Outsourcing Legal Services in Response to Antitrust "Second Requests" for Information: The Ethics Implications

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Under the premerger notification provisions of the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976,[1] parties to certain mergers or acquisitions are required to provide the federal antitrust authorities with information to allow the agencies to conduct a preliminary antitrust analysis of the proposed transaction prior to its consummation.[2] Much of the information the agencies require to conduct their preliminary antitrust analyses appears in the notification filings prepared by parties to the transaction. But the agencies may request additional information and documents from any person required to file a notification (commonly known as a Second Request).[3]

The scope of information produced by companies in response to such Second Requests in recent years has grown steadily.[4] Despite certain admirable reforms of the HSR Second Request process,[5] the cost and burden of responding to such requests remains a major concern.[6]

This article briefly outlines a recent development in response to the burdens and costs of Second Requests: "outsourcing" of large parts of the processing of information called for in such requests. This outsourcing phenomenon presents special ethical challenges to the lawyers who must manage the process.

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[1] *See* 15 U.S.C. § 18(a).

[2] The HSR program became effective on September 5, 1978, after final promulgation of Premerger Notification Rules. *See* 16 C.F.R. § 803.10(a). For an overview of the HSR program, and statistics on its recent implementation, see the agencies' annual report on the HSR program. *See* U.S. Dep't Of Justice & Federal Trade Comm'n, Hart-Scott-Rodino Annual Report (FY 2008), *available at* http://www.ftc.gov/os/2009/07/hsrreport.pdf.

[3] *See generally* Michael Byowitz & William Rooney, *Second Requests: Suggestions for Reform*, Antitrust, Spring 1999, at 43. A typical Second Request seeks details on the sales, facilities, assets, and structures of the businesses involved in a transaction. *See* Fed. Trade Comm'n, Premerger Notification Office, Model Request For Additional Information and Documentary Material (Second Request) (May 2007), *available at* http://www.ftc.gov/bc/hsr/introguides/guide3.pdf.

[4] *See* Statement of Mark D. Whitener Before the Antitrust Modernization Commission 1 (Nov. 17, 2005), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Whitener_Statement.pdf (noting "pressing need to reduce the volume of documents that must be collected, reviewed and produced in response to second requests"). As Mr. Whitener noted in 2005, production of information may be "ten times greater" than in past, entailing "several million dollars in direct costs" and "thousands of boxes" of material, or electronic equivalents. *Id.* at 6.

[5] *See* Deborah Majoras, Chairman, Fed. Trade Comm'n, Reforms to the Merger Review Process (Feb. 16, 2006), *available at* http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf; U.S. Dep't Of Justice, Antitrust Division, Background Information on the 2006 Amendments to the Merger Review Process Initiative (Dec. 15, 2006), *available at* http://www.usdoj.gov/atr/public/220241.htm.

[6] *See* Scott Sher & Daryl Teshima, *e-Normous: The Increasing Burden Associated with Electronic Document Production in Second Request Investigations*, Antitrust Source, Nov. 2005, http://www.abanet.org/antitrust/at-source/05/11/Nov05-Sher11=29.pdf.

The Burden and Cost of Second Requests

One very significant aspect of the cost and burden of responding to an HSR Second Request is the vast volume of documents (especially email and similar communications) that companies increasingly maintain (for business and regulatory purposes or simply because the cost of storage has greatly declined).[7]

The collection and review of such large quantities of information, even using automated search and other computer-assisted techniques, often requires substantial resources, especially the person-power of skilled document reviewers.[8] The compressed time frames for response to agency requests, moreover, coupled with the limited ability of parties to negotiate a more narrow scope, may overwhelm the capabilities of even some of the largest companies, and largest law firms, to respond effectively and efficiently.[9]

The effectiveness of outsourcing has been the subject of some spirited debate within the legal community.

These general problems in dealing with enlarged HSR Second Request obligations have perhaps become even more stark in the current regulatory and financial climate. The current administration appears to be dedicated to more vigorous enforcement of the nation's antitrust laws.[10] Meanwhile, economic turbulence has forced companies to economize in many areas, including (in particular) their expenditures on fees and costs for the services of outside counsel.[11]

The Outsourcing Response

One potential response to the costs and resource pressures affecting companies involved in HSR Second Requests may be the "outsourcing" of document review/information collection services to outside "litigation support" vendors or smaller firms.[12] The effectiveness of outsourcing has been the subject of some spirited debate within the legal community.[13]

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[7] *See* Steven C. Bennett, *Implications of a "Keep It All" Data World*, N.Y. St. B.A. J., Feb. 2009, at 42.

[8] In 2001, an ABA Task Force on Federal Antitrust Agencies reported that obtaining "substantial compliance" with a second request could take "months" and cost "millions" of dollars. *See, e.g.*, ABA Section of Antitrust Law, The State of Federal Antitrust Enforcement—2001: Report of the Task Force on the Federal Antitrust Agencies 10, 30 (2001), *available at* http://www.abanet.org/antitrust/at-comments/2001/reports/antitrustenforcement.pdf. The problem has only grown larger in recent years. *See* D. Bruce Hoffman, *The Digital Age at the FTC: Current Issues in Electronic Document Production and Review*, Antitrust Source, Mar. 2004, http://www.abanet.org/antitrust/at-source/04/03/hoffman.pdf.

[9] *See* Casey R. Triggs, *Effectively Negotiating the Scope of Second Requests*, Antitrust, Summer 1999, at 36 (noting limits on party leverage in negotiations with agencies).

[10] *See* Leslie C. Overton & Ryan C. Thomas, Antitrust Enforcement in the Obama Administration (Apr. 2009), *available at* http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S6176 (noting areas where "more vigorous and aggressive antitrust enforcement seems particularly likely," including "mergers).

[11] *See* Altman Weil, Inc., Law Department Cost Control: An Altman Weil Flash Survey of General Counsel (Dec. 2008), *available at* http://www.altmanweil.com/dir_docs/resource/d664b2c6-9978-4327-a66e-757972ebd091_document.pdf (80 percent of general counsel surveyed cited outside counsel costs as greatest concern regarding 2009 legal spending); Melissa Maleske & Yesenia Salcedo, *The Rating Game*, Inside Counsel, July 2008, at 47 (85 percent of inside counsel agreed that economic conditions are increasing pressure to spend less on outside counsel, from the results of 2008 annual survey of general counsel).

[12] Vendors range from all-in-one service providers, who can find, collect, extract, process, analyze,and produce information, down to smaller, segmented firms that specialize in one or more aspects of ediscovery, including certain esoteric functions, such as a forensic retrieval of deleted information and the processing of information in foreign languages. Some outsourcing firms largely offer skilled contract lawyers and paraprofessionals, who can help review masses of information. *See generally* George Socha & Tom Gelbmann, *Mining for Gold*, L. Tech. News, Aug. 2008, http://www.lawtechnews.com/r5/showkiosk.asp?listing_id=2117297 (describing the results of the Sixth Annual Socha-Gelbmann Electronic Discovery Survey).

[13] *See* Valuenotes, Legal Services Outsourcing: What Do Law Firms Think? (May 2009), *available at* http://www.valuenotes.com/valuenotes/services/reports.asp (noting lack of awareness of alternatives and quality and security concerns, among barriers to use of outsourcing).

Why Outsourcing May Be Attractive in the Second Request Context. The employment of non-legal ancillary services to assist clients is nothing new in the practice of law. In theory, traditional professional responsibility models should suffice to handle the issues that can arise from provision of such services. But the value and complexity of discovery-related services can be unique, and the stakes in a proceeding affected by large-scale information production can be quite high.

To take a simple example: a client might directly provide all of the photocopying services that a particular matter requires. This could mean staffing the project with the client's own personnel on the matter; the allocation of the client's copying machines, paper, and other resources; and, perhaps, the client's assumption of responsibility for any errors and omissions that could occur. Alternatively, a law firm might internalize these costs and burdens by assuming for itself all photocopying responsibilities. Under a third model, an outside vendor might provide some or all photocopying services on the matter. This vendor might have a preexisting relationship with the law firm or the client. This third solution represents a simple form of "outsourcing" some of the work that would otherwise be completed by the client or the law firm.

In the information-production arena, outside e-discovery services have become very big (and sometimes very profitable) businesses.[14] Hundreds of third-party vendors represent an emerging industry developed to assist counsel and clients in managing the sometimes elaborate process of fulfilling massive document production requests.[15]

This trend in the legal arena follows a larger trend toward outsourcing of business functions in a large array of other business operations, especially those involving management of information.[16] Where a discrete portion of a company's many functions can be performed effectively by a service provider external to the company, at substantially lower cost, the company may choose to outsource that function, retaining for itself more of the core, high-value aspects of its business.

Thus, increasing costs for legal services, wider regulatory obligations (such as Sarbanes-Oxley disclosure requirements), and the explosive growth of electronic discovery as a major factor in corporate litigation have all driven businesses (and law firms) to consider the outsourcing of certain functions as a means to reduce costs, while maintaining high-quality service. The ability to provide "24/7" availability, and offer rapid turn-around for labor-intensive projects, have created additional incentives to consider legal outsourcing.

ABA Opinion on Ethics Outsourcing Legal Services. The ABA Standing Committee on Ethics and Professional Responsibility, in a recent formal opinion, described the trend toward increased outsourcing of legal services as "salutary."[17] As the ABA Committee explained, outsourcing may reduce costs for law firms and their clients. Outsourcing, moreover, may permit smaller firms to perform labor-intensive tasks (such as large-scale e-discovery processing), thus increasing the range of options available to clients in their choice among legal service providers. The ABA Committee, moreover, recognized that legal outsourcing may involve a "global" network of service providers, increasing competition in the market for legal support services. The ABA Committee

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[14] A recent Socha-Gelbmann Electronic Discovery Survey, for example, estimates that commercial electronic discovery revenues, already in excess of $1 billion a year, will rise by 30 percent in 2009 and by another 25 percent in 2010. Socha & Gelbmann, *supra* note 12.

[15] The Socha-Gelbmann survey, for example, lists some 600 vendors of electronic discovery services, but notes several recent "departures" from the market. *Id.*

[16] *See generally* Erran Carmel & Paul Tjia, Offshoring Information Technology: Sourcing and Outsourcing to a Global Workforce (2005).

[17] A.B.A. Comm. on Ethics and Prof. Responsibility, Formal Op. 08-451 at 2 (Aug. 5, 2008) [hereinafter ABA Outsourcing Op.] (addressing lawyer's obligations when outsourcing legal and non-legal support services).

concluded that there is "nothing unethical" about outsourcing portions of legal services, so long as all services are provided with the "legal knowledge, skill, thoroughness and preparation reasonably necessary" for representation, and the lawyers involved satisfy their other professional obligations.[18] The ABA Committee outlined the various specific ethical obligations of counsel involved in outsourcing which are outlined and illustrated below.

Firms Must Actively Supervise Outsourced Work. In considering any outsourcing arrangement in connection with a Second Request, therefore, one of the first considerations should be the lawyer's involvement in supervision and review of the vendor's work. A lawyer cannot bait a client into believing that the lawyer will provide legal services and then switch total responsibility for the matter to a non-lawyer. A non-lawyer who falsely offers legal services under the guise of being a lawyer is guilty of unauthorized practice of law in most jurisdictions. And, because licensing of the practice of law is a state matter, a lawyer authorized to practice law in one state cannot, without admission to the other state's bar or *pro hac vice* admission for purposes of a specific matter, perform unlicensed legal services in a foreign jurisdiction. Nor may a lawyer encourage or abet the unauthorized practice of law by others.[19] For this reason, lawyers and clients who want to outsource services in connection with a Second Request must understand that licensed lawyers must actively supervise all such work.

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The precise contours of these ethical and legal prohibitions on the unauthorized practice of law are somewhat ill-defined.[20] In the modern economy, for example, business operations and legal concerns of clients often cross state (and international) boundaries. And the fracturing of legal services into various higher and lower level components may mean that portions of legal services are performed by lawyers in multiple jurisdictions or by support staff who lack legal training and who are not subject to the rigors of professional licensing. Typically, although the work may be balkanized, at least one lawyer must maintain overall responsibility for oversight and control of the work.

In the outsourcing context, the ABA Committee and other authorities have declared that supervision of all work by a fully-qualified lawyer is key.[21] Thus, the supervising lawyer must "independently verify" any work performed, to ensure that competent service is provided.[22] The lawyer cannot wholesale delegate a matter to an outsourcing service, and claim the work as his or her own. Wholesale delegation of legal work (without supervision), in the words of one ethics opinion, would make the lawyer the "tail" on the "dog."[23] The lawyer, moreover, must be "diligent" in supervision of the service provider.[24] Supervision must be "direct;" the lawyer must be "readily" available to answer questions concerning the work.[25]

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[18] *See id.* at 2.

[19] *See generally* Stephen Gillers, Regulation of Lawyers (6th ed. 2001) (summarizing operation and history of unauthorized practice rules).

[20] *See* Geoffrey C. Hazard & Angelo Dondi, Legal Ethics: A Comparative Study 273 (2004) (unauthorized practice rules have been "especially vexed" in the United States).

[21] *See* Ass'n of the B. of the City of N.Y. Comm. on Prof. and Jud. Ethics, Formal Op. 2006-3 (Aug. 2006) [hereinafter ABCNY Op.], *available at* http://www.nycbar.org/Ethics/eth2006.htm; ABA Outsourcing Op., *supra* note 17, at 2–3.

[22] *See, e.g.*, ABCNY Op., *supra* note 21.

[23] San Diego County B. Ass'n, Ethics Op. 2007-1 (2007) [hereinafter San Diego Op.], *available at* https://www.sdcba.org/index.cfm?pg=EthicsOpinion07-1.

[24] *See* ABCNY Op., *supra* note 21. The ABCNY Opinion suggests that communication during the course of the work is essential, to ensure that the vendor understands the assignment. *See id.*

[25] *See* Fl. B. Ass'n, Opinion 07-2 (Jan. 18, 2008) [hereinafter Fl. Op.], *available at* http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+07-2?opendocument.

The 2008 ABA opinion noted that the Model Rules of Professional Conduct (Model Rules) require that a lawyer who employs, retains, or associates with non-lawyers must "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[26] The "challenge" for an outsourcing lawyer, as the ABA Committee observed, is to "ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately."[27]

What seems clear from the ABA opinion is that effective supervision generally requires: (1) pre-hiring inquiry into the capabilities of the vendor, (2) regular communication during the course of the project, (3) some form of quality control, and (4) other "reasonable steps" to ensure that services are rendered "competently" to the client.[28] The supervising lawyer, moreover, must know enough about the subject matter of the outsourced work to judge the quality of the work.[29]

The duty to supervise fully applies in responding to Second Request. The Model Second Request from the FTC requires an affirmative declaration that:

> As required by Section 803.6 of the implementing rules for the Hart-Scott-Rodino Antitrust Improvements Act of 1976, this response to the Request for Additional Information and Documentary Material, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission.

Firms Must Consider Potential Conflicts in Outsourcing Functions for a Second Request

Ethical issues may also arise in some situations if the lawyer fails to check for potential conflicts of interest with the outsourcing vendor. A fundamental principle of professional responsibility is the duty of loyalty that attorneys owe their clients. A lawyer generally cannot represent a client if the representation involves a conflict of interest.[30] The conflicts of one lawyer in a law firm, moreover, may be attributed to other lawyers in the firm.[31]

The ABA, in an earlier ethics opinion, suggested that even a temporary lawyer in a firm may be treated as being "associated" with a law firm, where the temporary lawyer has access to confidential client information and there is thus a "risk of improper disclosure or misuse of information

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[26] Model Rules of Prof. Responsibility, R 5.3(b) (1983), *available at* http://www.abanet.org/cpr/mrpc/rule_5_3.html.

[27] This requirement comports with the lawyer's fundamental duty to provide "competent representation" to the client, and to make "reasonable efforts" to ensure that services provided by the law firm conform to standards of professional conduct. *See* Model Rules of Prof. Responsibility, R 1.1, 1.5(b) (1983), *available at* http://www.abanet.org/cpr/mrpc/rule_1_1.html; http://www.abanet.org/cpr/mrpc/rule_1_5.html.

[28] *See* ABA Outsourcing Op., *supra* note 17. The ABCNY Opinion similarly stated: "[T]he lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality." ABCNY Op., *supra* note 21. *See generally* Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEORGETOWN J. INT'L L. 401 (2007).

[29] *See* San Diego Op., *supra* note 23 (attorney "must be able to determine for himself or herself whether the work is competently done"). One recent decision in the electronic discovery area, for example, emphasized that Rule 26(g) requires the lawyer signing any discovery responses to certify that, after "reasonable inquiry" the response is "complete and correct." Mancia v. Mayflower Textile Services Co., 2008 WL 4595175 (D. Md. Oct. 15, 2008).

[30] *See* Model Rule of Prof. Responsibility, R 1.7(a) (1983), *available at* http://www.abanet.org/cpr/mrpc/rule_1_7.html.

[31] *See* Model Rule of Prof. Responsibility, R 1.10(a) (1983), *available at* http://www.abanet.org/cpr/mrpc/rule_1_10.html (no lawyer in a law firm may represent a client "when any one of them practicing alone would be prohibited from doing so"). The precise application of this Rule is a matter of some subtlety. Law firms, for example, sometimes build "Chinese Walls," to avoid potential conflicts due to imputed knowledge of the affairs of two clients in potential conflict.

relating to representation of other clients of the firm."[32] Although the 2008 ABA opinion does not address the potential for conflicts arising from a law firm's use of an outsourcing firm, the issue clearly may arise in that context. Just as an expert working for one client might divulge information about that client to a lawyer working for an adverse client,[33] so a contract lawyer (or non-lawyer) working for an outsourcing vendor might gain access to confidential information regarding one client and improperly divulge to, or use such information for, another client.[34]

The risk of (at least) claims of conflicts of interest, and the attendant disruption and cost that may arise from such claims, suggests that as part of the investigation of the background and capabilities of the outsourcing vendor, the supervising lawyer should address potential conflicts. A recent New York City Bar Association opinion suggested that the supervising lawyer should: inquire as to the vendor's "conflict-checking procedures and about how it tracks work performed for other clients;" inquire whether the vendor is performing, or has performed, any services for parties adverse to the lawyer's client; "[p]ursue further inquiry as required;" and remind the vendor, "preferably in writing," of the need to "safeguard the confidences and secrets" of the vendor's "other current and former clients."[35] A Florida Bar opinion further suggested that a supervising lawyer should take "extra steps" to make sure that the vendor is familiar with legal conflict rules.[36]

In the Second Request context, although most outsourcing firms are probably doing no work for the government, such vendors may nevertheless have conflicts with some of their other private clients.

In the Second Request context, although most outsourcing firms are probably doing no work for the government, such vendors may nevertheless have conflicts with some of their other private clients. The protection of intellectual property and marketing plans, for example, may be very important where a firm does work for competitors in the same industry. Thus, conflict checks must be an essential part of the choice of an outsourcing vendor for Second Request work.

Review of Vendor's Requirements in Outsourcing Functions for a Second Request. Just as lawyers must do due diligence in the area of conflicts, they must also follow through and ensure that the vendor has adequate confidentiality controls in place before the firm outsources any functions to a vendor that may handle responses to a Second Request. Another fundamental principle inherent in the attorney/client relationship is the duty of lawyers to protect the confidences and secrets of clients.[37] The lawyer's obligation, moreover, extends to persons providing services to a client at the lawyer's direction. Thus, commentary to the Model Rules states: "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."[38]

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[32] *See* A.B.A. Comm. on Ethics and Prof. Responsibility, Formal Op. 88-356 (Dec. 16, 2008) (addressing conflicts with temporary lawyers); *see also* ABCNY Op., *supra* note 21 (suggesting that conflicts of contract attorney may be imputed to law firm, depending upon facts and circumstances).

[33] *See generally* David C. Hricik, *Conflicts and Confidentiality: The Ethical and Procedural Issues Concerning Experts* (Mercer Univ., Walter F. George Sch. of L. Working Paper 2006), *available at* http://ssrn.com/abstract=917164.

[34] Conversely, where the connection between the temporary lawyer and the matter involving a potential conflict of interest becomes "more remote," it should become "more appropriate" to refrain from requiring disqualification. *See* A.B.A. Comm. on Ethics and Prof. Responsibility, Formal Op. 88-356 (Dec. 16, 2008).

[35] *See* ABCNY Op., *supra* note 21.

[36] *See* Fl. Op., *supra* note 25.

[37] *See* Model Rule of Prof. Responsibility, R 1.6 Comment 6 (1983), *available at* http://www.abanet.org/cpr/mrpc/rule_1_6_comm.html (noting that public interest is usually best served by strict rule regarding confidentiality).

[38] *Id.* Comment 16.

These principles logically apply to the outsourcing context. The 2008 ABA opinion on outsourcing, and several other state ethics opinions in this area, have suggested that the client's "informed consent" to the activities of the vendor is a key requirement in outsourcing since "no information protected by [Model] Rule 1.6 [concerning confidentiality] may be revealed [to anyone] without the client's informed consent. The implied authorization [in the Rules] to share confidential information within a firm does not extend to outside entities or to individuals over whom the firm lacks effective supervision and control."[39]

Beyond informing the client that an outsourcing vendor may obtain access to some of the client's confidential information, the ABA Opinion and other recent opinions offer additional practical suggestions. "Written confidentiality agreements" are "strongly advisable in outsourcing relationships."[40] The lawyer should limit the vendor's access to information to "only the information necessary to complete the work for the particular client," and should "provide no access to information about other clients of the firm."[41]

The extent of such precautions presumably must be "commensurate with the risk" of confidentiality breach involved in the vendor's services for the client. Concerns for data security in telecommunications, and even the coverage of foreign laws regarding data protection, for example, may require additional inquiry by the supervising lawyer.[42]

Confidentiality may be especially prominent in the context of Second Requests, where vital competitive information may be exposed. Thus, lawyers must take steps to ensure protection of client confidential information.

Transparency/Disclosure with Respect to Fees for Outsourced Functions. The processing of information in response to Second Requests can be extremely expensive. The client must know, and approve, such expenses.

As a general matter, lawyers cannot charge "unreasonable fees" for their services; nor may they collect "an unreasonable amount of expenses."[43] Legal ethics also prohibit lawyers from sharing legal fees with non-lawyers; and formation of a "partnership" with a non-lawyer that includes the "practice of law" is forbidden.[44] For these purposes, as the ABA Standing Committee on Ethics concluded in 1993, third parties providing services in aid of a lawyer (such as a court reporter or a travel agent) must be treated as a non-lawyer whose fees cannot be included in the lawyer's fees.[45] In 2000, the ABA Committee extended application of the fee rule to temporary lawyers, not-

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[39] *See* ABA Outsourcing Op., *supra* note 17, at 5 (citing Model Rule 1.6(a) and Comment 5 to the Rule).

[40] *See id.* (lawyer must "recognize and minimize the risk" of improper disclosure of confidential information by vendor); see also Los Angeles County B. Ass'n Prof. Responsibility and Ethics Comm., Op. No. 518 (2006) [hereinafter Los Angeles Op.], *available at* http://www.lacba.org/Files/LAL/Vol29No9/2317.pdf ("Confidential information can be disclosed to outside contractors so long as the outside contractors agree to keep the client confidences and secrets inviolate."); ABCNY Op., *supra* note 21 (recommending "contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality").

[41] *See* Fl. Op., *supra* note 25 (lawyer should require "sufficient and specific assurances" that information, 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").

[42] *See id.* (noting "risks inherent to transmittal of information"); ABA Outsourcing Op., *supra* note 17, at 4 (noting risk that documents "may be susceptible to seizure" by authorities in some foreign countries, despite claims of confidentiality).

[43] Model Rule of Prof. Responsibility, R 1.5(a) (1983) (listing eight factors to be considered in determining the reasonableness of fees generally including the time and labor required, the novelty and difficulty of the questions presented, the skill required to perform the legal service, and other considerations), *available at* http://www.abanet.org/cpr/mrpc/rule_1_5.html.

[44] *See* Model Rule of Prof. Responsibility, R 5.4(a) & (b) (1983), *available at* http://www.abanet.org/cpr/mrpc/rule_5_4.html.

[45] *See* A.B.A. Comm. on Ethics and Prof. Responsibility, Formal Op. 93-379 (1993) ("A lawyer may not charge a client more than her disbursements for services provided by third parties . . . except to the extent that the lawyer incurs costs additional to the direct cost of the third party services.").

ing that a "surcharge" could be added to the contract lawyer's costs, but only if the total charge remains "reasonable."[46] In substance, although lawyers cannot take a contract lawyer's work, mark it up as their own, and then charge a premium, a lawyer could use the contract lawyer's work as the base for the lawyer's own work, and then charge for the lawyer's services (paying the contract lawyer separately, out of the lawyer's own funds).

Predictably, the ABA Committee, in its 2008 opinion on outsourcing applied the same approach as in its 2000 Surcharge Opinion on fees for contract lawyer services.[47] Other recent opinions, however, offer more restricted views on appropriate billing for outsourced legal support services. The New York City Bar Association, for example, held that "[a]bsent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing," plus a reasonable allocation of overhead.[48] The Los Angeles Bar Ethics Committee took the view, under California law, that "the attorney must accurately disclose [to the client] the basis upon which any cost is passed on to the client."[49]

These suggestions for full disclosure of fee arrangements actually echo some of the suggestions (but not requirements) outlined in the ABA Surcharge Opinion from 2000. That opinion suggested that "in many instances, the fee and cost structure for a legal engagement" is reflected in a formal agreement between client and lawyer.[50] Such an agreement, the ABA Committee concluded, "or a disclosure concerning fees and costs, may be required by the rules in some circumstances."[51] Although the ABA Committee found "no requirement under the rules for disclosing the identity of specific personnel assigned to a client's matter absent client inquiry," the Committee recognized that "client expectations, and the overall client-lawyer relationship may make such disclosure desirable."[52] The Committee opined that the "spirit" of the Rules "best is served by communication whenever the fee basis or rate structure for services provided to a regularly represented client changes."[53]

Concerns for potential client misunderstandings about fee structures for outsourcing services, coupled with concerns about client confidentiality and conflicts (discussed above), all suggest that careful discussion with a client on the nature and arrangements for outsourcing support may

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[46] *See* A.B.A. Comm. on Ethics and Prof. Responsibility, Formal Op. 00-420 (2000) [hereinafter ABA Surcharge Op.]. The ABA Committee noted:

> When costs associated with legal services of a contract lawyer are billed to the client as fees for legal services, the amount that may be charged for such services is governed by the requirement of Model Rule 1.5(a) that a lawyer's fee shall be reasonable. A surcharge to the costs may be added by the billing lawyer if the total charge represents a reasonable fee for services provided to the client. When legal services of a contract lawyer are billed to the client as an expense or cost, in the absence of any understanding to the contrary with the client, the client may be charged only the cost directly associated with the services, including expenses incurred by the billing lawyer to obtain and provide the benefit of the contract lawyer's services.

[47] ABA Outsourcing Op., *supra* note 17, at 5–6 (citing ABA Surcharge Op., *supra* note 46).

[48] ABCNY Op., *supra* note 21 ("inappropriate" to include cost of outsourcing in legal fees).

[49] Los Angeles Op., *supra* note 40, at 11 (emphasis added) (noting California requirement that client "be kept reasonably informed about significant developments relating to the representation").

[50] ABA Surcharge Op., *supra* note 46, at 1 n.1.

[51] *Id.*

[52] *Id.* at 2 n.1.

[53] *Id.* at 4. The ABA Committee also noted several state ethics opinions, which "expressly or impliedly observe[] that it is improper to add surcharges on payments made to a contract lawyer when billed to the client as disbursements unless there is an agreement with the client or disclosure about a markup in advance of the billing." *Id.* at 6 (citing to ethics opinions from Virginia, Colorado, and the District of Columbia).

be the best way to uphold the lawyer's obligation to provide the client competent and effective services.[54]

The New York City Bar Association, in this regard, has opined on circumstances where disclosure may be essential: (1) Where the outsourcing service will "play a significant role in the matter," for example, where "several non-lawyers are being hired to do an important document review." (2) Where "client confidences and secrets" must be shared. (3) Where "the client expects that only personnel employed by the law firm will handle the matter." (4) Where outsourcing services are to be billed to the client on a basis "other than cost." In short, the client is entitled to know who is providing legal representation and is entitled to know the basis on which an outsourcing service may be assisting the supervising lawyer.[55]

In the Second Request context, where time may be compressed due to the need to complete a deal promptly, advance consideration and disclosure of plans for how to handle large volumes of information may be essential. If outsourcing is an option, the client should be informed, if possible, in advance of expected arrangements for such work.

Conclusion

The burdens and costs involved in responding to Second Requests can be crushing. As a result, the use of outsourcing to ameliorate the difficulties in responding efficiently may become increasingly attractive to clients. Counsel involved in Second Request processing thus must familiarize themselves with the norms of outsourcing practice and learn to recognize the ethical hazards involved in such practices.

The past year has been economically unclear for the legal profession in general, and for in-house counsel in particular. But the ongoing changes in the profession started much earlier than this most recent downturn of the economy. The changing economics of law may well, in time, work a "transformation" in how legal work is staffed and completed.[56] These changes, however, implicate various ethical concerns, many of which are fundamental to the profession. For lawyers and their clients involved in the transformation of established methods of doing business into new, perhaps more efficient, arrangements, a solid understanding of these fundamental principles is essential. Lawyers and their clients, moreover, must "watch this space," as new ethical opinions and guidelines seek to answer some of the more difficult questions involved in this transformation of the modern profession. ●

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[54] The Model Rules, in this regard, require that a lawyer *shall* "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and "keep the client reasonably informed about the status of the matter." Model Rule of Prof. Responsibility, R 1.4(a) (2)–(3) (1983), *available at* http://www.abanet.org/cpr/mrpc/rule_1_4.html. Further, a lawyer must explain a matter to a client, "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Model Rule of Prof. Responsibility, R 1.4 (b).

[55] The ABCNY Opinion cited an earlier New York State Bar Opinion to the effect that, where a contract lawyer is making "strategic decisions" or performing "other work that the client would expect of the senior lawyers working on the client's matters," the firm should disclose the nature of the work performed, and obtain client consent. ABCNY Op., *supra* note 21 (citing N.Y. St. B. Ass'n Comm. on Prof. Ethics, Op. 715 (1999)); *see also* ABA Outsourcing Op., *supra* note 17, at 4 ("clients are entitled to know who or what entity is representing them").

[56] *See generally* Richard Susskind, The End of Lawyers? (2008); Richard Susskind, The Future of Law (1996).