

White Paper

Legal Process Outsourcing: Avoiding Conflicts, Maintaining Confidentiality and Preserving Privilege

Law firms and their corporate clients are evaluating options for outsourcing legal services as a strategy for legal cost containment. Embracing the advantages of outsourcing with increasing frequency, many companies are already reaping the benefits of this efficient, cost-effective practice.

While evaluating legal outsourcing options, it is wise to consider the ethical implications of such practices. Three key issues that will arise in this analysis are: avoidance of conflicts, maintaining client confidentiality, and preserving attorney work product and attorney-client privileges. As an overarching issue, you will also want to ensure that an unauthorized practice of law is not undertaken by an outsourced service provider.

Bar committees in Los Angeles County, San Diego County and New York City have all ruled that “lawyers may contract with foreign lawyers not admitted to practice in any jurisdiction in the United States, or with non-lawyers outside the United States, to perform legal work for U.S. clients” without aiding the unauthorized practice of law.¹ The Florida Bar has also considered the issue and cited the decisions of Los Angeles County and New York City favorably.² In North Carolina, Proposed 2007 Formal Ethics Opinion 12 states that a lawyer may outsource limited legal work to a foreign lawyer or non-lawyer, provided that the U.S. lawyer properly selects and supervises the foreign assistants, ensures the preservation of client confidences, avoids conflicts of interests, discloses the outsourcing, and obtains the client’s advanced informed consent.³

The American Bar Association has also stated that outsourcing legal work to foreign or domestic attorneys is ethically permissible as long as the supervising attorney takes the appropriate steps to ensure that certain ethical obligations are met. In Formal Opinion 88-356.32, the ABA analyzed the ethical implications that arise with the use of temporary lawyers. When outsourcing legal work, supervising attorneys have a duty to avoid conflicts of interest and maintain confidentiality of information relating to the representation of clients.⁴

¹ Steven J. Mintz, *Ethics Opinions Allow Foreign Legal Outsourcing*, ABA Litig. News Online, July 2007, at: http://www.abanet.org/litigation/litigationnews/2007/july/0707_article_outsourcing.html.

² Professional Ethics of the Florida Bar, Proposed Advisory Opinion 07-2 (Sept. 7, 2007).

³ North Carolina State Bar, Proposed 2007 Formal Ethics Opinion 12 (July 12, 2007). Note: the proposed North Carolina opinion was sent back to the Ethics Committee for further study on October 19, 2007.

⁴ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 88-356.32 (1988).

In considering your legal outsourcing options, it is important to choose a service provider that has proper protocols for avoiding conflicts of interest, maintaining client confidentiality and preserving the attorney work product and attorney-client privilege. Asking about these protocols in advance of an engagement will ensure that the legal team managing the project in the United States has the information necessary to meet all the ethical obligations associated with the project.⁵

AVOIDING CONFLICTS

Legal professionals have an undisputed duty to avoid conflicts of interest. Attorneys may be responsible for any conflicts that result from using a legal outsource provider.⁶ Analyzing this issue in 2006, the New York City Bar opined that “[a]s a threshold matter, the outsourcing ... lawyer should ask the intermediary, which employs or engages an overseas non-lawyer, about its conflict checking procedures and about how it tracks work performed for other clients.”⁷ To avoid potential conflicts and satisfy the requirements of DR 5-105(E), outsourcing providers should keep records of prior clients and have an established system for checking potential clients against current and past clients.⁸

A legal outsourcing company should have a conflicts checking procedure in place that is substantially similar to that of a reputable law firm. Key issues include avoidance of a concurrent conflict of interest with a client already engaged, and avoidance of a significant risk that the representation of one client may be materially limited by responsibilities to another client.⁹

MAINTAINING CONFIDENTIALITY

Corporate legal departments and law firms vigilantly safeguard the confidentiality of their clients' information and data. Preservation of confidentiality is no less important when selecting an outsourcing provider. The confidentiality principles that govern practicing attorneys within the United States apply equally to their agents, regardless of function and geographic location.¹⁰ It is the responsibility of the supervising attorney to ensure that all necessary measures are taken to preserve confidentiality.¹¹ There are no additional

⁵ See Model Rule of Professional Conduct 5.1.

⁶ Los Angeles County BA Prof'l Responsibility and Ethics Comm. (“LACBA”), Op. 2006-518 (2006); NY City BA Comm. on Prof'l and Jud. Ethics (“NYCBA”), Formal Op. 2006-3 (2006).

⁷ NYCBA, Formal Op. 2006-3.

⁸ *Id.*

⁹ See Model Rule of Professional Conduct 1.7.

¹⁰ *Id.*; NYCBA Formal Op. 2006-3; LACBA, Op. 2006-518; see also Steven J. Mintz, *Ethics Opinions Allow Foreign Legal Outsourcing*, ABA Litig. News Online, July 2007, at http://www.abanet.org/litigation/litigationnews/2007/july/0707_article_outsourcing.html.

¹¹ Alison M. Kadzik, *The Current Trend To Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 Geo. J. Legal Ethics 731 (2006); see also NYCBA, Formal Op. 2006-3. (“DR 4-101 imposes a duty on a lawyer to preserve the confidences and secrets of clients. . . . DR 4-101(D) requires that a lawyer ‘exercise reasonable care to prevent his or her employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client.’”).

requirements to ensure the preservation of confidentiality for an off-shore agent of a U.S.-based attorney.¹²

To ensure that client confidentiality is rigorously protected, outsourcing providers should employ a redundant security strategy incorporating physical security, computer and data security, personnel security, and additional protocols. The following security measures and protocols are crucial in protecting client information and maintaining a secure environment.

Physical Security

- Biometric access controls
- Audit trail records to identify the circumstances under which particular information has been accessed
- Offsite storage for digital audit trail records
- Biometric entry and exit locks keyed to individual reviewers to monitor access
- Additional badge identification
- Time and location information access restrictions
- Escort program for visitors
- Visual and motion detection surveillance

Data Security

- Information securely maintained and hosted by the e-discovery review application provider (e.g., Applied Discovery, Concordance, Kroll OnTrack, etc.)
- Secure web access incorporating Proxy/Firewall NAT and Port filtering
- Each individual client team working on a local subnet based on a client/server architecture with a United States data source supported by Citrix or other X-Windows platform
- PCs with biometric access tracking, limited user rights, and disabled media drives and USB/printer ports
- Individual PC firewall and antivirus protection
- Network monitoring and tracking

Personnel Security Measures

- Comprehensive background checks
- Staff security training
- Full time security personnel

Other Security Protocols

- Review team may not use cell phones, cameras, or PDAs in client project areas
- No paper or writing instruments except as necessary for the project and as supplied by the outsourcing provider
- Paper shredded and writing instruments collected at the end of each work session
- All reviewers and personnel required to execute confidentiality and nondisclosure agreements upon hiring

¹² NYCBA, Formal Op. 2006-3.

PRESERVING PRIVILEGE

The preservation of attorney-client privilege and attorney work product is a vital concern when performing document reviews and other litigation support tasks. As with the protection of client confidentiality, it is the duty of the supervising attorney to ensure that attorney-client privilege and attorney work product are preserved during the review process.

The principles of privilege that apply to attorneys in the United States also apply to their agents.¹³ Permitting an agent of a law firm or in-house counsel—such as a paralegal, staff attorney or law student—to review documents does not destroy privilege, regardless of whether the agent is a paralegal in the United States or an attorney in the Philippines.

To preserve privilege in an outsourced project, the document review should be conducted via secure web access to a review platform hosted by an e-discovery service provider in the United States. Electronic documents do not need to be sent or transferred offshore. Foreign attorneys review information via the Internet from secure PCs. This secure process preserves attorney-client privilege and attorney work product in the same way the privilege would be protected if the work were being performed by paralegals or attorneys in the United States.

CONCLUSION

Avoiding conflicts of interest, protecting client confidentiality and maintaining privilege are fundamental concerns in any document review or litigation support project. Regardless of where the work is performed, the supervising attorney is charged with the duty to ensure that proper precautions are taken. Legal outsourcing providers must have technology and protocols in place that are consistent with the obligations of the supervising attorney.

An effective outsourcing strategy requires careful consideration of the protective measures offered by service providers. Advance preparation and ongoing communication will ensure that all parties are properly aligned to avoid conflicts, preserve confidential materials and protect privileged information.

The information contained herein is not intended to provide legal or other professional advice. American Discovery encourages you to conduct thorough research on the legal issues raised in this paper.

¹³ See NYCBA, Formal Op. 2006-3.