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***Offshore Legal Outsourcing and Risk Management:
Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(H)***
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This article proposes that law firms whose clients want to use Legal Process Outsourcing (LPO) companies (i.e., intermediary firms that contractually loan paralegals and attorneys to legal departments and law firms because the services provided by LPOs are more efficient and cost effective) have the ethical right to prospectively limit their liability in connection with this arrangement. Because many LPO employees are “non-lawyers” who are often located overseas and not trained to practice law in the U.S., a U.S. law firm must stringently supervise these attorneys to reduce the risk of liability for negligent work product. Thus, outsourcing may result in increased costs to the law firm due to the increased risk of liability and the extra steps the firm must take to ensure that the *Model Rules of Professional Conduct* are upheld. Hence, limiting prospective liability could offset the risks and make offshore legal outsourcing more efficient and cost effective.

Ethical Duties and Risk Considerations

Although lawyers who outsource legal work to overseas LPOs are subject to higher ethical standards than those governing their local practices (particularly in the areas of competence, supervision, diligence, communication, and scope of representation), lawyers can take certain steps to integrate LPO into their practice in an ethical manner and thereby mitigate the risk of violating their ethical duties. For example, in order to competently represent a client, a lawyer could avoid having to re-do work that has been outsourced by selecting an LPO that employs highly credentialed lawyers from the best known and most respected law schools in that country. Additionally, the U.S. lawyer could conduct extensive background checks of the LPO employees verifying academic records and previous employment, perform regular quality control checks, and provide significant training using sample projects to ensure effective communications.

The burden of extra supervision for LPOs, due to the varying locations and training of workers, can be addressed by providing on-site qualified project managers, such as U.S.-trained lawyers, to oversee the project and ensure quality work product is being produced. Having LPO employees work exclusively for one firm, and providing them with contact information for the lawyers they are assisting in the U.S. also will assist the law firm in its supervisory responsibilities.

Due diligence becomes a greater responsibility for a U.S. law firm working with an LPO to ensure the work submitted adheres to U.S. standards. In the context of a legal research project, due diligence risks can be minimized by requesting samples of the LPO’s prior projects and conducting pre-project training on research techniques. The risks can also be reduced by engaging in regular communications with the LPO’s employees during the research project. The hiring firm should also examine the LPO’s response and recovery plan in the event of an emergency to ensure that the LPO regularly updates the electronic data it stores remotely and make sure that the data is accessible and usable by the firm’s lawyers, even if the firm’s offices no longer exist.

The hiring law firm should also maintain a consistent and honest stream of communication between its U.S. employees, the outsourced staff and the client itself. The firm should advise the client on how its legal representation might change, if at all, due to some of the work being outsourced overseas, and should notify the client of the risks and benefits inherent in an LPO arrangement. Although a lawyer can limit its liability over outsourced employees by limiting their scope of responsibility, this could affect the employees' ability to provide proper representation. Therefore, the lawyer should advise its client of the risks and benefits of limited representation before actually limiting the scope.

Even if a law firm follows the available ethical guidance, the law firm and its lawyers could be held liable for negligence or other ethical violations in the context of an offshore outsourcing arrangement. For example, vicarious liability could apply to U.S. law firms and their lawyers who transfer non-delegable responsibilities to an LPO lawyer. They also could be liable for negligently selecting and supervising the LPO lawyers, or for creating a financial arrangement with foreign lawyers that is essentially a joint venture instead of an independent contracting scenario.

Because of the liability risks, firms must take the necessary precautions to avoid liability for malpractice. Although LPO lawyers are technically employees of the LPO, they could be deemed employees of the U.S. law firm if the U.S. firm rigorously controls the manner in which the LPO lawyer conducts his or her work. Furthermore, since the firm is employing the LPO, the final work is the responsibility of the firm, and any errors, whether in the final product or the process of completion, will reflect upon the firm.

A U.S. law firm could violate ethics rules by ordering subordinate misconduct or by failing to take remedial action after becoming aware of misconduct. Where a U.S. law firm's insurance policy does not explicitly cover mistakes of an LPO attorney, the insurer's assessment of potential risk may preclude the insurer from providing coverage to the firm due to the novelty and uncertainty of offshore legal outsourcing. Therefore, firms should review their insurance policies prior to contracting with an LPO.

Limiting Liability

The mitigation of liability, as accepted by the client, is a way for U.S. law firms to properly protect themselves from the risks of outsourcing. Rule 1.8(h) of the *Model Rules of Professional Conduct* indicates circumstances under which firms can limit their liability for negligent work product stemming from employees under their supervision.

Limited liability in the outsourcing process could ultimately result in financial benefits for both law firms and their clients. For example, U.S. law firms and lawyers could be willing to provide a fee discount to clients who release them from the risk of malpractice liability. A corporate client with its own legal department could supervise some of its own work and shoulder the increased risk of errors in exchange for paying reduced legal fees. In addition, prospective limitations could reduce the amount of time lawyers spend trying to decrease their vulnerability to malpractice by practicing defensively.