training of the foreign professionals, attend to training the foreign professionals in relevant legal and ethical rules, and establish regular communication practices to ensure that the foreign professional has reasonable access to supervising lawyers in the local law firm.

B. Preservation of Confidential Information

In New York, lawyers have a duty to protect the confidential information of their clients; no lawyer may "knowingly" reveal client confidential information.[14] Lawyers also have a duty to exercise reasonable care to ensure that a client's confidential information is not disclosed or used by the lawyer's employees, associates and others whose services are used by the lawyer.[15] When lawyers outsource legal work to foreign professionals, they have a duty to ensure that the foreign professionals maintain client confidential information.

Ensuring the preservation of confidential information by foreign professionals is more difficult where the foreign professionals operate under different laws and traditions regarding the confidentiality of information learned from clients. For example, in most civil law jurisdictions,

[14] New York Rules of Professional Conduct, Rule 1.6(a); *see also* DR 4-101(B)(1);

[15] New York Rules of Professional Conduct, Rule 1.6(c); *see also* DR 4-101(D); N.Y. State 782 (2004) (duty of reasonable care under DR 4-101(D) extends to use of e-mail by employees or agents under the lawyer's supervision); *see also* Model Rules 1.6, 5.1 and 5.3 (addressing the lawyer's duty of confidentiality under the Model Rules).

communications with in-house counsel are not considered privileged.[16] At the same time, in such jurisdictions, the parameters surrounding confidentiality of a client's identity and the scope of permissible disclosure of information about, and materials belonging to, clients are more restrictive than in the U.S.[17] A lawyer who directs its clients' materials to a foreign jurisdiction, or who retains non-U.S. lawyers or legal staff to provide legal services, should be aware of these differences in law and the myriad ways in which U.S. courts have addressed concomitant conflicts of law questions.[18]

In some non-U.S. jurisdictions, a government's ability to seize assets is far more plenary than in the United States, raising concerns about the security of client data. Indeed, if this is true in the jurisdiction in which the New York lawyer intends to outsource work and is relevant to the contemplated representation the foreign government's seizure authority should be discussed with the client and the client's consent should be obtained before engaging in the outsourcing arrangement.

In certain instances, the New York lawyer may be aware of heightened confidentiality concerns governing information relevant to a particular representation. This would be the case,

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[16] See Joined cases T-125/03 & T-253/03, *Akzo Nobel Chemicals, Ltd. v. Commission* (Sept. 17, 2007) (where Commission of the European Communities carried out a raid of Akzo Nobel and its subsidiary in connection with its investigation of anti-competitive practices by the two companies, court ruled that communications between in-house counsel and manager were not privileged because privilege only covers communications with "independent' lawyers) *located at* http: //ear-lex.europa.eu/LexUriServ.do? uri=CELEX:62003A0125:EN:HTML; *see also* Lex Mundi, "In-House Counsel and the Attorney-Client Privilege" (2005) (the attorney-client privilege was recognized under the India Evidence Act of 1972, but the protection afforded generally does not cover communications with in-house counsel).

[17] *See* Robert Morvillo and Robert Anello, *Attorney-Client Privilege and International Investigations*, NYLJ (August 7, 2008).

[18] *See, e.g., Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D.N.Y. 2002) (where most of the documents subject to the challenge to a claim of privilege were foreign documents, determination of the applicability of the attorney-client privilege or work product protection implicated issues of foreign law).

for example, where the matter concerns trade secrets or company proprietary information, or where information is filed under seal or must be kept confidential pursuant to court order. In such instances, the lawyer necessarily will require special consideration of whether it was appropriate, or even permissible, to outsource work that requires disclosure of this information to foreign professionals. In addition, federal law may prohibit sending certain information offshore. If sharing information with a foreign professional is prohibited under federal law, the New York firm must either limit the scope of legal services to be provided offshore to those which would not require sharing information subject to the federal prohibition, or refrain from outsourcing the work.

Based in part on the considerations described above, the Committee on Professional and Judicial Ethics concluded that if an outsourcing assignment requires the lawyer to disclose client confidential information to the foreign professional, then the lawyer should secure the client's informed consent in advance.[19] As an initial matter, compliance with the confidentiality obligations under the Rules requires that the New York lawyer understand the differences between the rules governing confidentiality in this jurisdiction and the foreign jurisdiction, and instruct the foreign professionals on the duty under U.S. law to maintain client confidential information. The lawyer must adapt for differences in the legal requirements in the two jurisdictions, possibly by entering into contractual arrangements with the offshore provider in which the offshore provider would agree to confidentiality restrictions that otherwise would not

[19] N.Y. City 2006-3 (2006); *see also* N.Y. State 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 721 (1999) ("[i]f the lawyer would have to disclose confidential information 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").

exist under the offshore provider's local law. The lawyer should also obtain sufficient assurances relative to the risks inherent in the transfer of digital information containing confidential information, and should consider restricting access to sensitive client information (both physical and electronic) where prudent. If feasible, a New York law firm or legal department may consider reducing confidentiality concerns by establishing a captive outsourcing arrangement where the firm or department either hires lawyers admitted to practice in the foreign jurisdiction as direct employees of the department or firm or establishes a subsidiary company or law firm in the foreign jurisdiction.

C. Conflict Checks

Rule 1.10 (e, f, g), requires law firms to maintain records of prior engagements and have a system by which proposed engagements are checked against current and previous engagements. In Opinion 2006-3, the Committee on Professional and Judicial Ethics concluded that the New York lawyer should inquire into the conflict-checking procedures used by the intermediary that retains the foreign professional, including its system for tracking work performed for other clients. *Id.*[20] The lawyer should also determine whether the intermediary and the foreign professionals who will perform the work are providing, or have provided, services to any parties who are adverse to the lawyer's client.

Finally, the New York lawyer should pursue further inquiry into any specific confidentiality issues, as required, and remind the intermediary and the non-lawyer in writing to

[20] As in N.Y. City 2006-3, footnote 4, this report is limited to "substantive" legal support services and not to "administrative" services such as transcription, word processing or document solutions companies that provide duplication/scanning/Bates stamping services in connection with litigation. No conflict inquiry is necessary of these administrative service providers, and these providers are neither required nor expected to conduct conflict checks before providing services in connection with a matter. It is probably advisable, however, not to discuss the nature of the matter with such providers.

protect the confidential information of their other current and former clients. *Id.* To assist in fulfilling this obligation, the lawyer may wish to develop a conflict questionnaire for use in situations in which he or she wishes to outsource work offshore, and make as a requirement of any retention of the foreign professional completion and satisfaction of the conflicts check questionnaire.

We note that the process followed with respect to (i) an intermediary and (ii) a foreign professional retained by the intermediary will depend on the nature of the relationship between the New York lawyer and the intermediary and/or foreign professional. For example, if the intermediary and/or the foreign professional are functioning as co-counsel, then they would be expected to perform a conflict check consistent with New York's ethics rules. If, however, the nature of the relationship is more akin to that which exists between a law firm and a temporary attorney agency, where the temporary attorney is retained to assist with a specific matter and the intermediary has no contractual responsibility for conducting conflict checks, then the New York lawyer remains fully responsible for the conflict check. In this instance, the New York lawyer should have the intermediary and foreign professional complete a conflict questionnaire listing recent matters, clients, and adverse parties to assist the New York lawyer's ability to search to determine whether the temporary attorney or intermediary have worked, or are working, on matters that are substantially related to the New York lawyer's ongoing representations.

At most, the intermediary and foreign professional should only have access to the confidential information of the New York lawyer's client in the immediate matter (*i.e.*, the foreign professional should not be able to access information regarding other clients of the New York lawyer). Therefore, it is sufficient to ensure that the intermediary and foreign professional

is not side-switching for *that matter*. In other words, if the intermediary and foreign professional are working on a different matter that is substantially related to the New York lawyer's representation of another client in an unrelated matter, the unrelated representation by the intermediary and/or foreign professional should not be imputed to the New York lawyer provided that the intermediary and foreign professional can confirm that they are not working, and have not worked, on a related matter.

D. Client Disclosure, Client Consent

In Opinion 2006-3, the Committee on Professional and Judicial Ethics concluded that a New York lawyer who outsources legal work to offshore providers need not "reflexively" inform a client each time the lawyer intends to outsource legal support services offshore to a non-lawyer. The Committee articulated factors that would favor disclosure and consent from the client, including: (i) whether non-lawyers will play a significant role in the matter; (ii) whether client confidential information must be shared with the foreign professional; (iii) whether the client expects that only personnel employed by the law firm will handle the matter; or (iv) whether nonlawyers are to be billed to the client on a basis other than cost.[21] Assuming client consent is advisable, such consent should be formalized in a writing to avoid any confusion later.

[21] *See also* Florida Op. 07-02 ("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.").

E. Unauthorized Practice of Law

Rule 5.5 of the New York Rules of Professional Conduct provides that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law."[22] One ethics committee explained that the rule would permit a New York lawyer to use the services of non-lawyers to perform a range of services – including researching questions of law and drafting contracts, pleadings and briefs – provided that there is adequate supervision, which requires advance consideration of the work that needs to be done and review of the work after it has been performed.[23]

To avoid aiding the unauthorized practice of law, the Committee on Professional and Judicial Ethics advised that the lawyer retain complete responsibility for the work of the foreign professional, use his or her professional skill and judgment to set the appropriate scope for the foreign professional's work, and then vet this work to ensure its quality.[24]

III. Outsourcing Scenarios

We now address the steps that lawyers can take to ensure outsourcing that is consistent with a New York lawyer's ethical obligations in the context of several outsourcing scenarios that are described below.

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[22] *See also* New York Judiciary Law § 478 ("it shall be 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 . . . .").

[23] N.Y. State 721 (1999); *see also* N.Y. State 677 (1996) (a lawyer representing a bank in a real estate transaction may delegate attendance at the closing to a paralegal provided the delegation does not substitute for the direct relationship between the attorney and client and the lawyer properly supervises the sufficiency and competence of all work delegated to the paralegal).

[24] N.Y. City 2006-3 (2006).

Scenario 1

A New York law firm retains a foreign law firm, through an intermediary company, to conduct patent searches on behalf of some of the New York firm's clients. The intermediary will verify the credentials of the foreign firm and check conflicts. Lawyers and non-lawyers at the foreign firm may work on the matters. The foreign lawyers are licensed to practice law in the foreign jurisdiction, but are not licensed in any U.S. jurisdiction. The foreign firm will not have access to any client confidences with the exception of confidential information (if any) that is necessary to perform the patent searches.

1. Competence and Supervision

In this scenario, the patent searches that must be completed for several clients of a New York law firm have been outsourced to foreign lawyers and non-lawyers through an intermediary company that is responsible for verifying the credentials of the foreign firm. To satisfy its ethical duty of competence, the New York firm must first confirm that the intermediary will competently carry out the credentialing of the foreign lawyers.

As an initial matter, the law firm should consider the following steps to ensure the competence of the lawyers and nonlawyers retained to perform the legal support services:

- Intermediary Interviews. The law firm should interview the intermediary's managers and employees. This inquiry should solicit information on the intermediary's retention practices, which will assist the firm in evaluating the quality and character of the lawyers and non-lawyers that will be retained.

- Intermediary Reference checks. The law firm should obtain and check references for the intermediary to satisfy itself of the competence of the people who will be involved in confirming the credentials of the outsourced legal support.

- Professional Credentialing. The law firm should learn about any professional credentialing scheme (including relevant training, education, certification and/or degrees) and disciplinary regime applicable in the foreign jurisdiction, determine the credentials that the law firm requires for the patent work to be conducted, convey the firm's requirements to the intermediary, and require the intermediary to provide credential and disciplinary information to the firm as part of its credentialing process. The law firm should also find out whether there is testing or a certification process in the foreign jurisdiction for the legal support work that

the firm wishes to outsource.[25] At all times, the New York firm must consider that it is ultimately responsible for the work that is performed, and the competence of the individuals (local or foreign) who work on the matter.

- Foreign Worker References. The New York firm should require the intermediary to provide references for the individuals at the foreign firm who will work on the matter. In addition, the law firm should obtain sample work product where feasible, and request that the intermediary facilitate a direct interview of the foreign lawyers and nonlawyers who are likely to work on the matter, which will assist the firm to ensure ease of communication with the outsourced workers and their suitability for the work.[26]

- Foreign Firm Structure. The firm should gain some understanding, through the intermediary, of the business practices of any foreign law firm referred by the intermediary, including whether compensation is based on performance, procedures for review of work and ethical practices, and whether the law firm will be able to provide feedback on the performance of the outsourced firm's employees. It is also advisable to determine whether the foreign firm has liability insurance, and whether that insurance coverage would apply to a representation of this nature.

- Highly Sensitive Matters. In highly sensitive matters, the law firm may consider retaining a private investigator to provide additional background on the foreign firm and individuals.

Once the law firm has satisfied itself that the lawyers and nonlawyers identified by the intermediary are competent to perform the work, the law firm must ensure that it sets up supervisory procedures that will ensure proper service of the client and compliance with New York's ethical standards. Supervision by the law firm and its lawyers should include (i) ensuring that the foreign worker understands the patent searches to be conducted and the information necessary to conduct those searches; (ii) discussing with the foreign workers any relevant legal

[25] For example, an examination has been developed to certify Indian law students interested in working at outsourcing companies. The examination tests the lawyers' command of English, technology, professional ethics, online legal database and data security laws and certain substantive areas of practice in the U.S. and other jurisdictions, and also includes a personality assessment and an assessment of familiarity with cultural differences. *See* "Ethical Risks of Offshore Outsourcing of Legal Services," Stafford Teleconference (August 5, 2008). Sample questions can be found at http://www.glptest.com/samples/GLPTest_IndicativeQs.pdf.

[26] *See* S.D. Bar Opinion 2007-1.

or ethical rules and constraints; and (iii) gaining an understanding of the foreign firm's practices and procedures with respect to conducting the patent searches and memorializing the results.

The law firm should tailor procedures relevant to the patent work that needs to be performed for supervision of foreign legal support to the education and training of the foreign workers. Such procedures might address conducting online research, communicating information via e-mail or other means, office hours and availability by e-mail or telephone, formatting of work product, and the appropriate method for communicating confidential information. The law firm's lawyers should communicate with the offshore legal support throughout the assignment to continually ensure that the patent assignment has been understood and that satisfactory work is being produced.

2. Preservation of Client Confidential Information

The supervising New York lawyer in the scenario above should consider the following steps to avoid compromising its client's confidential information:

- Assess the level of risk to client information posed by the rules and regulations applicable in the jurisdiction in which the services are being performed. This would include whether there are any data export issues posed by the arrangement (for example, under the EU Data Protection Directive)[27] or other local privacy rules and regulations, whether there is any significant risk of seizure of client data under local law, and whether local Bar rules and case law provide equivalent levels of protection for client data to those applicable in the U.S. lawyer's home jurisdiction.

- Instruct both the outsource provider and the legal services provider as to the U.S. lawyer's obligations, and make preservation of client confidential information a term of contract with the outsource provider. The contractual arrangement with

[27] *See* Directive 95/46 of the European Parliament and the council of 24 October 1995 on the protection of individuals with regard to the processing of personal data in the free movement of such data (imposing information handling requirements on the data any organization wants to process in an EU country).

the outsource provider should also require that the subcontracted service provider be required by contract to comply with confidentiality provisions outlined in the outsourcing agreement and should hold the outsource provider liable for any breaches of the confidentiality provisions by either its employees or subcontracted service providers. It may also be prudent to require any legal service provider who will have access to client data to execute a confidentiality undertaking memorializing its understanding of its obligations to comply with the lawyer's ethical and legal obligations pertaining to preservation of client confidential information and to material inside information under applicable securities laws.

- Review the outsource and legal service provider's data security arrangements and impose minimum requirements for data security as a term of contract. The contract with the outsource provider should also provide for notification to the U.S. lawyer of any breach of the outsource provider's or legal service provider's security systems. Also consider whether other security measures (*e.g.*, encryption of data and use of secure websites) is appropriate.

- Minimize the amount of information about the underlying matter shared with the outsourcing provider—including, in appropriate circumstances, the identity of the client and the nature of the underlying matter.

- If there is a significant risk of governmental seizure of data, minimize the amount of data held by the outsource provider. This can be accomplished by housing client information and data on the U.S. law firm's servers and permitting limited access to such data by the outsource and legal services provider. Under such an arrangement, client data would not be held by the outsource provider on its own servers and systems for any significant period of time, if at all.

- Advise the client as to the risks and advantages of the outsourcing relationship and obtain their informed consent to the arrangement.

3. Conflict Checks

In this scenario, if the intermediary and/or foreign professional will act as co-counsel to the New York lawyer, then the lawyer must rely on the intermediary to ensure that any foreign professional who works on the matter has a system for conflict checking that can assure compliance with New York's conflict rules. This means that as a condition of retaining the foreign professional, the intermediary should be required to demonstrate that the foreign

professional's procedures for checking conflicts are sufficient to satisfy the New York rules. For example, the intermediary should explain its procedures for ensuring that each foreign professional has in place a conflict checking system that complies with New York's rules. The New York firm might insist that the lawyers whom the intermediary contemplates retaining to work on this matter complete a conflict system questionnaire, and the New York firm should review the responses. For example, the firm might request the following information of the foreign professionals and/or the foreign firm:

- Describe the searches you have conducted to ensure that you are not adverse to the client in this matter or in related or unrelated matters.
- Describe the searches you have conducted to ensure that you do not represent the adverse party in any related or unrelated matters.
- Describe the searches you conducted to ensure that you did not previously represent the adverse party in a substantially related matter.

If the intermediary essentially serves as a temporary attorney agency, and the foreign professional as a temporary employee retained to supplement the New York lawyer's staff, then follow the guidance discussed in Section II(3) above.

4. Client Disclosure; Client Consent

New York City Bar Opinion 2006-3, described above, notes that "non-lawyers often play more limited roles in matters than contract or temporary lawyers do." In those situations, the Opinion suggests that there may be "little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to outsource legal support services offshore to a non-lawyer." While this observation may apply to truly tangential, clerical, or administrative outsourced activities, client disclosure should be the rule whenever, as in this scenario, *legal*

work is being outsourced. The outsourcing law firm can thus avoid any suggestion that its clients expected and even understood that the firm would be undertaking the work itself. Of course, disclosure will inevitably occur when the firm passes along the charges for the foreign firm's work. The law firm in the above scenario should inform its clients of the foreign law firm's role in undertaking patent searches.

Beyond disclosure, whether advance client consent is necessary can be determined by following a checklist of considerations. The first consideration is whether a client's confidential information will be disclosed by the outsourcing law firm. With respect to those clients whose confidences will be shared, advance consent must be obtained. Where client confidential information will not be disclosed to the foreign professional, the next question is whether the outsourcing firm plans to bill the clients on a basis other than the actual cost (together with a reasonable allocation of overhead charges associated with the work). If the answer is yes, then advance client consent should be obtained. If the answer is no, then the question comes down to an assessment of the role of the foreign law firm in the clients' representation. If the work being done is relatively ministerial or tangential to the representation, consent is probably not required. As one state bar has framed it, "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. Some may view the role of the foreign firm in this scenario – conducting patent searches – as below the threshold necessary for advance consent. Others would argue that patent searches, legal research, document review, and nearly every legal task that a foreign firm or lawyer might be asked to perform is substantive and far enough along the "degree of risk" scale to warrant obtaining advance consent. The significance

of the role to be played by the offshore firm is plainly a subjective consideration that depends upon the particular circumstances of each case. Generally, consent is recommended.

5. Unauthorized Practice of Law

Although the professionals in the foreign law firm retained in this scenario are licensed to practice law in the foreign jurisdiction, they are not licensed to practice law in New York. The key to whether the law firm can be assured that the foreign professionals may be engaging in the unauthorized practice of law in conducting these patent searches is whether the firm will provide adequate supervision of the foreign professionals.

The New York law firm retains complete responsibility for the work of the foreign professional; the firm and cannot abdicate that responsibility in reliance on the fact that the people conducting the searches hold a law license in the foreign jurisdiction. Instead, the New York firm avoids an unauthorized practice of law problem if it ensures that it supervises the lawyers as described above under "Competence and Supervision."

Scenario 2

A New York law firm hires "Lawyers 'R' Us" to do legal research and some brief writing in connection with a pending matter. Lawyers 'R' Us is a law firm in India that provides legal research, develops case strategy, prepares deposition outlines and drafts pleadings for U.S. law firms and law departments. All of the attorneys who will work on the New York firm's matters are licensed to practice in India, but not in any U.S. jurisdiction.

1. Competence and Supervision

In Scenario 2, the determination of the competence of the foreign professionals should be approached in a manner similar to the approach discussed in Scenario 1, except that there is no intermediary to assist the New York firm with checking the credentials of the professionals from Lawyers 'R' Us. As part of the firm's determination of the competence of Lawyers 'R' Us, the

firm should review sample memoranda and briefs prepared by the professionals who will work on the matter.

Effective supervision of the legal research and writing requires the New York lawyer to assure himself or herself that the foreign lawyer has a good understanding of the issues presented, and is able to identify and research other issues that are pertinent to reaching conclusions on those issues. If the law firm is diligent in its determination that the credentials of the personnel at Lawyers 'R' Us meet the firm's needs, this will go a long way toward providing comfort in the research that is performed. At the same time, the New York lawyer remains responsible for the competence of the work performed – here, substantive work that includes conducting research and drafting pleadings – and therefore the New York lawyers must be vigilant in communicating with the Lawyers 'R' Us personnel to ensure the accuracy and completeness of the results, and check the research locally to the extent necessary to ensure confidence in the work product.

2. Preservation of Client Confidences

All the steps discussed in Scenario 1 above should be considered. In addition, since the outsourcing agent is itself the legal services provider, it may be advisable (depending on the volume of work being assigned through the outsource provider) to request segregation of the U.S. firm's client data from that of other customers of the legal services provider and to request that the staff working on the U.S. lawyer's matter be solely assigned to the particular matter at hand during the pendency of the engagement.

3. Conflict Checks

In Scenario 2, the conflict check would be performed directly by Lawyers ‘R’ Us. As in Scenario 1, the New York firm should assure itself that Lawyers ‘R’ Us understands the obligation to check conflicts and has procedures in place to confirm that its professionals are not engaged, or have not been engaged, in representations that are adverse to the New York firm’s client such that it would be impermissible for the professional to work on the matter. Under New York Rules of Professional Conduct, Rule 1.10, if any professional at Lawyers ‘R’ Us would be conflicted from working on the matter, then all professionals at the firm are vicariously disabled from the representation.

4. Client Disclosure; Client Consent

See the discussion of this topic in Scenario 1. The law firm in this instance should obtain advance client consent because of the substantive legal work that will be performed by Lawyers ‘R’ Us.

5. Unauthorized Practice of Law

The same considerations described with respect to avoiding engaging in the unauthorized practice of law in Scenario 1 apply to the supervision of the work of the Lawyers ‘R’ Us professionals to do research and write briefs in Scenario 2. This would include communicating with the professionals at Lawyers ‘R’ Us regarding the relevant legal issues and close review and possibly spot-checking of the work product.

Scenario 3

The legal department of a diversified New York company that engages in numerous acquisitions and divestitures each year uses an intermediary to hire a foreign law firm to perform due diligence for some of its transactions. The foreign firm will have access to client confidences relating to the transactions. The intermediary will verify the credentials of the lawyers in the foreign firm who work on the company's matters. The lawyers in the foreign firm are licensed to practice law in the foreign jurisdiction, but are not licensed in any U.S. jurisdiction.

1. Competence and Supervision

Scenario 3, like Scenario 1, involves a situation where the legal department of a local company will use an intermediary to retain foreign professionals to conduct work for the company – here, due diligence in connection with the company's acquisitions and divestitures. The credentialing process should be the same as suggested in Scenario 1. The legal department should request that the intermediary check references from other New York firms or companies that have used any of the proposed foreign professionals for due diligence work, and that the intermediary obtain sample due diligence reports. Because confidentiality is often critical in acquisitions and divestitures (both as to the fact that there is a proposed transaction and with respect to much of the information that must be reviewed in due diligence), the legal department should consider using an investigator to do an additional background check on the foreign professionals.

Adequate supervision of this work may require that a lawyer from the legal department either travel to the offshore location to observe firsthand the work of the foreign professionals and interact directly with them for a portion of the due diligence review, and/or spot-check the review locally or in the foreign location.

2. Preservation of Client Confidences

All of the considerations applicable to outsource providers discussed with respect to Scenario 1 are applicable to the intermediary agent in this scenario. With respect to the foreign firm, a general retention agreement should be entered discussing the scope of the engagement and the legal advice to be provided. The company employing the foreign-licensed law firm should, of course, make a careful assessment as to whether it is compromising client confidential information through the retention of the foreign firm, and, where applicable, should make inquiry with the non-U.S. firm as to the scope of the privilege and the effect of any applicable data security and data protection laws and regulations on the legal services to be provided.

3. Conflict Checks

The same conflict checking considerations that were described in Scenario 1 apply to this scenario.

4. Client Disclosure; Client Consent

In this scenario, the "client" is itself outsourcing its legal work, rendering this topic inapplicable. Nevertheless, it behooves the in-house legal department to inform the business unit of its outsourcing plans.

5. Unauthorized Practice of Law

The same considerations with respect to the unauthorized practice of law described under Scenarios 1 and 2 apply equally to the legal department's retention of a foreign law firm to perform due diligence in this scenario.

Scenario 4

The law department of a New York pharmaceutical company retains a foreign law firm to draft contracts with vendors regularly used in the company's work inside and outside the United States. The foreign firm will not have access to the company's confidential information. Lawyers and non-lawyers will work on these matters. None of the lawyers are licensed to practice in New York or any other U.S. jurisdiction.

1. Competence and Supervision

Scenario 4, like Scenario 2, involves the direct retention of a foreign law firm – in this instance by a law department rather than a law firm – to draft contracts. The law department should follow the steps outlined in Scenario 1 (with the exception of those steps that concern confirming the credentials of the intermediary) to ensure the competence of the foreign firm to draft the vendor contracts. The law department should obtain samples of contracts drafted by the foreign firm, making sure that the foreign firm is careful not to provide samples that reflect information that would reveal confidential information belonging to a former client of the foreign firm. In addition, the law department should confirm that either the firm has professionals who are familiar with the laws governing the vendor contracts in the relevant jurisdictions, or that the local lawyers who will supervise the work are familiar with the relevant laws and will be able to provide adequate supervision. To ensure adequate supervision, the law department should establish procedures for communicating with foreign law firm personnel by e-mail and telephone.

2. Preservation of Client Confidences

By minimizing the amount of information disclosed to the outsourced legal services provider, the company has limited risk of disclosure. The company should, however, make a

careful assessment of risk and follow the guidelines for retention of non-U.S. counsel set forth in Scenario 3 above.

3. Conflict Checks

The law department of the pharmaceutical company should follow the same procedures with respect to the foreign law firm in this scenario as those outlined with respect to Lawyers 'R' Us in scenario 1.

4. Client Disclosure; Client Consent

See the discussion of this topic in Scenario 3, above.

5. Unauthorized Practice of Law

The same considerations with respect to the unauthorized practice of law described under Scenarios 1 and 2 apply equally to the retention of a foreign law firm to draft contracts by the law department of the company in this scenario.

IV. Conclusion

In the ever expanding global economy, an increasing number of New York lawyers and law firms have elected to outsource substantive legal work. Although such outsourcing may be ethically permitted, the practitioner would be well advised to identify the lurking ethical issues and consider the guidance described in this paper.

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