

# FLATTENING THE WORLD OF LEGAL SERVICES? THE ETHICAL AND LIABILITY MINEFIELDS OF OFFSHORING LEGAL AND LAW-RELATED SERVICES

Mary Daly & Carole Silver

This article examines offshore outsourcing of legal and law-related services as the newest twist in the international market for legal services. We consider the impact of offshore outsourcing on the profession generally and analyze the ethical issues raised by offshore outsourcing, both as it exists today and as the practice may develop in the future. The article begins by situating offshore outsourcing in the framework of relationships created in the context of delivery of legal services. This framework is used, in turn, to construct a structure of analysis for the ethical implications of offshore outsourcing. Lawyers who outsource to offshore providers must conduct an investigation to ensure that the referral is appropriate. We also consider the potential reputation and economic benefits and disadvantages to law firms and legal departments in outsourcing offshore. We find that offshore outsourcing creates new opportunities for non-U.S. lawyers without putting them on equal footing with lawyers trained and licensed in the U.S. Instead, as with many aspects of globalization, offshore outsourcing emphasizes the divisions already present in the legal profession.

# FLATTENING THE WORLD OF LEGAL SERVICES? THE ETHICAL AND LIABILITY MINEFIELDS OF OFFSHORING LEGAL AND LAW-RELATED SERVICES

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Globalization recently has been described by Thomas Friedman as “flattening” the world through a combination of technology and “geoeconomics,” resulting in a shift in the way work is accomplished and enabling new

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Senior Lecturer, Northwestern University School of Law. Many thanks to Johana Gomez for thinking through these issues with me and for valuable research support. A portion of this paper was presented at the International Law Association’s International Law Weekend in New York (October 2004); I am grateful for the comments generated at the panel “Ethical Implications of Outsourcing Legal Services Internationally.”

<sup>1</sup> © King Features Syndicate (Jim Borgman, CINCINNATI ENQUIRER, Dec. 7, 2004).

collaboration and competition. Technology enables the proliferation of information, and facilitates the division and distribution of tasks to those able to most efficiently accomplish them regardless of their location. As a result, individuals and organizations from less developed nations such as India and China are able to participate in highly sophisticated work without leaving their home countries, while previously they would have had to relocate for the same opportunities.<sup>2</sup>

This article addresses the impact of this aspect of globalization on the world of legal and law-related services. We ask whether the market for these services is “flattened” by globalization in the same ways described by Friedman. Our focus here is on offshore outsourcing, which is possible when services are divided into discrete tasks that are delegated to less-costly service providers located far from the outsourcer. A business outsources by segmenting off an aspect of its activities and retaining a third party to perform the activities.<sup>3</sup> Offshoring, on the other hand, occurs when a business relocates its activities to a location that allows the business to capture some efficiency, often through lower labor costs.<sup>4</sup> The developments that drive globalization, including advances in

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<sup>2</sup> Thomas L. Friedman, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (Farrar, Straus and Giroux 2005).

<sup>3</sup> *See, e.g.*, 8 Executive Agenda: Ideas and Insights for Business Leaders 50 (No. 3 AT Kearney 2004), *available at* [http://www.atkearney.com/shared\\_res/pdf/EA73\\_RealOffshoring\\_S.pdf](http://www.atkearney.com/shared_res/pdf/EA73_RealOffshoring_S.pdf) (“We define outsourcing as when a company assigns its activities, and sometimes its people, to a third party.”).

<sup>4</sup> *See id.* (“Our definition of offshoring is the search for a lower cost location for business processing.”). Of course, there are other uses for offshore outsourcing, as well as business

transportation and technology, also support outsourcing offshore. Examples are ubiquitous, and include relocation of customer call centers, data processing activities, medical transcription services,<sup>5</sup> software design activities,<sup>6</sup> accounting services<sup>7</sup> and even interpretation of x-rays.<sup>8</sup> One estimate is that “as many as [3.3 million] white-collar jobs could be shipped abroad ... by 2015.”<sup>9</sup>

Law practice tends to follow business, whether we focus on international expansion, diversity of the workforce or the acceptance of more casual standards of business attire. Outsourcing is no exception. Law firms have outsourced their

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purposes. See, e.g., Michael Braga, *Wary of change*, Sarasota Herald-Trib. (Florida), Jan. 16, 2005, at D1 (describing outsourcing in the 1990s being fueled by “U.S. software firms ... hunting for programmers to help them deal with the much-hyped Y2K computer bug.”); Jane Mayer, *Outsourcing Torture*, NEW YORKER MAGAZINE, Feb. 14, 2005, at 106 (discussing the U.S. government’s outsourcing of interrogation and torture).

<sup>5</sup> For a description of medical transcription, see *Medical Transcription A to Z*, available at <http://www.medtranscription.com/info.htm> (last visited Feb. 13, 2005).

<sup>6</sup> See Posting of Todd Ogasawara to O’Reilly Developer Weblogs, <http://www.oreillynet.com/pub/wlg/4126> (Jan. 4, 2004, 21:36 EST) (referring to a survey by Software Development Magazine that reported more than 50% of design projects being outsourced offshore).

<sup>7</sup> See Tom Herman, *Tax Report: Ethics Rule May Help Taxpayers Learn if Firms Outsource Returns*, WALL ST. J., June 29, 2005, at D2; Kris Maher, *Next on the Outsourcing List*, WALL ST. J., Mar. 23, 2004 (listing medical, animation, insurance, digitizing, desktop publishing, telemarketing and financial jobs as being outsourced; accounting, bookkeeping and tax preparation work are included in the “financial” category of outsourced jobs). But see Braga, *supra* note 4 (reporting on resistance of Southwest Florida accountants to outsource preparation of tax returns to India: “[W]e decided not to do it [outsource their 10-40 work offshore] because we didn’t feel it was what our clients would want.’ ... ‘It came down to a quality control issue and whether we would be ashamed to tell our clients.’”).

<sup>8</sup> See Susan Bliss, *Should DUR be outsourced offshore to cut costs?*, Drug Topics, Dec. 13, 2004, available at <http://www.drugtopics.com/drugtopics/article/articleDetail.jsp?id=137451> (“For at least two years, many U.S. hospitals have been beaming digital X-rays to radiologists in Australia and India for interpretation. “Nighthawk” services (so called because they work during our nighttime hours) are staffed by U.S. licensed doctors or Indian M.D.s who communicate with U.S. physicians.”).

<sup>9</sup> Braga, *supra* note 4. See also Leigh Jones, *The 24-hour firm: a ‘No Sleep Zone?’*, NAT’L L. J., Nov. 14, 2005 (suggesting that “[i]n 2004, an estimated 12,000 legal jobs, including those in research and document production and preparation, were sent offshore”) (citing U.S. Bureau of Labor Statistics and Forrester Research).

libraries<sup>10</sup> and certain support services, such as data processing and copying,<sup>11</sup> for some time. Today, certain law firms outsource significant portions of their back-office support services.<sup>12</sup> One foreign offshore firm offers law firms the option of outsourcing ten categories of activities, including financial and accounting services, presentation preparation services, and litigation support services.<sup>13</sup> The outsourced work might be accomplished in a lower-cost area of the United States (which is sometimes called “homeshoring “ or “farmshoring”<sup>14</sup>) or in another country, in either case taking advantage of lower labor and overhead costs.

Attention recently has shifted from outsourcing back-office, administrative and support functions for law firms and legal departments to outsourcing legal and law-related services themselves.<sup>15</sup> In this shift, the uniqueness of law, compared to business and even to other professional services such as accounting,

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<sup>10</sup> Sherrie F. Nachman, *Baker & McKenzie to Librarians: Check Out*, AM. LAW., May 1995, at 14.

<sup>11</sup> Nathan Koppel, *How Bad Is It*, AM. LAW., Feb. 2002, at 74.

<sup>12</sup> Orrick, Herrington & Sutcliffe’s outsourcing center is described in Amy Kolz, *Wheeling, We Have a New Client*, AM. LAW TECH., Sept. 2004, at S27.

<sup>13</sup> Office Tiger, [http://www.officetiger.com/whatwedo/legal\\_mar.htm](http://www.officetiger.com/whatwedo/legal_mar.htm) (last visited Feb. 13, 2004).

<sup>14</sup> *Inside vs. Outside: When Does it Make Sense for Law Firms to Outsource*, Roundtable Discussion, LAW PRACTICE TODAY (April 2006), available at <http://www.abanet.org/lpm/lpt/articles/mgt04063.shtml> (last visited July 10, 2006).

<sup>15</sup> Domestic outsourcing by U.S. and UK firms is more common, but outside the scope of this article. U.S. domestic outsourcing firms include Axiom Legal Solutions, Inc., Outside GC and CorpLaw Associates. Heather Smith, *Temps with a Twist*, CORP. COUNSEL (Aug. 2004) at 28. See also Anthony Lin, *Legal Outsourcing Looks to the Heartland*, N.Y. L.J. (June 16, 2004) (outsourcing of office staff to Fargo, N.D., for Piper Rudnick). On the practices of English Magic-Circle firms to outsource to smaller English law firms, see Paul Hodkinson, *Freshfields in low-margin property outsourcing push*, LEGAL WEEK (Jan. 4, 2004); Press Release, Lovells, Lovells wins Client Care Award for “Mexican-Wave,” (July 3, 2003), available at <http://www.lovells.com/PressReleaseDetailServlet?id=198> (last visited Feb. 19, 2005) (describing Lovells practice of referring routine legal services to “provincially-based solicitors”).

is crystallized. Outsourcing legal services raises special concerns that implicate the professional obligations of lawyers and our self-regulatory regime. The ethical and regulatory issues are complicated by the outsourced activities being sent offshore to jurisdictions where regulatory restrictions and judicial systems differ from those in the United States and consequently issues of unauthorized practice and enforceability of contracts may be relevant.<sup>16</sup> Of course, these ethical and regulatory concerns are only part of the story, for outsourcing legal services implicates the judgment lawyers bring to their clients. In this regard, outsourcing legal services is similar to the issues raised any service involving judgment, nuance and experience.

In this article, we place offshore outsourcing of legal and law-related services in the larger context of globalization as it impacts the legal profession generally, and consider the ethical issues raised by offshore outsourcing, both as it exists today and as the practice may develop in the future. We begin in Part I with an examination of the existing offshore outsourcing activities of lawyers, law firms and corporate legal departments, in order to separate the hype surrounding outsourcing from reality. We then consider the motives for outsourcing, both for outsourcers and those receiving the assignments (frequently referred to as “vendors” or “providers”). In order to understand how the outsourcing

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<sup>16</sup> On the legal system of India in the context of outsourcing legal services, see Jayanth K. Krishan, *Outsourcing and the Globalizing Legal Profession*, WILLIAM & MARY L. REV. (forthcoming), available at [www.ssrn.com](http://www.ssrn.com).

relationship differs from typical lawyer-client and lawyer-lawyer relationships, in Part II we construct an analytical framework based on traditional relationships among lawyers and between lawyers and their clients to consider the ethical issues raised by offshore outsourcing. We look to professional regulation for guidance on the ethical issues raised by offshore outsourcing in the context of a law firm outsourcing to an offshore service provider. Finally, in Part III we consider the potential benefits and disadvantages to law firms and legal departments in outsourcing offshore.

### **I: Contextualizing Offshore Outsourcing Through the Lens of Globalization**

Offshore outsourcing is headline news for businesses, and legal services are following here as elsewhere.<sup>17</sup> Reports of offshore outsourcing of legal services are announced with attention-grabbing proclamations such as “Corporate America Sending More Legal Work to Bombay,”<sup>18</sup> “A Passage to India,”<sup>19</sup> “New Jersey law firms to outsource from India,”<sup>20</sup> and “More U.S. Legal Work Moves

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<sup>17</sup> In fact, an average of three news articles on offshore outsourcing of legal services has been published each month since March 2004.

<sup>18</sup> Ellen L. Rosen, *Corporate America Sending More Legal Work to Bombay*, N.Y. TIMES, Mar. 14, 2004, § 10, at 1.

<sup>19</sup> Rich Smith, *A Passage to India*, The Motley Fool, Jan. 26, 2004, available at <http://www.fool.com/news/commentary/2004/commentary040126rs.htm>.

<sup>20</sup> *New Jersey law firms to outsource from India*, IndiaExpress Bureau, Mar. 24, 2004, available at <http://www.indiaexpress.com/news/business/20040324-0.html>. See also, *New Jersey firms outsourcing their legal work to India*, Outsourcing.org, Mar. 24, 2004, available at [www.outsourcing.org](http://www.outsourcing.org).

to India's Low-Cost Lawyers".<sup>21</sup> Despite the warnings implicit in these banners, however, most of the reports tell of offshore outsourcing of back-office and support services for lawyers rather than of legal advisory services.<sup>22</sup> Back-office work is substantial in terms of dollars involved: one estimate is that the "top 200 [U.S.-based] law firms spend more than \$20 billion a year for back-office work."<sup>23</sup> Law firms are accomplishing the outsourcing of back-office work both directly and through the use of intermediary outsourcing firms to outsourcers situated in the United States and abroad.<sup>24</sup>

In addition to administrative back-office work, services commonly performed by paralegals and new law graduates are being outsourced, including preparation of patent applications and document review. Outsourcing of these

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<sup>21</sup> Eric Bellman & Nathan Koppel, *More U.S. Legal Work Moves to India's Low-Cost Lawyers*, WALL ST. J., Sept. 28, 2005, at B1.

<sup>22</sup> The comments of Kirkland & Ellis partner, Gregg Kirchhoefer, are apropos: "[I]t could be 50 years before lawyers in India do more than "routine, prosaic" American legal work. . . . 'Firms like ours that work on complicated and significant cases don't expect the main part of that work effort to be done [offshore] at the same level we do it,' he says." *Id.*

One prediction is that by the year 2025, "[o]utsourcing and offshoring of legal work will be the norm . . . 'Research may be done in India, transcript summaries may be done in the Philippines, and document preparation will be done in Mexico.'" *Trends*, Partner's Report for Law Firm Owners (Feb. 2005). *But see Associate Management*, Partner's Report for Law Firm Owners, (Nov. 2004) ("One government study suggests that 8% of the lawyer jobs in the U.S. will be outsourced over the next five years" according to Ward Bower of Altman Weil, Inc.); Jennifer Fried, *U.S. Legal Jobs Being Shipped Overseas*, WESTERN MASS L. TRIB., Oct. 17, 2004, at 1 ("Forrester Research, Inc., a Cambridge, Mass.-based market research firm, predicts that more than 489,000 U.S. lawyer jobs, nearly 8% of the filed, will shift abroad by 2015."). Forrester estimated that 12,000 legal jobs moved offshore in 2004. Krystan Crawford, *Outsourcing and the Lawyers*, CNN MONEY, Oct. 15, 2004.

<sup>23</sup> Tommy Fernandez, *Low costs make the case for outsourcing legal work*, CRAINS N.Y. BUS., Sept. 13, 2004, at 21.

<sup>24</sup> See [http://www.hildebrandt.com/Documents.aspx?Doc\\_ID=1802](http://www.hildebrandt.com/Documents.aspx?Doc_ID=1802) (describing the joint venture between Hildebrandt and OfficeTiger); Leigh Jones, *supra* note 9 (describing Orrick Herrington & Sutcliffe's domestic outsourcing activities).

sorts of activities illustrates how services can be disaggregated for purposes of capitalizing on the efficiencies from sending work to lower cost service providers situated overseas.<sup>25</sup> Discrete tasks are outsourced to individuals, who may be licensed lawyers or experts in other fields, such as engineering, working in remote locations, including India. Once the outsourced work is completed it is integrated into the larger context of the client project, and this integration typically occurs in the United States. One of the earliest examples of offshore outsourcing by a law firm is the Bickel & Brewer law firm of Dallas, which opened a back-office support facility in India in 1995 in which it uses lawyers and non-lawyers to “scan, code, index and abstract documents”<sup>26</sup> to support its Texas litigation practice.

Analyzing outsourcing by examining the functions being outsourced leads to the dilemma of separating legal from law-related and non-legal services. When legal services are outsourced the same ethical rules regulating lawyers’ activities generally apply, resulting in outsourcing raising concerns about unauthorized practice and other ethical issues. Law-related services, in contrast, raise a relatively limited set of ethical issues. Back office, support and paralegal services, on the other hand, are appropriate for non-lawyers and generate application of the ethical rules in the larger context in which the services are integrated. The

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<sup>25</sup> See Beaverstock, *Managing Across Border: Knowledge Management and Expatriation in Professional Service Legal Firms*, 4 J. ECON. GEOG. 157, at 157 (2004) (“Processes of economic globalization have continued to splinter the productive activities of transnational corporations . . .”).

<sup>26</sup> Helen Coster, *Briefed in Bangalore*, AM. LAW., Nov. 2004.

distinction among legal, law-related and non-legal services implicates the boundaries of the practice of law, which leads us to the circuitous definition that “the ‘practice of law’ is the rendering of professional services to a person who believes that he or she is a client dealing with a lawyer.”<sup>27</sup> Unfortunately, this raises at least as many questions as it might resolve, since there is no general agreement on the definition of “the practice of law” and the activities currently being outsourced skate close to the divide between “legal” and “support” services. Examples of the type of work outsourced offshore include “patent applications and litigation support,”<sup>28</sup> “legal research and pieces of M & A transaction[s],”<sup>29</sup> and even drafting pretrial motions and briefs.<sup>30</sup> Each of these activities might be performed by lawyers, paralegals, or other support staff working under the supervision of lawyers.

Intermediary outsourcing firms have been organized in the U.S. and

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<sup>27</sup> See, e.g., Robert R. Keatinge, *Multidimensional Practice in a World of Invincible Ignorance: MDP, MJP, and Ancillary Business after Enron*, 44 ARIZ. L. REV. 717, 723 (2002) (“A starting point is to recognize that the most workable definition of the “practice of law” is the rendering of professional services to a person who believes that he or she is a client dealing with a lawyer.”).

<sup>28</sup> Ward Bower, *Law Firm Marketing: Intellectual Property Practice Strategies*, N.Y. L. J., Dec. 20, 2004, at 4.

<sup>29</sup> Jyoti Kamal and Rahul Kumar, *U.S. legal claims processing to be increasingly offshored to India*, THE ECONOMIC TIMES, Dec. 12, 2004 (citing Stites & Harbison, a 250-lawyer Louisville-based law firm).

<sup>30</sup> Renee Deger, *More companies now follow DuPont’s ‘Legal Model*, NAT’L L.J., May 17, 2004, at S6 (quoting a Texas lawyer who used Atlas Legal Research to draft a pretrial motion). See also Geanne Rosenberg, *Offshore legal work continues to make gains*, NAT’L L. J., May 17, 2004, at S3 (noting Hildebrandt International, a law firm consulting firm, reported that the “categories of legal work that have been performed offshore by non-U.S. lawyers include legal research; assistance in the drafting of legal memos and briefs; discovery work; assembling facts in support of litigation claims; and patent, trademark and ERISA work.”).

abroad to take advantage of the interest of corporate law departments and law firms.<sup>31</sup> Several outsourcing intermediary firms were founded by U.S. lawyers with elite credentials, including Mindcrest (Ganesh Natarajan and George Hefferan, both formerly with McGuire Woods's Chicago office<sup>32</sup>) and Atlas Legal Research (Abhay "Rocky" Dhir, former law clerk to U.S. District Judge Jerry Buchmeyer<sup>33</sup>). Other outsourcing firms have been organized in India, including Manthan Services, which has "120 Indian-trained lawyers, including two UK qualified solicitors and 50 senior lawyers"<sup>34</sup> and IP Pro, an affiliate of a Mumbai law firm.<sup>35</sup> These outsourcing intermediaries identify foreign lawyers to work on outsourced projects, communicate assignments to them, set and collect fees, and might even provide U.S.-lawyer review of the finished product.<sup>36</sup> Each

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<sup>31</sup> Intermediary firms for outsourcing legal services include Mindcrest, Atlas Legal Research, Intellevate, Lawwave.com, Lexadigm Solutions, OfficeTiger and Quislex, IP Pro. Joy London, in her blog [www.excitedutterances.com](http://www.excitedutterances.com), has identified 29 outsourcing intermediary firms in India; *see* [http://excitedutterances.blogspot.com/2005\\_08\\_01\\_excitedutterances\\_archive.html#112544823759972718](http://excitedutterances.blogspot.com/2005_08_01_excitedutterances_archive.html#112544823759972718) (last visited Oct. 6, 2005); *The Inside Scoop on Legal Outsourcers*, CORP. COUNS., Dec. 2004, at 59; Helen Coster, *supra* note 26. *See generally*, Krishan *supra* note 16.

<sup>32</sup> Geanne Rosenberg, *supra* note 30; Ameet Sachdev, *Law firms slow to outsource – Confidentiality outweighs savings*, CHICAGO TRIB., Jan. 19, 2004.

<sup>33</sup> John Council, *Lawyer sets up research business: Indian lawyers service small firms and solos in Texas*, NAT'L L.J., May 17, 2004, at 51. In addition, a 2004 joint venture was formed between OfficeTiger and law firm consultants Hildebrandt International. *Law Firm Outsourcing Is Aim of New Joint Venture*, posted June 8, 2004 on SBPOA, available at <http://www.sharedxpertise.org> (last visited July 15, 2004).

<sup>34</sup> William O'Shea, *Caseload grows for advocates in absentia*, FIN. TIMES (London), Oct. 10, 2004, at 10.

<sup>35</sup> Karl Schoenberger, *Looking for Legal Work Companies Turn to India to Save Lawyer Expense*, AUGUSTA CHRONICLE (Georgia), Jan. 23, 2005, at F01; *Law Firm Outsourcing Is Aim of New Joint Venture*, *supra* note 33 (Mindcrest also boasted that "many of [its] outsourced lawyers . . . had training from U.S. law schools . . .").

<sup>36</sup> Helen Coster, *supra* note 26 ("There are a few different emerging models. Vendors like Lexadigm Solutions and Lawwave.com rely exclusively on Indian lawyers to conduct low-level

of the outsourcing firms is careful to note that they are not providing “legal services” and are not involved in any lawyer-client relationship.

More insight into outsourcing might be gained by focusing on the substantive areas of law involved. Much of the outsourced work sent offshore by law firms relates to patent law. This may be revealing in itself of the limits of outsourcing, since patent law is highly technical and involves engineering expertise, as well. One description of patent application work divided a hypothetical application project into six separate tasks in addition to compiling and integrating the application. Each of these tasks might be outsourced and several involve activities that easily could fall outside of the definition of legal services, including searching for prior art, drafting specifications and preparing drawings.<sup>37</sup> Certain Indian-based outsourcing firms focus specifically on services related to “patent research, analysis, drafting and patent record management.”<sup>38</sup>

Other areas of law also lead to outsourcing offshore. General research projects have been the subject of offshore outsourcing arrangements, including a

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legal work and analysis. Others, like OfficeTiger, use a mix of lawyers and trained professionals to handle legal and non-legal tasks such as managing conflicts databases and document management and review. A few vendors specialize. Intelivate has hired an Indian staff of lawyers and Ph.D.s to conduct patent research and other IP work. The company has a dedicated team devoted just to Microsoft’s patent work.”).

<sup>37</sup> See Alok Aggarwal, *Offshoring Patent Drafting and Prosecution Services*, INTELLECTUAL PROPERTY TODAY, 5.05, at 38-39 (2005) (“A patent application typically consists of the following activities: (a) prior art searching, (b) drafting background, (c) drafting specifications, (d) drafting claims, (e) drafting summary, (f) preparing drawings, and (g) a final review, modifications and filing. Although the last activity has to be always performed by a USPTO registered attorney or agent, who usually also becomes the attorney of record, other activities can be either done by the IP professionals in a remote location or by the IP professional located in the US.”); Braga, *supra* note 4; Karl Schoenberger, *supra* note 35.

<sup>38</sup> William O’Shea, *supra* note 34.

search for the law in each U.S. jurisdiction related to a particular insurance matter, for example.<sup>39</sup> The outsourcing firm, Lexadigm, reported that its work included preparation of briefs for submission to the U.S. Supreme Court and several Circuit Courts of Appeals.<sup>40</sup> Even aspects of mergers and acquisitions have been outsourced offshore.<sup>41</sup>

Offshore outsourcing typically is sold as a means to save money. The fees for lawyers in India – the most typical site of offshore outsourcing of legal services to date – are extraordinarily low compared to U.S. law firm rates. For example, rates charged by the outsourcing intermediary, Lexadigm, for legal research range from \$60 to \$80 per hour depending upon the turnaround time required. Lexadigm advertises these services as being performed by its “research specialists” who are Indian law school graduates with several years of work experience.<sup>42</sup> Another source puts the hourly rate for Indian lawyers as low as \$2 per hour.<sup>43</sup> The cost differential obviously is significant for lawyers working in a

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<sup>39</sup> Helen Coster, *supra* note 26 (quoting sole practitioner Solan Schwab: “When I go home at 6, I can have them do the grunt work, research, and proofreading that I would otherwise have other people do,” says Solan Schwab, a New York-based solo practitioner who outsources research projects like analyzing state-by-state insurance regulations with QuisLex, which has 12 lawyers in Hyderabad. “Then, when I come in in the morning, I receive a beautiful e-mail with research done exactly how I like it.”). *See also* Kamal & Kumar, *supra* note 29 (describing Stites & Harbison’s use of offshore outsourcing for legal research).

<sup>40</sup> Interview with Puneet Mohey, President of Lexadigm, for NPR, *available at* <http://www.npr.org/templates/story/story.php?storyId=4626716> (last visited July 17, 2006). This is further discussed in Krishan, *supra* note 16.

<sup>41</sup> Kamal & Kumar, *supra* note 29.

<sup>42</sup> *See* <http://www.lexadigm.com/about.html> (last visited Sept. 15, 2005). Lexadigm attorneys earn between \$6,000 and \$36,000 annually, according to Daniel Brook, *Made in India*, LEGAL AFF., May/June 2005, *available at* [www.legalaffairs.org](http://www.legalaffairs.org).

<sup>43</sup> Laxmi Devi, *Indian legal eagles wing their way to BPOs*, ECON. TIMES, June 9, 2005.

variety of organizations in the United States including sole practitioners, one of whom reported using offshore outsourcing to accommodate the “erratic workflow that doesn’t justify the overhead of a full-time [U.S.-licensed] staff.”<sup>44</sup>

Aside from cost savings, offshore outsourcing also captures time efficiencies related to the time change between the outsourcer’s location and the site of the recipient of the outsourcing assignment. DuPont initially decided to outsource patent application work to Indian scientists in order to save money, “but soon found there were additional benefits from the 10-hour time difference, such as being able to send assignments as you leave for the day and having the work completed when he arrived the next morning.”<sup>45</sup> The same time difference, however, also has been cited as a negative factor against outsourcing because it serves as a barrier to the communication between the outsourcer and receiving attorneys and the effective supervision over the work outsourced.<sup>46</sup>

Nevertheless, top U.S. law firms generally focus on providing sophisticated services and are unlikely to embrace offshore outsourcing as a new organizational model. These firms, which certainly include those on the American Lawyer list of the 200 highest-grossing United States law firms,<sup>47</sup> focus

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<sup>44</sup> Helen Coster, *supra* note 26.

<sup>45</sup> Jeff Blumenthal, *A Gateway to India?* THE LEGAL INTELLIGENCER, May 18, 2005.

<sup>46</sup> *Id.* (“When I assign work to an associate or a paralegal, they come into my office and we go through several iterations when we are dealing with a patent application,” [Gregory] Lavorgna [chairman of IP firm Drinker Biddle & Reath] said. “And that’s just harder to do when they are so far away. We have looked into it and I know it is a way to control costs. I just don’t think it will wind up saving firms as much as advertised when you factor everything into the equation.”).

<sup>47</sup> See *The Am. Law 200*, AM. LAW., Aug. 2005.

on cutting-edge and high fees work at the opposite end of the spectrum from the routine and low-level work currently being outsourced offshore.<sup>48</sup> What they are selling is more judgment and experience than legal research. It is anathema to the identities of these firms, as providers of highly sophisticated expertise, to connect with service providers at the other end of the spectrum, whose attraction is their low cost. However, the more routine aspects of their work is critical to their ability to train new lawyers, in order to offer sufficient routine and lower-stakes experiences to allow their development of the kind of judgment that forms the basis for the reputations of top lawyers at these firms.

Reputation for quality is among the most important assets of any law firm, whether or not its work actually includes more routine services. An offshore outsourcing relationship may be perceived as undermining that reputation because of the suspicion that foreign legal education and training is different and consequently of lower quality.<sup>49</sup> In addition, there is a built-in assumption in the

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<sup>48</sup> This is not to say that sophisticated work might not be outsourced offshore in the future. *But see* comment of Gregg Kirchhoefer in Bellman and Koppel, *supra* note 21; comment of Bruce MacEwen, Adam Smith, Esq., Aug. 30, 2005, <http://www.bmacewen.com/blog/archives/globalization> (last visited Oct. 6, 2005) (“While the future projections come from consultants with, the cynical might say, an interest in generating excitement about the numbers, they forecast 35,000 “US law jobs” moving to India by 2010 and just over twice that number by 2015. Does “US law jobs” strike you as a fuzzi-phrase? (A: Yes.) Are these Bates-stamping clerks and digital-scanning jockeys, or AmLaw 100 partner equivalents? My guess is that for the duration of the careers of most of you reading this, it will not be the latter.”).

<sup>49</sup> Of course, certain outsourcing providers may be U.S.-trained lawyers. This is not the common model, however. *See, e.g.*, interview with Puneet Mohey, *supra* note 40 (reporting that none of Lexadigm’s employees are U.S.-trained lawyers). Nonetheless, a number of the outsourcing intermediary firms were created by U.S.-educated and licensed, experienced lawyers, whose participation in the venture provides legitimacy and trustworthiness.

market for sophisticated legal advice that the client gets what it pays for, so a higher billing rate indicates higher quality of the advice and advisor. Outsourcing admits commodification – an admission few firms will concede even if there is no rational basis for claiming participation in the high-fees-sophisticated tier of the market. Perhaps few clients, too, would be satisfied with the moniker “routine” attached to the legal issues that cause them to retain outside counsel.

Finally, to the extent we limit our discussion to offshore outsourcing that utilizes non-U.S. law graduates, the distance between U.S.-based elite firms and outsourcing deepens. U.S. firms have been reluctant to include foreign-trained lawyers in their organizations, even as such lawyers have become an increasing presence in United States law schools. Law firms point to state regulations that limit the ability of foreign lawyers to sit for the bar examination as one justification for their exclusion. But the reluctance to embrace foreign-educated lawyers is limited in large part to the location of their offices. U.S. firms rely increasingly on foreign lawyers to staff their foreign offices.<sup>50</sup> Regulation plays a part, but economics does, too – hiring local lawyers is less expensive in terms of compensation (including cost of living and hardship allowances, for example), stability and retention, which can be costly for law firms. But as to their domestic offices and practices, United States firms’ reluctance to hire foreign-trained

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<sup>50</sup> Most of these foreign-educated lawyers working in foreign offices of the top 60 U.S. law firms have not earned LL.M.s or other law degrees in United States law schools. See Silver, *Winners and Losers in the Globalization of Legal Services*, 45 VA. J. INT’L L. 897 (2005).

lawyers likely relates to three factors: first, the assumption that most foreign lawyers will return to their home jurisdictions after a relatively brief period in the United States; second, a concern that training foreign lawyers may require more time than training their U.S.-educated counterparts; and third, the nature of the work assigned to new law graduates, which is intensely language-focused and consequently presents a considerable challenge to foreign-educated lawyers whose first language is not English.

Offshore outsourcing does present opportunities for U.S. law firms. The potential for cost saving is important and firms may be willing to outsource work they characterize as “non-legal” or support services. In addition, firms with international offices may see offshore outsourcing as an opportunity to develop relationships with local lawyers in jurisdictions otherwise closed to foreign firms, such as India, where the local rules prevent United States and other non-Indian firms from operating openly. When Indian regulations are liberalized, these firms may use their relationships to build their own offices, or bring the outsourcing workers “in-house.”

While law firms may dabble in offshore outsourcing, corporate legal departments reportedly have been more seriously engaged in taking advantage of the cost savings available by sending some of their work offshore. The general pressure on corporate officers to lower costs also applies to legal costs. In addition, corporate general counsel (GCs) may be more likely to try offshore

outsourcing than law firms because they are influenced by the successful experiences of other corporate departments that have outsourced work overseas.<sup>51</sup> According to Ganesh Natarajan, a founder of Mindcrest, a legal outsourcing firm based in Chicago, “Corporate law departments ... are much more apt [than law firms] to make use of outsourced legal staff, often because other corporate divisions also have cut costs through outsourcing.”<sup>52</sup>

In analyzing offshore outsourcing in the corporate counsel context, we are mindful that the line distinguishing lawyers from non-lawyers in terms of function is blurred. Corporations use lawyers in a variety of capacities that do not require a license.<sup>53</sup> Corporate compliance officers are an example of corporate positions that may be staffed with lawyers, and when they are, may assume a more “law minded” role that influences the relationship with the corporation’s general counsel. As one article on legal outsourcing recently noted, “[w]hat constitutes lawyering can get fuzzy.”<sup>54</sup>

Moreover, corporations already outsource their legal work to outside

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<sup>51</sup> According to Leon Steinberg, CEO of Intellevate, an Indian outsourcing firm, “The Fortune 500s are already doing work overseas. If they have research facilities in India, they know they can put their legal over there as well.” William O’Shea, *supra* note 34.

<sup>52</sup> *Law Firm Outsourcing Is Aim of New Joint Venture*, The Shared Services and Business Processing Outsourcing Ass’n, June 8, 2004, available at <http://www.sharedxpertise.org/modules.php?file=article&name=News&op=modload&sid=1519> (last visited Feb. 17, 2005).

<sup>53</sup> For example, compliance officers may or may not be lawyers. *See generally* Ben W. Heineman, Jr., *Imagination At Work*, AM. LAW., April 2006, at 73 (describing the importance of lawyers as “members of the business team” and reporting on several GE general counsel who moved into business roles).

<sup>54</sup> Nathan Koppel, *Nation Builder*, CORP. COUNSEL, Jan. 2005, at 100 (describing the role of a Reed Smith partner, Sanjoy Bose, who also serves as president of project finance consulting firm, GFS Group).

counsel on a regular basis. When they turn to non-U.S. lawyers in an offshore outsourcing relationship, the GCs may need to assume more responsibility for monitoring the work of those performing the work but the nature of the relationship between the GC and the lawyers performing the outsourced work is not substantially different whether the outsourcing lawyer is licensed in the same jurisdiction as the GC and works in a law firm down the street from the corporation's office or is licensed in a foreign jurisdiction and occupies an office thousands of miles away.

General Electric and DuPont have led the charge on offshore outsourcing of legal services. GE reportedly hired and trained Indian lawyers to create its own in-house Indian legal staff.<sup>55</sup> According to one report, "By creating its own in-house legal department in India, GE reports that in 2001 its plastics division saved approximately half a million dollars that would otherwise have been spent on American advice purchased from American law firms. By 2002, those savings had already increased by 40%."<sup>56</sup> The DuPont Legal Model advocates using alternatives to outside law firms, including outsourcing to U.S.-licensed temporary attorneys and offshore outsourcing.<sup>57</sup> Other corporations that

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<sup>55</sup> See Coster, *supra* note 26 ("In 2001, General Electric Company established a legal team in Gurgaon, India, with lawyers and paralegals who draft documents like contracts.").

<sup>56</sup> Rich Smith, *A Passage to India*, The Motley Fool, Jan. 26, 2004, *available at* <http://www.fool.com/news/commentary/2004/commentary040126rs.htm> (last visited Feb. 17, 2005).

<sup>57</sup> Renee Deger, *supra* note 30.

reportedly have outsourced certain legal work offshore include BorgWarner,<sup>58</sup> Cisco Systems,<sup>59</sup> Microsoft,<sup>60</sup> and the Andrew Group.<sup>61</sup> These companies have outsourced research relating to patent applications and IP prosecution, among other matters; suggestions for outsourcing offshore also include reviewing documents for discovery, preparing “first drafts of responses to interrogatories, or [doing] privilege reviews ...”.<sup>62</sup> West Publishing uses Indian lawyers to prepare their case summaries.<sup>63</sup>

Nevertheless, even among GCs offshore outsourcing is not uniformly embraced; indeed, according to a 2004 survey of 167 Chief Legal Officers conducted by the Association of Corporate Counsel and Altman Weil, Inc., fewer than 2% of the corporations surveyed use offshore outsourcing for any of their legal or back office work, while 8% predicted they would consider offshore outsourcing for legal and/or back office work in the foreseeable future.<sup>64</sup> Only 1.2% of the 149 respondents to a survey by the Corporate Legal Times, the source

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<sup>58</sup> Ellen L. Rosen, *Corporate America Sending More Legal Work to Bombay*, NY TIMES, Mar. 14, 2004, § 10, at 1.

<sup>59</sup> Geanne Rosenberg, *On the Web; Use of offshore legal work makes gains with help of Internet, telecommunications and Ernest Hemingway*, BROWARD DAILY BUS. REV., Sept. 2, 2004 at 9.

<sup>60</sup> Karl Schoenberger, *supra* note 35.

<sup>61</sup> The Andrew Group is “an Orland Park, Ill., manufacturer of telecom infra-structure equipment, [that] has cut back on its use of American outside counsel by sending more of its patent application work to Baldwin Shelston Waters, a law firm in Wellington, New Zealand.” Fried, *supra* note 20.

<sup>62</sup> Rees Morrison, *Litigation Fee Liposuction*, CORP. COUNSEL Oct. 2003, at 71.

<sup>63</sup> Rich Smith *supra* note 56.

<sup>64</sup> Survey results are available at <http://www.acca.com/Surveys/CLO2004.pdf> and <http://www.altmanweil.com/pdf/CLO2004.pdf> (last visited Feb. 18, 2005). Among the companies considering outsourcing legal work in the future is Speedera Networks, which may or may not have participated in the survey. See Karl Schoenberger, *supra* note 35.

for their 8<sup>th</sup> Annual Report of Corporate Law Departments, indicated that they had outsourced work to foreign firms as a way to control costs, compared to 8.4% who indicated that they had outsourced work to U.S. law firms.<sup>65</sup>

The reluctance to invest more in offshore outsourcing may be related to concerns about the need for supervision and monitoring. Generally, GCs purchase expertise in their use of outside counsel, supplementing their own substantive knowledge and familiarity with their company's operations with the expertise of lawyers working in firms, whose experience in representing multiple clients gives them insight into a larger and different context of legal issues than that available to an in-house lawyer. It is the judgment and experience of the outside counsel that makes them valuable, although technical and more routine tasks also likely are performed. In offshore outsourcing, GCs essentially are going in the opposite direction: rather than buying expertise they are buying services for which they must serve as a reviewer and expert supervisor. Such supervision reduces the cost savings attainable through outsourcing. Of course, the GCs might contract with their outside firm to perform the reviewing and monitoring function, but in either case, review costs money. In expressing concerns about the quality of offshore outsourcing services, GCs may in fact be concerned about the efficiency of outsourcing in light of this need for supervision. That which is outsourced returns as increased demand for high-level supervision

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<sup>65</sup> *8th Annual Report of Corporate Law Departments*, CORP. LEGAL TIMES, May 2005.

within the GC's organization.<sup>66</sup>

Nevertheless, outsourcing offshore allows GCs to challenge the traditional role of the corporate law firm. Sending routine matters offshore through outsourcing arrangements removes the work that law firms often use to train new lawyers. Moreover, engaging outside law firms to monitor and supervise the outsourcing work of foreign lawyers causes firms to interact with foreign lawyers performing the outsourced work, and without this incentive from the client, the law firms and outsourcing lawyers may be unlikely to interact. By enabling offshore outsourcing, globalization thus brings new power to GCs, who can instruct outside firms to develop relationships with the foreign lawyers they select. GCs in this way have more leverage over the internal structure of their outside law firms and may demand international staffing in the same way that they demand diversity.<sup>67</sup>

For foreign lawyers who receive the outsourcing assignments, working as an outsourcing lawyer offers the opportunity to take advantage of globalization's ability to destabilize the local legal market.<sup>68</sup> In India, for example, success in the

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<sup>66</sup> Jeff Blumenthal, *supra* note 45 (quoting Mike Walker, DuPont's chief IP counsel, referring to outsourced patent application work performed by Indian scientists: "we found that it takes some extra effort on our part to make sure the quality is where we want it").

<sup>67</sup> Heather Smith, *Hue and Cry: Firms Have Begun to Respond to Wal-Mart's Urgent Call for Diversity Action*, AM. LAW. Sept. 2005, at 18.

<sup>68</sup> See Krishan, *supra* note 16 for an excellent review of the current conditions in the Indian legal market. See generally, Galanter, Goonesekere and Twining, *Report of the Expert Panel on the National Law School of India University*, (1996) available at <http://www.marcelgalanter.net/Documents/papers/scannedpdf/reportoftheexpertpanel.pdf> (last visited Aug. 5 2006).

legal profession is closely related to social status. “The combination of caste with social networks produces a highly stratified profession.”<sup>69</sup> At the same time, regulation keeps the Indian legal market essentially closed to foreign lawyers and law firms. But globalization, through outsourcing, allows the local and foreign lawyers to meet and bypass the rigidity characteristic of the old professional hierarchies. Indian lawyers can gain status offered by globalization without leaving home by linking with foreigners through an outsourcing relationship, even though the local profession remains closed to foreign lawyers and firms.<sup>70</sup> The association brought by outsourcing with foreign clients, law firms and with U.S. law itself brings prestige to the local outsourcing lawyers. Moreover, the salaries for outsourcing work exceed local pay scales.<sup>71</sup> Local lawyers may even gain important skills and training. According to one source, there are significant problems with quality of legal education in India, and local lawyers may receive training from the outsourcing firms that could compensate for this.<sup>72</sup>

Outsourcing, then, offers rewards to both local lawyers and those entities

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<sup>69</sup> J.S. Ghandi, *Past and Present: A Sociological Portrait of the Indian Legal Profession*, in Abel and Lewis, *LAWYERS IN SOCIETY*, 369, 376 (1988).

<sup>70</sup> According to one lawyer working at Pangea3, a legal outsourcing firm with offices in India, working conditions also are better at outsourcing firms compared to a “standard Indian law firm.” Eric Bellman and Nathan Koppel, *More U.S. Legal Work Moves to India’s Low-Cost Lawyers*, *WALL ST. J.*, Sept. 28, 2005, at B1.

<sup>71</sup> *Id.*

<sup>72</sup> See Ghandi, *supra* note 69. On the training provided by outsourcing firms, see the description on the web site of Mindcrest, one of the legal outsourcing firms using Indian trained lawyers, available at <http://www.mindcrest.com/careers.htm> (last visited Apr. 29, 2006) (“Our most important asset is our human capital. We recruit the best and provide them with the resources to develop as professionals. Through rigorous training and systematic performance reviews, we encourage continuous improvement in everything we do.”).

initiating the outsourcing relationship, but also brings risks of increased costs and potential injury to reputation. Offshore outsourcing arrangements open spaces for local lawyers to obtain additional opportunities that otherwise might well be closed to them because of local hierarchies. For GCs initiating the outsourcing referral, offshore outsourcing offers potential cost savings and also the opportunity to influence the role and composition of outside law firms. Finally, law firms might use outsourcing to develop relationships with local lawyers when they cannot directly enter the local market because of restrictive regulations. Openly embracing offshore outsourcing, however, may negatively impact U.S. law firms' reputations and ability to market themselves as high-end advisers. For certain law firms, this risk is likely to tip the balance away from offshore outsourcing because of the threat to firms' core identities and roles.

## **II: A Relational Framework for Offshore Outsourcing**

Offshore outsourcing of non-legal work may raise political issues but it does not trigger ethical concerns. Rather, it is in the offshore outsourcing of legal services that ethical issues are implicated. The nature of outsourcing – the disaggregation of services into separate component parts, distributed to various service providers – also complicates the determination of the ethical issues involved. This division of services into discrete segments focuses attention on the

service providers involved in aspects of legal services that traditionally would be subsumed in the finished product. While a project in total may clearly involve legal services and the expertise of a lawyer, the component parts may be characterized as non-legal once divided from their context. Part of the task in assessing the ethical issues involved in offshore outsourcing, then, is to determine what sort of services we are concerned about when discussing the ethical implications of offshore outsourcing.

Instead of trying to determine whether a particular activity involves the practice of law, however, we focus here on understanding the relationships created by offshore outsourcing and examine how they differ from more traditional relationships of lawyers and clients. The following Case Studies ## 1-7, *infra*, clarify the continuum from typical lawyer-client and lawyer-lawyer relationships to those accomplished through an outsourcing arrangement.

In Case Study # 1, the client hires lawyer L-1 to work on a particular problem or project, and L-1 delegates certain tasks associated with the project to others within her firm. She might delegate certain functions to specialists who will use their substantive expertise to resolve specific issues, such as tax or environmental concerns, and other tasks to younger lawyers with lower hourly billing rates in order to help conserve the client's resources.<sup>73</sup> In each of these examples, L-1 segments certain tasks and sends them to others in her organization.

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<sup>73</sup> Skadden Arps reportedly utilizes a system to channel work to the most efficient worldwide location, as described by Leigh Jones in *The 24-hour Firm*, *supra* note 9.

Outsourcing takes this delegation one step further by sending the tasks to a lawyer (or law firm, as in Case Study # 5) who works outside of L-1's organization. By outsourcing, L-1 loses at least some – and perhaps total - control over the work she delegates. While L-1 can direct her in-firm associates to work on the project in a particular manner, when she outsources the work she abdicates some control over the direction and monitoring of the way in which the work will be accomplished by the lawyer who receives the outsourcing assignment, whom we will call L-O. Outsourcing involves not only a loss of control over the manner of work but also over the physical aspects of the work, which raises questions such as where the work will be performed, access to the work site, and risks posed by the work site to maintaining confidentiality of the client's information.<sup>74</sup> Moreover, by outsourcing the work, L-1 introduces uncertainty into her relationship with her client, since L-O may desire direct contact with the client while L-1 may wish to not divulge to the client the fact that she is outsourcing part of the job at all. When the outsourcing is sent to a non-U.S. lawyer working outside of the U.S., as in Case Study # 7, the issues are magnified – more distance yields less control.

We can imagine a continuum of lawyer-client and lawyer-lawyer relationships in which offshore outsourcing to a non-US lawyer is at one extreme,

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<sup>74</sup> Confidentiality is a serious problem, as evidenced by “the University of California at San Francisco Medical Center’s recent scare over patient medical records. A woman in Pakistan hired to transcribe patient records threatened to reveal patient information if she was not paid money a subcontractor owed her.” Deger, *supra* note 30.

and delegation to a lawyer in the same law firm office occupies the opposite end of the spectrum. In between are intermediate steps of delegation:

- Case Study # 2: L-1 refers the matter to lawyers in a branch office of the same law firm;
- Case Study # 3: L-1 refers the matter to lawyers working for her law firm in its non-U.S. office;
- Case Study # 4: L-1 hires a temporary lawyer to work on the project under her supervision and in space provided by her firm;
- Case Study # 5: L-1 refers the matter to a lawyer/law firm occupying offices in the same city as she works, but unaffiliated with her firm;<sup>75</sup>
- Case Study # 6: L-1 refers the matter to an outsourcing firm that hires non-US lawyers in a foreign jurisdiction to perform the work;
- Case Study # 7: L-1 refers the matter to a non-U.S. lawyer/law firm situated in a foreign jurisdiction and who is unaffiliated with her firm.

Each of these delegation relationships can be analyzed according to the sorts of controls that L-1 retains: control through physical proximity, control through an employment or partnership relationship, and control through the ability to effectively monitor as a result of L-1's familiarity with the law being applied by

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<sup>75</sup> Such a referral may occur because L-1 or her firm is conflicted out of representing the client on the particular matter.

L-O. Figure 1 organizes these various relationships according to these three control mechanisms.

Figure 1: Case Studies

	# 1	# 2	# 3	# 4	# 5	# 6	# 7
Mechanism of Control	Referred to another lawyer in same office	Referred to lawyers in branch office of same law firm	Referred to non-US lawyers in non-US office of same law firm	Referred to a temporary lawyer (licensed in the US) hired by L-1	Referred to lawyers in different law firm located in same city as L-1	Referred to an outsourcing intermediary firm that will hire non-US lawyers in non-US jurisdiction	Referred to non-US lawyers working for a different law firm in non-US location
Employment or partnership relationship	Yes	Yes	Yes	No, but	No	No	No
Physical proximity	Yes	No	No	Possibly	No	No	No
Ability to effectively monitor through shared education/licensing	Yes	Possibly (depends upon whether lawyers in non-US office are US lawyers)	No	Yes	Yes	Yes (based on outsourcing firm's staff being US licensed)	No

Each of the relationships in Case Studies ## 1-4 enable L-1 to maintain control on the basis of an employment or partnership relationship with the lawyer receiving the referral, L-O. In these instances, L-O's interest in maintaining his reputation with L-1 and within the firm generally supports the notion of control. This means that L-O will self-monitor for quality of work and timeliness, among other factors, so that even if L-1 cannot effectively review L-O's work product because L-O must apply foreign law or expertise with which L-1 is unfamiliar or it is not cost-effective for L-1 to supervise closely, L-1 nevertheless may trust that L-O will not exceed the boundaries of his competence. While temporary lawyers (Case Study # 4) do not share the same employment or partnership relationship with L-1 as the other relationships described above, the temporary lawyer is likely to be motivated by the same reputational interests as lawyers in L-1's firm so that L-1 will retain him again.<sup>76</sup> Moreover, the employment and even quasi-employment relationships support the confidentiality of client information.<sup>77</sup>

In contrast, the relationships in Case Studies ## 5-7, including referrals to lawyers in different law firms regardless of their location and through outsourcing intermediaries, lack the same reputational connection. Of course, reputation still

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<sup>76</sup> See Deger, *supra* note 30 (According to Thomas Sager, then chief litigation counsel at DuPont, "the temporary agency . . . uses many of the same lawyers repeatedly, so they have come to know and understand DuPont's methods).

<sup>77</sup> Coster, *supra* note 26 (discussing the concern in outsourcing that two different firms will use the same group of lawyers in the offshore location and that client confidences will inadvertently be shared as a result. Orrick Herrington and Sutcliff for example, uses contract lawyers but keeps them in the same location as the firm's permanent legal staff.).

matters; it is unlikely that L-1 would refer a matter to any lawyer without some knowledge or experience relating to the lawyer's abilities. But once the matter is referred out, L-1's awareness of L-O's performance as well as her ability to influence L-O is greatly reduced.<sup>78</sup> Instead, L-1's best option for monitoring L-O's performance is her ability to review the work of L-O; this, in turn, depends upon whether she receives that work instead of it being sent directly to the client, and whether she has the time and expertise to assess it.<sup>79</sup> In outsourcing, it is likely that L-O will accomplish the outsourced tasks and return the work product to L-1, giving L-1 the ability to monitor through review of the work. In a typical referral relationship, on the other hand, L-O would not return his work product to L-1. Thus, outsourcing provides some measure of control by the referring attorney, L-1, that is absent in a typical referral relationship. Nevertheless, the efficiency of L-1's ability to monitor based on common education and expertise is necessarily limited both by the cost of L-1's time and the nature of the matter undertaken by L-O. The more detailed the review by L-1 of L-O's work product, the less savings afforded by referring the matter to L-O, since the cost of L-1's time spent on reviewing the work will reduce the cost savings.<sup>80</sup> On the other hand, even if L-1 reviews L-O's work carefully, it may be difficult for her to

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<sup>78</sup> See Coster, *supra* note 26 ("Many lawyers feel uncomfortable with the idea of outsourcing work to professionals who they've never trained, let alone met, yet whose work reflects the quality of the firm.").

<sup>79</sup> See *id.* (citing concern regarding the time required to review outsourced work as inefficient).

<sup>80</sup> See Blumenthal, *supra* note 45 at 4.

reach a conclusion about the advice offered by L-O if L-O's work relates to a sophisticated legal issue that is outside of L-1's area of expertise. Control through this mechanism of shared education and licensing may be illusory. As a Florida lawyer commented recently, "It's hard enough to assure quality work from people in your own firm let alone people you don't know who are located halfway around the world."<sup>81</sup>

Of course, lawyers may contract for control and the right to supervise outsourced work. L-1 and L-O might agree that L-O will communicate with the client only through L-1, that all work produced by L-O be submitted to L-1 for review, and that the work be performed in a setting monitored by L-1 for issues of access and other matters affecting the ability to keep client information confidential. The retention of control in this manner increases the costs associated with outsourcing. In addition, depending upon the location of the outsourced work, the enforceability of the contract may be at issue.<sup>82</sup>

### **III: Focusing on Professional Ethics and Tort Liability**

#### **A. An Overview**

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<sup>81</sup> Braga, *supra* note 4 (quoting Doc Benjamin, a Williams Parker Harrison Dietz & Getzen partner).

<sup>82</sup> See, e.g., Emily Umbright, *Appearing in St. Louis, Indian advocate provides a legal perspective on outsourcing work*, ST. LOUIS DAILY RECORD/ST. LOUIS COUNTIAN, Aug. 23, 2005 (Indian law holds only the employer liable for breaches of confidentiality by leaks of information).

While the capability to offshore developed only recently, the principles of professional ethics and tort liability that constrain a lawyer's decision to send back-office and support functions, law-related services, or legal services<sup>83</sup> to foreign lawyers or vendors are long standing. For example, a lawyer is generally under no obligation to inform a client that other lawyers and non-legal personnel within the lawyer's firm will be working on the client's matter.<sup>84</sup> Thus, in Case Studies 1-3, *supra*, L-1 may proceed without advising the client of the involvement of L-1's associates, partners, or non-legal personnel.

In contrast, a lawyer must obtain a client's consent before associating with

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<sup>83</sup> As discussed more fully, *infra* at notes 90-102 and accompanying text, the line between legal services and law-related services is far from bright. This article adopts Model Rule 5.7(b)'s definition of the phrase, "law-related services":

services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as the unauthorized practice of law when provided by a nonlawyer.

MODEL RULES OF PROF'L CONDUCT, R. 5.7(b) (2003).

The Model Rules definition is singularly unhelpful in trying to decide whether a particular service is "legal" or "law-related." The Comment to the Rule provides some, but not much, guidance.

Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

*Id.*, *cmt.*

<sup>84</sup> The Comment to Model Rule 1.6 specifically notes:

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

MODEL RULES PROF'L CONDUCT R. 1.6 *cmt.* (2003).

an outside lawyer.<sup>85</sup> This well established principle applies equally to Case Study #5 (a referral to lawyers in a different law firm located in the same city as L-1) and to Case Study #7 (a referral to non-U.S. lawyers working for a different law firm in a non-U.S. location) and Case Study # 6 (a referral to an outsourcing intermediary that will hire non-U.S. lawyers in a non-U.S. jurisdiction).<sup>86</sup> A similar logic seems to compel the conclusion that the lawyer should inform the client even if the work being sent to the offshore provider is law-related (*i.e.*, not "legal services") and is being sent to a foreign vendor rather than a foreign law firm. The need for such advisement is especially obvious if the offshored work involves confidential client information and/or there is any form of a financial relationship between the provider and the law firm.<sup>87</sup>

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<sup>85</sup> RESTATEMENT OF THE LAW GOVERNING LAWYERS THIRD, § 14, cmt. h, at 132; *id.* § 21, cmt. e, at 177, RESTATEMENT OF AGENCY SECOND, § 18; Ronald D. Rotunda & John S. Dzienkowski, LEGAL ETHICS - THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (2004-05 ed.).

<sup>86</sup> One lawyer who outsources legal services has commented that it is not necessary to advise the client provided that the referring lawyer closely supervises the receiving lawyer. *Outsourcing of Legal Work is Growing But There's Still Little Ethics Guidance*, 21 ABA/BNA LAWS. MAN. PROF. CONDUCT 316 (June 15, 2005). His opinion is generally consistent with the advice contained in Formal Opinion 88-356 issued by the ABA Committee on Ethics and Professional Responsibility and the opinions of some state bar association ethics committees relating to the employment of temporary lawyers. Other committees disagree, calling for mandatory disclosure. *E.g.*, *Oliver v. Bd. of Governors*, 779 S.W.2d 212 (Ky. 1989) *See generally* ABA/BNA LAWS. MANUAL ON PROF. CONDUCT 91:410 (2006). In light of this disagreement, the authors maintain that non-disclosure remains a risky proposition with respect to a lawyer's ethical responsibilities and potential tort liability.

<sup>87</sup> *E.g.*, *Estate of Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 907 (S.D.N.Y. 1997) (A conflict of interest may exist if certain of the lawyers in Law Firm A that had represented the plaintiff in the underlying action were previously associated with Law Firm B, the law firm that was acting as counsel for the defendant in that action, and Law Firm A had regularly accepted referrals from Law Firm B).

The need for complete and accurate disclosure to a client concerning a law firm's recommendation of a vendor, such as a document management company, to respond to discovery

A law firm or law department<sup>88</sup> seeking guidance on the principles of professional ethics and tort liability that are likely to arise in a decision to offshore legal services need look no further than the Restatements of both Agency and the Law Governing Lawyers, case law on negligent referrals and failures to monitor law firm employees, third-party organizations, and outside lawyers to whom referrals have been made, and the provisions of ethics codes that place a particular responsibility on lawyers to supervise the firm's lawyers, non-legal employees, and under certain circumstances, third-parties.<sup>89</sup>

As noted earlier,<sup>90</sup> offshoring frequently raises the threshold issue of the

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requests is both a matter of ethics and managing client relationships. The strength of this proposition is powerfully illustrated by the adverse reaction of the Adelphia Communications Corp. (Adelphia) when it learned that the outside vendor that it had hired at the recommendation of the law firm that was representing it in a very complex bankruptcy proceeding and criminal investigation was partially owned by family members of the lawyers in the firm. Adelphi fired the law firm and the ensuing publicity damaged the law firm's reputation. Robert Frank & Nathan Koppel, *Boies Office Send Clients to 3rd Firm With Family Ties*, WALL ST. J., Oct. 11, 2005, at C1; Robert Frank, *Adelphia, Boies Firm Agree to Split; Cable Company Asked Special Counsel to Quit Over Ties to a Contractor*, WALL ST. J., Aug. 30, 2005, at A.3; Jonathan D. Glater, *A Lion of the Courtroom Hears His Critics Roar*, N.Y. TIMES, Sept. 22, 2005, at C1; Anthony Lin, *Boies Schiller Dogged by Claims of Conflict Document Company Angers A Former Client*, NAT'L L.J., Sept. 19, 2005, at 6.

<sup>88</sup> Rule 1.1 of the American Bar Association Model Rules of Professional Conduct defines "law firm" as denoting, *inter alia*, "lawyers employed in . . . the legal department of a corporation or other organization." MODEL RULES PROF. CONDUCT R. 1.1 (2002). This article adopts the Rule 1.1 definition. References to a "law firm" include a legal department.

<sup>89</sup> There are other substantive law dangers that a firm should be aware of, such as the possibility that it might be considered a joint employer with an offshore vendor, exposing it to potential liability for the employment law violations of the offshore company, that its transfer of materials to an offshore company might violate a U.S. export law or the privacy laws of foreign jurisdictions. *E.g.*, Sam Ramanujan & Sandhya, *A Legal Perspective on Outsourcing and Offshoring*, 8 J. AM. ACADEMY OF BUS. 51, 52-54 (2006). *See also* Richard F.D. Corley & Elizabeth L. McNaughton, *Current Issues in Outsourcing Transactions: Canadian Privacy Laws, the Patriot Act and Other Considerations*, N.Y.S.B.A. INT'L PRACTICUM, Autumn 2005, at 138; Scott C. Harris, *Outsourcing, Offshoring*, NAT'L L.J., Sept. 12, 2005, at 14; Judith A. Moldover, *Outsourcing: Who's the Boss?*, N.Y.L.J., Apr. 4, 2005, at 9.

<sup>90</sup> *See supra*, notes 25-28.

unauthorized practice of law (UPL) because the work is being sent directly to foreign lawyers who are not authorized to practice law in the United States or to vendors outside the United States who employ the foreign lawyers and/or non-legal professionals. Resolving the UPL issue is next to impossible for two reasons.<sup>91</sup> First, UPL jurisprudence with respect to outsourcing to U.S.-licensed lawyers, foreign lawyers who are physically present in the United States,<sup>92</sup> and domestic vendors<sup>93</sup> lacks coherence. Defining the activities that constitute UPL is the responsibility of the states, and they have not taken a uniform view.<sup>94</sup> The efforts of the American Bar Association to assert a leadership role in the creation of a national norm have failed miserably.<sup>95</sup>

Second, neither the courts nor bar regulators currently display any interest

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<sup>91</sup> This article consequently makes no attempt to define “legal services.” While the offshoring of back office functions and law-related services does not raise UPL issues, it does raise other ethical and liability issues such as confidentiality, competence, and monitoring. *See infra* notes 118-38 and accompanying text.

<sup>92</sup> *E.g., In re Roel*, 144 N.E.2d 24 (N.Y. 1957) (affirming a finding of criminal contempt and the issuance of a preliminary injunction, restraining a Mexico-licensed lawyer physically located in New York from giving advice limited to the domestic relations law of Mexico to clients physically located in New York).

<sup>93</sup> Outsourcing to domestic vendors raises UPL issues because both the courts and state bar ethics committees have concluded that organizations may not employ lawyers to provide legal services to the organizations' clients (as opposed to the organization itself). The prohibition allegedly rests on the proposition that lawyers employed by an organization are less likely to be able to exercise independence of professional judgment on behalf of the organizations' clients than lawyers employed by law firms. History reveals, however, that the real purpose behind the prohibition was to protect solo practitioners and small firms from competition. Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 83 MINN. L. REV. 1115 (2000).

<sup>94</sup> *See generally* Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEG. ETHICS 217, 248-52 (2000).

<sup>95</sup> *See* American Bar Ass'n, Report of the Task Force on the Model Definition of the Practice of Law (2004).

in enforcing UPL prohibitions against organizations in analogous circumstances involving the outsourcing within the United States of services that are arguably legal in character. Legal research,<sup>96</sup> brief writing,<sup>97</sup> and discovery-related activities<sup>98</sup> are regularly undertaken by vendors without any protestation by the courts or bar regulators. The likely, but generally unarticulated, justification for their passivity is that the law firms and legal departments that retain these organizations supervise them and bear a significant marketplace and reputational risk if the organizations' final product is sub par.

The courts and bar regulators view UPL enforcement fundamentally as a matter of consumer protection, generally focusing their limited resources on non-lawyers who mislead unsophisticated clients about the clients' rights in areas such as immigration, domestic relations, bankruptcy, real estate, etc.<sup>99</sup> Lawyers are punished only when their failure to supervise their employees facilitates the employees' UPL activities<sup>100</sup> or when the lawyers deliberately assist the UPL

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<sup>96</sup> Legal research has been determined not to be the practice of law when it is undertaken by a licensed lawyer for the benefit of other lawyers and the legal research is provided through an entity separate from the lawyer's law firm. Supreme Court of Ohio Bd. of Commissioners on Grievances and Discipline, Op. 88-018 (1988).

<sup>97</sup> Robert J. Ambrogi, *Outsourced Legal Writing: If It's Used With Caution, It Can Be A Lifesaver*, NAT'L L.J., Mar. 17, 2003, at C4.

<sup>98</sup> See *Litigation: A Special Report Support*, LEGAL TIMES, Mar. 22, 2004, at 34-37.

<sup>99</sup> *Cleveland Bar Assn. v. Slavin*, 62 Ohio Misc.2d 570, 608 N.E.2d 870 (Ohio Bd. Comm'rs on the Unauthorized Practice of Law 1993).

<sup>100</sup> E.g., *In re Castorena*, 270 B.R. 504 (Bank. D. Idaho 2001) (bankruptcy); *In re Konohia*, 550 S.E.2d 318 (S.C. 2001) (real estate). See also Jay M. Zitter, J.D., *What Constitutes Unauthorized Practice of Law by Paralegal*, 109 A.L.R.5th 275 (2005).

activities of affiliated organizations.<sup>101</sup> Rarely are lawyers ever sanctioned for assisting an out-of-state lawyer in the practice of law in a jurisdiction in which the lawyer is not licensed.<sup>102</sup>

The prime consequence of this jurisprudential incoherence and regulatory restraint is that law firms in deciding to offshore legal services likely face few or no UPL hurdles as a practical matter. The courts and bar regulators will likely continue to look the other way provided that consumer protection interests are not implicated.<sup>103</sup>

For many years, the fear that nonlawyers would interfere with a lawyer's exercise of independent professional judgment prompted the disciplinary

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<sup>101</sup> *E.g.*, *Bluestein v. State Bar of California*, 529 P.2d 599 (Cal. 1975) (disciplining a lawyer for referring a criminal matter involving a foreign jurisdiction to a lawyer whom he believed was admitted in New York and had practice experience outside the United States); *In re Flack*, 33 P.3d 1281 (Kan. 2001) (disciplining a lawyer for failing to supervise nonlawyers in connection with estate planning); *Florida Bar v. Flowers*, 672 So.2d 526 (Fla. 1996) (disciplining a lawyer for failure to supervise nonlawyer immigration consultant who shared office space with the lawyer).

<sup>102</sup> *But see* *Office of Disciplinary Counsel v. Pavlik*, 732 N.E.2d 985 (Ohio 2001) (disciplining an Ohio lawyer who assisted an Illinois lawyer in practicing law in Ohio). *See also* Ga. Ethics Op. 98-1 (1998) (A Georgia lawyer who acts as local counsel may risk discipline for an out-of-state lawyer's discovery abuses under certain circumstances.) *See generally* Christine M. Guerci, *Vicarious Liability of Attorney for Acts of Associated Counsel*, 35 A.L.R.5th 717 (1996 & 2004 Supp.); David A. Gerregano, J.D., *What Constitutes "Unauthorized Practice of Law" by Out-of-State Counsel*, 83 A.L.R.5th 497 (2005).

On occasion, the courts have effectively "disciplined" an out-of-state lawyer for UPL by imposing non-disciplinary sanctions. *E.g.*, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998) (denying a New York law firm's request for fees for services that constituted the practice of law in California); *Wellmore Coal Corp. v. Harman Mining Corp.*, 568 S.E.2d 671 (Va. 2002) (dismissing a notice of appeal signed by an out-of-state lawyer). *See generally* Sarah Diane McShea, *Disgorgement of Fees and the Unauthorized Practice of Law*, 2002 PROF. LAW. 153 (2002). The *Birbrower* decision was in large measure the impetus for the establishment of the ABA Commission on Multijurisdictional Practice. At the Commission's urging, the ABA amended Model Rule 5.5, expanding the circumstances in which a lawyer could ethically practice law in a jurisdiction in which the lawyer was not licensed.

<sup>103</sup> *See generally* American Bar Ass'n, 1999 Survey of Unauthorized Practice of Law Committees (2000). Such interests might become implicated if, for example, the offshoring involved debt collection work. *See e.g.*, *Boyd v. Wexler*, 275 F.3d 642 (7th Cir. 2001).

authorities, bar association ethics committees, and courts to use the threat of potential UPL charges to discourage lawyers from establishing a law-related business with a nonlawyer. They also disfavored law-related businesses *even if* singly owned by a lawyer, fearing confusion by clients as to the nature of the services being rendered and conflicts of interests caused by the lawyer's referral of clients to the law-related business. While neither fear has entirely dissipated, lawyers now may offer law-related services under certain circumstances pursuant to ABA Model Rule 5.7.<sup>104</sup>

Model Rule 5.7 may directly impact a law firm's decision to offshore both legal and law-related services. While it is difficult to obtain precise information concerning the frequency and extent to which law firms and legal departments are offshoring both types of services, news articles and interviews suggest that

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<sup>104</sup> Model Rule 5.7 entitled "Responsibilities Regarding Law-Related Services" provides:  
(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:  
(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or  
(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.  
(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

*See also supra* note 78. *See generally* Robert R. Keatinge, Multidimensional Practice in a World of Invincible Ignorance: MDP, MJP, and Ancillary Businesses after Enron, 44 ARIZ. L. REV. 717 (2002); Lowell J. Noteboom, Professions in Convergence: Taking the Next Step, 84 MINN. L. REV. 1359 (2000); Henry Gottlieb, Ancillary Businesses Let Law Firms Provide a Fuller Range of Services and Carner Revenue Beyond Hourly Billing, N.J.L.J., July 18, 2005, at 1; Leigh Jones, Firms Not Minding Their Own Businesses, LEGAL INTELLIGENCER, June 22, 2005, at 1.

offshoring occurs more frequently in connection with intellectual property matters than in connection with other areas of the law.<sup>105</sup> Some law firms have gone so far as to establish ancillary businesses outside the United States to provide non-legal services to their own clients, other law firms, and non-clients.<sup>106</sup> These law firms consequently face an additional, distinct challenge arising from Model Rule 5.7's ethical restraints on ancillary businesses. The fact that these businesses are conducted in foreign countries is irrelevant to the Rule's applicability.<sup>107</sup>

#### B. The Ethical Duties of Supervision and Monitoring and Associated Tort Liability

Many of the ethical principles governing the client-lawyer relationship and the common law principles determining a lawyer's tort liability to a client with respect to offshoring are rooted in Section 405 of the Restatement of the Law of Agency. It provides in relevant part:

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<sup>105</sup> See Coster, *supra* note 26; Jeff Blumenthal, "Region's IP Lawyers Consider Offshore Outsourcing," DELAWARE LAW WEEKLY, May 25, 2005; see also *US patent errors revealed*, Managing Intellectual Property, Feb. 2006 (reporting on mistakes identified in 1,600 patents proofread by Intellevate).

<sup>106</sup> See Coster, *supra* note 26.

<sup>107</sup> Rule 8.5, Disciplinary Authority; Choice of Law provides in relevant part:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.

The comment to Rule 8.5 notes :

The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

- (2) An agent is subject to liability to the principal if, having a duty to appoint or to supervise other agents, he has violated his duty through lack of care or otherwise in the appointment or supervision, and harm thereby results to the principal in a foreseeable manner. He is also subject to liability if he directs, permits or otherwise takes part in the improper conduct of other agents.
- (3) An agent is subject to liability to a principal for the failure of another agent to perform a service which he and such other have jointly contracted to perform for the principal.<sup>108</sup>

#### Applying Section 405 to a lawyer's decision to offshore legal services or

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<sup>108</sup> RESTATEMENT OF THE LAW OF AGENCY, § 405 (1958 & Supp. 2004). Determining whether an individual or an entity is an agent, subagent, independent contractor, servant or joint venturer involves a complex analysis that is outside the scope of this article. *See generally* RESTATEMENT (SECOND) AGENCY § 1 cmt. 3 (describing the characteristics of an agent and independent contractor); *id.* § 5 (defining subagents and subservants); *id.* § 220 (defining servant) (1958 & 2005 Supp.); RESTATEMENT (THIRD) OF AGENCY § 3.03 (T.D. No. 2, 2001) (defining a joint venture). Such determinations frequently turn on factual data relating to the degree and kind of supervision exercised by a principal and/or agent.

Further complicating these determinations is the public policy question, whether and to what extent should the existence of an underlying client-lawyer relationship influence the application of the Restatement principles. Although an individual or entity retained by a lawyer to provide legal or law-related services to a client may be properly characterized as a servant, a subservant, a joint venturer, or an independent contractor for some purposes by the Restatement, a court may not treat that characterization as controlling in determining a lawyer's ethical responsibilities or tort liability. *See infra* note 148 and accompanying text, describing the nondelegable duties that a lawyer owes a client.

For the purposes of this article, it is assumed, unless otherwise noted, that the relationship between the referring law firm and the offshore party performing the service satisfies the legal criteria for the creation of an agency relationship that is derivative of the underlying attorney-client relationship.

law-related services is theoretically straightforward. The lawyer must exercise a duty of care in selecting and monitoring the offshore vendor. Section 405 does not, however, impose vicariously liability on the lawyer for the vendor's negligence.

Issues of Professional Conduct: Rules 5.1<sup>109</sup> and 5.3<sup>110</sup> of the Model Rules of

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<sup>109</sup> Rule 5.1 provides:

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
  - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

MODEL RULES OF PROF'L CONDUCT R. 5.1 (2002). *See generally* Thomas A. Kuczajda, *Self Regulation, Socialization, and The Role of Model Rule 5.1*, 12 GEO. J. LEGAL ETHICS 119 (1998); Robert R. Keatinge, *The Floggings Will Continue Until Moral Improves: The Supervising Attorney and His or Her Firm*, 39 S. TEX. L. REV. 279 (1998); Irwin D. Miller, *Preventing Misconduct by Promoting The Ethics of Attorneys' Supervisory Duties*, 70 NOTRE DAME L. REV. 259 (1994); Note, Rachel Reiland, *The Duty to Supervise and Vicarious Liability: Why Law Firms, Supervising Attorneys and Associates Might Want to Take a Closer Look at Model Rules 5.1, 5.2, and 5.3*, 14 GEO. J. LEGAL ETHICS 1151 (2001).

<sup>110</sup> Rule 5.3 provides:

- With respect to a nonlawyer employed or retained by or associated with a lawyer:
- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
  - (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is

Professional Conduct create three categories of ethical responsibilities. The first focuses on partners and lawyers who hold managerial responsibilities within a law firm. They must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that "all lawyers in the firm conform to the Rules of Professional Conduct"<sup>111</sup> and that the conduct of a nonlawyer employed, retained or associated with a lawyer" is "compatible with the professional obligations of the lawyer."<sup>112</sup> The second focuses on lawyers who have direct supervisory authority over other lawyers and nonlawyers.<sup>113</sup> Both sets of duties, like Section 405 of the Restatement of Agency, create supervisory responsibilities rather than vicarious responsibility.<sup>114</sup> The third duty imposes direct liability on

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compatible with the professional obligations of the lawyer; and  
(c) a lawyer shall be responsible for conduct of such a person that  
would be a violation of the Rules of Professional Conduct if engaged  
in by a lawyer if:  
(1) the lawyer orders or, with the knowledge of the specific conduct,  
ratifies the conduct involved; or  
(2) the lawyer is a partner or has comparable managerial authority in  
the law firm in which the person is employed, or has direct  
supervisory authority over the person, and knows of the conduct at a  
time when its consequences can be avoided or mitigated but fails to  
take reasonable remedial action.

*Id.* R. 5.3. See also *In re* Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 607 A.2d 962 (N.J. 1992) (While a lawyer may delegate tasks to a paralegal, the lawyer must directly supervise the paralegal *even if* the paralegal is an "independent paralegal" not an employee of the lawyer).

<sup>111</sup> See *supra* note 113 and accompanying text.

<sup>112</sup> See *supra* note 114 and accompanying text.

<sup>113</sup> Compare R. 5.1(b) with R. 5.3(b).

<sup>114</sup> American Bar Ass'n, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-1998* at 229 (1999). Furthermore, these supervisory ethical

lawyers for conduct by non-lawyers that violates the Rules of Professional Conduct or other professional obligations of the lawyer. The lawyer incurs liability if s/he either ratifies wrongful conduct or fails to take reasonable remedial action.<sup>115</sup> Particularly significant is the introductory language in Model Rule 5.3, "a nonlawyer employed or retained by or associated with a lawyer," because it shows the broad range of relationships for which the lawyer must assume ethical oversight.<sup>116</sup> There is ample caselaw under Rules 5.1 and 5.3 disciplining lawyers<sup>117</sup> for failing to properly supervise the work of associates<sup>118</sup> and nonlawyer employees.<sup>119</sup>

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responsibilities exist "even if state law provides certain damage limitations or exclusions for the purpose of liability." ABA Formal Op. 96-401(1996) (*emphasis added*).

<sup>115</sup> Compare R. 5.1(c) with R. 5.3(c).

<sup>116</sup> E.g., *In re Flack*, 33 P.3d 1281 (Kan. 2001) (disciplining a lawyer for failing to supervise an estate planning company); *Florida Bar v. Flowers*, 672 So.2d 526 (Fla. 1996) (disciplining a lawyer for failing to supervise an immigration consultant). See also *Spencer v. Steinman*, 179 F.R.D. 484 (E.D. Pa. 1998) (sanctioning a lawyer for a violation of Rule 45 of the Federal Rules of Civil Procedure by a paralegal in the lawyer's office).

<sup>117</sup> In New York and New Jersey, law firms – as well as lawyers – may be disciplined. E.g., *In re Law Firm of Wilens and Baker*, 777 N.Y.S.3d 116 (1st Dep't 2004); *In re Ravich, Tobin, Oleckna, Reitman & Greenstein*, 715 A.2d 216 (1998), *aff'd*, 754 A.2d 554 (N.J. 2000); *In re Jacoby & Meyers*, 687 A.2d 1007 (N.J. 1997).

<sup>118</sup> E.g., *In re Yacavino*, 494 A.2d 801 (N.J. 1985) (criticizing a law firm's "sink or swim" policy towards associates); *In re Saab*, 547 N.E.2d 919 (Mass. 1989) (disciplining a lawyer for assigning a domestic relations matter to an inexperienced association whom the lawyer failed to supervise); *Attorney Grievance Comm. v. Ficker*, 706 A.2d 1045 (Md. 1998) (disciplining a lawyer for assigning a difficult drunk driving case to a novice lawyer and assigning too many cases to too few lawyers); *In re Moore*, 494 S.E.2d 804, 807 (S.C. 1997) (disciplining a lawyer for discovery failures even though the responsibility for responding to discovery demands was an associate's); *People v. Kusick*, 2001 WL 1161113 (Colo. O.P.D.J. June 6, 2001). See generally Wilbur McCoy Otto, *Identifying and Maintaining Lawyer Competence and Professionalism*, 56 DEF. COUNSEL J. 288 (1989).

<sup>119</sup> *In re Jayson*, 772 N.Y.S.2d 769 (N.Y. App. Div. 2003) (disciplining a lawyer who failed to supervise two nonlawyer employees, as a result of which the lawyer filed an incorrect Uncontested Matrimonial Checklist with a court); *State v. Taylor*, 4 P.3d 1242 (Okla. 2000) (disciplining a lawyer who failed to supervise an employee with respect to the proper handling of a

Applied to the decision to offshore legal services, Model Rules 5.1 and 5.3 and the supporting caselaw clearly require a law firm to implement a policy of instructing its offshore vendors and providers to conform to the ethical obligations of the Model Rules and to adopt practices and procedures to monitor their compliance. Without such policies, practices, and procedures firmly established, lawyers run the serious risk of discipline.<sup>120</sup> It is impossible to describe the content of those policies, practices, and procedures with any precision given the little public knowledge that exists about the details of the working relationship between law firms and the offshore vendors of legal and law-related services. Certainly the starting place is the policies, practices, and procedures already in place for monitoring and supervising a firm's lawyers, nonlawyer personnel, and outside vendors. As explained in more detail below,<sup>121</sup> however, it is highly unlikely that simply modifying existing policies and procedures will be sufficient in light of the significant differences in foreign legal systems and professional education.

In formulating the specific provisions of these policies, practices, and procedures, a law firm must focus at a minimum on three substantive ethical

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client's funds). *See generally* Jay M. Zitter, *Annotation, What Constitutes Unauthorized Practice of Law by Paralegal*, 109 A.L.R.5th 275 (2005).

<sup>120</sup> *See supra* notes 113-114.

<sup>121</sup> *See infra* notes 128-38 and accompanying text.

obligations:<sup>122</sup> the duty to maintain confidentiality of client information,<sup>123</sup> avoid conflicts of interest,<sup>124</sup> and provide competent representation.<sup>125</sup>

Observance of the duty of confidentiality requires a law firm to take multiple affirmative measures to ensure that its offshore agents understand the scope of a U.S. lawyer's duty to preserve information relating to the representation of a client. Breaches of confidentiality not only violate the Model Rules of Professional Conduct<sup>126</sup> but they are also the basis of tort liability. Lawyers have been held liable for both inadvertent<sup>127</sup> and deliberate<sup>128</sup> disclosures.

Establishing procedures and policies to protect offshored confidential

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<sup>122</sup> Depending upon the financial arrangement between the law firm and the vendor, the law firm may also need to address ethical issues relating to fees for legal services and the sharing of legal fees with a non-lawyer. For example, one lawyer who outsources projects to India has reported "I usually bill the clients a certain hourly rate and pay these folks a portion of that rate." Coster, *supra* note 26. Fee splitting with non-lawyers was a matter of particular concern when businesses first began to offer temporary lawyer services. *E.g.*, Ass'n of the Bar of the City of New York Comm. on Professional Ethics and Judicial Ethics, Formal Ops. 1989-2 (1989); *id.*, Formal Ops. 1988-3 & 1988-3A (1988); N.J. Sup. Ct. Advisory Comm. on Professional Ethics, Op. 632 (1989); Fl. State Bar Ass'n Comm. on Professional Ethics, Op. 88-12 (1988). As the use of temporary lawyers became more common, ethical inquiries shifted to the question whether and to what extent a law firm could charge a client a "markup fee" for the services of a temporary lawyer. *E.g.*, D.C. Bar Ethics Comm., Op. 284 (1998). Because of the paucity of information on the fee arrangements between law firms and offshore vendors, this article does not address ethical issues relating to fees.

<sup>123</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

<sup>124</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7, 1.8 & 1.9 (2003).

<sup>125</sup> MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

<sup>126</sup> *See Oklahoma v. McGee*, 48 P.3d 787 (Okla. 2002) (disciplining a lawyer for failing to supervise his secretary who disclosed the confidential information of Client A to Client B).

<sup>127</sup> *E.g.*, *Thiery v. Bye*, 597 N.W.2d 449 (Wisc. Ct. App. 1999) (disclosure of client's confidential medical information); *Kohn v. Schiappa*, 656 A.2d 1322 (N.J. Super. Ct. Law Div. 1995) (disclosure of the identity of adopting parents to natural parents); *In re Mandelman*, 514 N.W.2d 11, 12 (Wisc. 1994) (disclosure of confidential information to non-affiliated lawyers).

<sup>128</sup> *Sherman v. Klopfer*, 336 N.E.2d 219 (Ill. App. Ct. 1975) (disclosure of allegedly improper accounting to the Internal Revenue Service); *In Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Suignan & Eisenberg*, 265 Cal.Rptr. 330 (Cal. Ct. App. 1989) (disclosure of the timing of a client's bid for property); *Lakoff v. Lionel Corp.*, 137 N.Y.S.2d 806 (N.Y. Sup. Ct. 1955) (disclosure of client's invention).

information and prevent illegal conduct such as insider trading does not require law firms to reinvent the wheel.<sup>129</sup> Rather, they can build on existing internal procedures and policies that already have been implemented to prevent violations of U.S. securities and other relevant law.<sup>130</sup> Firms without existing procedures and policies will need to adopt similar measures.

Law firm procedures generally focus on securing documents containing confidential information and include such measures as physically and electronically segregating them, severely limiting access to them, restricting their copying, tracking copies, shredding unnecessary copies, and inserting code names in the documents and filing systems to mask the identity of the clients and other parties.<sup>131</sup> Law firm policies focus on individuals, regularly reminding both lawyers and non-lawyers of the critical importance of preserving the confidential information, the dangers of conversations about client matters outside the law

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<sup>129</sup> The Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA) mandates that broker-dealers and investment advisors "establish, maintain, and enforce written policies and procedures reasonably designed" to prevent insider trading. PUB. L. NO. 100-74. While a law firm is neither a broker-dealer or investment advisor as defined by ITSFEA, the SEC has taken the position that a law firm has an affirmative obligation to protect material, non-public information. SEC REL. NO. 34-13437, 11 SEC DOCKET 2231 (1977).

<sup>130</sup> Despite a firm's best efforts, misconduct by lawyers and nonlegal personnel is unavoidable. *E.g.*, U.S.A. v. O'Hagan, 521 U.S. 642 (1997). *See also* Phyllis Diamond, *Two Plead Guilty to Insider Charges Involving Tips from Law Firm Secretar*, 36 SEC. REG. & LAW REP. 1105 (June 21, 2004); *Former Lawyer at BioTech Concern Given Prison Term in Insider Case*, 36 SEC. REG. & LAW REP. 142 (Jan. 26, 2004); Joyce E. Cutler, *Lawyer Pleads Guilty to Insider Charges Over Acquisition of Software Company*, 33 SEC. REG. & LAW REP. 1311 (Sept. 17, 2001); *IP Lawyer Sentenced After Pleading Guilty to Insider Trading*, 33 SEC. REG. & LAW REP. 1758 (Dec. 17, 2001).

<sup>131</sup> *See* Ronald E. Mallen & Jeffrey M. Smith, 2 LEGAL MALPRACTICE § 13.9, at 334-35 (2005 ed.). *See also* Ronald E. Mallen & Jeffrey M. Smith, 1 LEGAL MALPRACTICE § 2.25, at 257-60 (2005 ed.).

firm, and the risks of disclosure by e-mail.<sup>132</sup>

The importance of these measures cannot be underestimated. While all foreign jurisdictions in the common- and civil-law traditions acknowledge a lawyer's duty to maintain client confidences in one form or another, the courts, the organized bar, and the informal professional culture of a foreign country's legal system may well shape the contours of that duty differently. China<sup>133</sup> and the Islamic countries where the shirah is adopted,<sup>134</sup> for example, are certain to have

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<sup>132</sup> See Ronald E. Mallen & Jeffrey M. Smith, 2 *LEGAL MALPRACTICE* § 13.9, at 334-35 (2005 ed.).

<sup>133</sup> Law of the People's Republic of China on Lawyers, Arts. 33-34, 35(2), 46(6)-(7) & 51, <http://en.chinacourt.org/public/detail.php?id=100> (last visited Mar. 3, 2006). It has been noted:

U.S. firms practicing in China . . . may encounter vastly different rules concerning client confidences. At one time, Beijing even sent orders to foreign law offices in China requiring quarterly reports on information usually considered confidential by American lawyers, such as "client lists, locations of projects under consideration, affiliations with Chinese law firms, business reference lists, and the value of deals in negotiations."

Mark I. Harrison & Mary Gray Davidson, *The Ethical Implications of Partnerships and Other Associations Involving American and Foreign Lawyers*, 22 *PENN. STATE INT'L L. REV.* 639, 649 (2004) (citing, Yujie Gu, Note, *Entering the Chinese Legal Market: A Guide for American Lawyers Interested in Practicing Law in China*, 48 *DRAKE L. REV.* 173, 191 (1999)). See also, Charles Chao Liu, Note and Comment: *China's Lawyer System: Dawning Upon the World Through A Tortuous Process*, 23 *WHITTIER L. REV.* 1037 (2002); *Shanghai Bar Drafts First Local Code for Lawyers*, <http://www.china.org.cn/English/2002/Jan/25205/htm>.

<sup>134</sup> Determining the scope of a lawyer's duty of confidentiality under the shari'a is not an easy task.

Although principles of the shari'a are largely consistent with U.S. standards of confidentiality, various interpretations of Islamic law will determine the acceptability of disclosure. In contrast to the *maslaha mursalah* concept, other principles of the shari'a arguably demand that a lawyer abide by a higher standard of duty in maintaining a client's confidentiality. In complex representation involving Islamic issues, lawyers operating under the Model Rules are charged with recognizing these higher standards. It is, therefore, important for the lawyer dealing with Islamic issues to consult with the client on the duty of confidentiality. Although difficult to imagine, a Muslim party or client may expect a higher degree of confidentiality than a lawyer is accustomed to.

M. McCary, *Bridging Ethical Borders: International Legal Ethics with an Islamic Perspective*, 35 *TEX. INT'L L.J.* 289, 313 (2000) (footnotes omitted).

radically different perspectives.

Law firms must be certain that their agents understand that the duty of confidentiality generally extends to all information even if it is a matter of public record<sup>135</sup> and that the duty continues even when the engagement is over. On a practical level, a law firm may be obligated to examine the offshore agent's hiring practices to ensure that only reputable employees have access to confidential information and that adequate measures are in place to prevent both physical and electronic theft of the information. Even the vendor's recycling policies must be examined.<sup>136</sup>

It may also be necessary to investigate the substantive law of the country in which the legal services are being performed with regard to the duty of confidentiality. If services are performed on behalf of a global organization, that organization's property may be subject to judicial or administrative seizure in numerous countries. Thus, a law firm must consider the risk, if any, to confidential client information that would result if a disgruntled employee, customer, or creditor of the vendor instituted a lawsuit and sought to seize the

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<sup>135</sup> This consequence of the ethical duty of confidentiality is counter-intuitive to many U.S. lawyers. *E.g.*, *In re Anonymous*, 654 N.E.2d 1128 (Ind. 1995) (sanctioning a lawyer for revealing information despite the fact that the information was "readily available from public sources and was not confidential in nature"); *Ex parte Taylor Coal Co.*, 401 So.2d 1, 8 (Ala. 1981) (even though a fact was disclosed in a court proceeding and therefore lost the protection of the attorney-client privilege, it was still a "secret" and could not be disclosed by client's former lawyer); Bar Ass'n of Nassau County, Op. 96-7 (1996) (a lawyer may not disclose the conviction of a former client, even though the conviction is a matter of public record). Like their U.S. counterparts, most foreign lawyers and offshore organizations are likely to find this consequence unsettling.

<sup>136</sup> *E.g.*, NYSBA Comm. on Professional Ethics, Formal Op. 641 (1993) (analyzing a lawyer's ethical responsibilities in complying with local recycling laws).

organization's property within the jurisdiction (e.g., its papers and documents containing confidential information). The disclosure of confidential client information might also be an issue if a dispute arose between the law firm and vendor, and suit was brought in foreign jurisdiction where the work was performed.<sup>137</sup> An evaluation of risk must also include an assessment of the efficiency and honesty of the jurisdiction's court system, since in certain countries the judiciary is notoriously slow and/or corrupt.

The duty to avoid conflicts of interest presents an even greater challenge than the duty to protect confidential client information. While the admonition to avoid conflicts of interest is a regular feature of codes of professional conduct in both common and civil law countries, the interpretation of that admonition is far from uniform.<sup>138</sup> It is not at all unreasonable to assume that foreign lawyers and organizations that employ foreign lawyers are generally insensitive to U.S.-style conflicts. Consequently, a law firm must take painstaking care to communicate the conflicts' standards that the foreign lawyer or offshore organization must apply.<sup>139</sup> Bar association ethics committees have created an extensive

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<sup>137</sup> This possibility has also been a matter of concern for state bar association ethics committees with respect to the hiring of temporary lawyers from an agency. *E.g.*, State Bar of California Comm. on Professional Responsibility and Conduct, Formal Op. 1992-126 (1992).

<sup>138</sup> *See* Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117 (1999).

<sup>139</sup> Law firms have been disqualified for conflicts attributable to the experts they retained. *E.g.*, *Schairer v. Schairer*, 745 N.Y.S.2d 410 (N.Y. Sup. Ct. 2002); *see also* *Gibbs Properties Corp. v. CIGNA Corp.*, 196 F.R.D. 430, 435-36 (M.D. Fl. 2000); *Bell Helicopter Textron, Inc.*, 87 S.W.3d 139 (Tex. App. 2002); *Western Digital Corp. v. Superior Court*, 71 Cal. Rptr.2d 179 (Cal

jurisprudence regarding the application of conflict of interest ethics rules to affiliated lawyers and law firms. They have analyzed, for example, conflicts avoidance by temporary lawyers<sup>140</sup> and lawyers in an “of counsel” relationship.<sup>141</sup> That jurisprudence is a likely template for identifying the conflicts dilemmas springing from the offshoring of legal services to foreign lawyers. Finally, ethics opinions specifically discussing the relational boundaries between U.S. and foreign lawyers should also generally contribute to shaping the nature and extent of the U.S. lawyers’ involvement and supervision.<sup>142</sup>

The duty of competence requires a law firm to conduct two lines of inquiry. The first is directed to answering the fundamental question, does the foreign lawyer or offshore vendor possess the knowledge and skills necessary to

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Ct. App. 1998). It is not at all inconceivable that a court might disqualify a law firm for a conflict attributable to the foreign lawyers employed by an offshore vendor that the law firm hired or by the simultaneous or successive work that the vendor was conducting for another law firm.

<sup>140</sup> *E.g.*, ABA Committee on Ethics and Professional Responsibility, Formal Op. 88-356 (1988); New York City Bar Committee on Professional and Judicial Ethics, Formal Ops. 1989-2, 1988-3 & 1988-3-A (1988); Cal. State Bar Formal Op. 1992-126 (1992). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 *cmts. g-h* (1998).

<sup>141</sup> *E.g.*, ABA Committee on Ethics and Professional Responsibility, Formal Op. 90-357 (1990); New York City Bar Committee on Professional and Judicial Ethics, Formal Op. 1996-8 (1996).

<sup>142</sup> *E.g.*, ABA Committee on Ethics and Professional Responsibility, Formal Op. 01-423 (2001) (U.S.-licensed lawyers may form a partnership with a foreign lawyer provided that the foreign lawyer is a member of a recognized legal profession in the foreign country and that the partnership complies with the applicable law; NYSBA Committee on Professional Ethics, Op. 762 (2003) (New York law firm with a foreign office must ensure that the firm's compliance with the New York Lawyer's Code of Professional Responsibility is not compromised by the substantive law obligations of the firm's foreign lawyers and their ethical obligations); *id.* Op. 658 (1994) (a lawyer licensed to practice in New York State may enter into a partnership with a lawyer licensed in Sweden provided that "the training and ethical standards applicable to the foreign lawyer are comparable to those of an American lawyer."). *See also* ABA Committee on Ethics and Professional Responsibility, Formal Op. 94-388 (1994) (analyzing the ethical issues created by various types of affiliations among law firms).

carry out the client's objective.<sup>143</sup> The second is directed to an assessment of the on-the-ground, day-in day-out, capability of the foreign lawyer or offshore vendor to deliver the promised service. Neglecting either line of inquiry is fraught with ethical and/or liability peril.

Issues of Tort Liability: The principles governing a lawyer's tort liability for the actions of another lawyer to whom legal work has been outsourced have become less certain in recent years. Traditionally, a law firm and its partners were vicariously liable for the malpractice of the firm's lawyers and nonlawyer employees. Consequently, if a partner "outsourced" an assignment for a client to an associate or another partner in the firm, the law firm and all its partners bore the risk that the associate or partner might negligently represent the client and expose the firm and all its partners to financial ruin.<sup>144</sup> See Case Studies ## 1-3, *supra*.<sup>145</sup> The physical location of the lawyer receiving the assignment (*e.g.*, main office, U.S. branch office, or foreign branch office) is irrelevant. The principle of vicarious liability has weakened within the last twenty years, however, as the legislatures and the courts have permitted lawyers to organize as professional

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<sup>143</sup> See generally, Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, 17 J.L. & COM. 301, 328-335 (1998); Bryon S. Hollins, *The Hazard: Practicing Outside Your Area*, 84 A.B.A. J., Mar. 1998, at 58; Emily S. Lassiter, Note, *Liability for Referral of Attorneys*, 24 J. LEGAL PROF. 465 (2000); Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT'L L.J. 53, 81-85 (1992/1993).

<sup>144</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 (2000 & 2004 Supp.).

<sup>145</sup> *Supra* at 23.

corporations,<sup>146</sup> limited liability partnerships,<sup>147</sup> and limited liability corporations.<sup>148</sup> Nonetheless, it remains true as a general proposition that law firms and their principals remain subject to vicarious liability for the actions of their partners,<sup>149</sup> associates,<sup>150</sup> and nonlawyer employees<sup>151</sup> that damage their clients. In some circumstances, they are liable for the acts of of-counsel attorneys<sup>152</sup> and independent contractors who are performing non-delegable duties.<sup>153</sup> Local counsel may also be liable to the client an out-of-state attorney.<sup>154</sup> There is at least one case suggesting that an associate may be liable to a supervising attorney for contribution arising out of the associate's negligence

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<sup>146</sup> Ronald E. Mallen & Jeffrey M. Smith, 1 LEGAL MALPRACTICE § 5.4, at 575-84 (2005 ed.).

<sup>147</sup> Ronald E. Mallen & Jeffrey M. Smith, 1 LEGAL MALPRACTICE § 5.6, at 597-611 (2005 ed.).

<sup>148</sup> Ronald E. Mallen & Jeffrey M. Smith, 1 LEGAL MALPRACTICE § 5.5, at 575-596 (2005 ed.).

<sup>149</sup> Ronald E. Mallen & Jeffrey M. Smith, 1 LEGAL MALPRACTICE § 5.3, at 553-575 (2005 ed.).

<sup>150</sup> *E.g.*, *Friesens, Inc. v. Larson*, 438 N.W.2d 444 (Minn. Ct. App. 1989).

<sup>151</sup> *E.g.*, *David C. Joel, Attorney at Law, P.C. v. Chastain*, 562 S.E.2d 746 (Ga. Ct. App. 2002); *Bullard v. Bailey*, 959 P.2d 1122 (Wash. Ct. App. 1998).

<sup>152</sup> *E.g.*, *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 590 N.Y.S2d 201 (N.Y. App. Div. 1st Dep't 1992); *Staron v. Weinstein*, 701 A.2d 1325 (N.J. Super. Ct. App. Div. 1997). *See also* RESTATEMENT OF THE LAW GOVERNING LAWYERS § 58 cmt. e, at 444 (2000 & Supp. 2005); Ronald E. Mallen & Jeffrey M. Smith, 1 LEGAL MALPRACTICE § 5.7, at 596-620 (2005 ed.).

<sup>153</sup> *E.g.*, *Kleeman v. Rheingold*, 614 N.E.2d 712 (N.Y. 1993). While a lawyer has wide latitude in the type of work that he may assign to a nonlawyer within his firm or an independent contractor, the courts have concluded that certain duties are non-delegable. They do not, however, agree on which duties fall within that category. Among the duties that are commonly described as non-delegable are: establishing the lawyer-client relationship; maintaining direct contact with a client; giving legal advice; and exercising legal judgment. *See* ABA/BNA Laws. Man. on Prof. Conduct 91:208 (1999).

<sup>154</sup> *E.g.*, *Ortiz v. Barrett*, 278 S.E.2d 833 (Va. 1981).

and breach of contract.<sup>155</sup>

The doctrine of vicarious liability becomes more complicated if the assignment is made to a lawyer who is not formally affiliated with the referring law firm, such as in Case Studies ## 6-8, *supra*. In such instances, vicarious liability may be grounded on the nondelegable character of the responsibility being transferred to the receiving lawyer, the existence of a joint venture between the two lawyers, or the referring lawyer's failure to exercise due care in selecting the unaffiliated lawyer and/or in monitoring the lawyer's activities.

While state law defines the elements of a joint venture relationship,<sup>156</sup> the most important characteristic for the purposes of this article is an agreement to share fees between the referring and receiving lawyer.<sup>157</sup> In offshoring legal and law-related services a law firm should consider how any financial arrangement between the lawyer and the vendor may impact a later claim that the vendor was not an independent contractor, but a joint venturer of the law firm, making the law firm vicariously responsible for the vendor's negligence.

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<sup>155</sup> Kramer v. Nowak, 908 F.Supp. 1281 (E.D. Pa. 1995).

<sup>156</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 9 cmt. h, at 92. A joint venture is treated as a form of a general partnership. According to the Restatement of Agency:

A general partnership results when two or more persons associate for the purpose of carrying on as co-owners a business for profit . . . . General partnership is thus the legal structure applicable to an ongoing business that extends beyond a single project. An association limited to a single project is a joint venture. A joint venture is treated as a form of partnership, in which duties and authority are limited by the scope of the venture.

RESTATEMENT (THIRD) OF AGENCY § 3.03 (T.D. No. 2, 2001).

<sup>157</sup> *E.g.*, *Armor v. Lantz*, 535 S.E.2d 737 (W. Va. 2000); *Duggins v. Guardianship*, 632 So.2d 420 (Miss. 1994).

*Tormo v. Yormark*<sup>158</sup> is the touchstone for any discussion of vicarious liability involving a lawyer's referral of a matter to an out-of-state lawyer and consequently bears directly on a lawyer's decision to offshore law-related or legal services. In that case, a lawyer licensed to practice in New York referred a client with a potential personal injury claim to a lawyer in New Jersey. The New York lawyer did not research the New Jersey's lawyer's competence or reputation for ethical behavior. He simply verified the lawyer's admission to the bar. Had he conducted a more complete investigation, he might have learned that the New Jersey lawyer had been indicted for conspiring fraudulently to obtain money from an insurance company. The New Jersey lawyer ultimately embezzled the funds received from the client's settlement of the personal injury claim. The client, in turn, sued the New York lawyer seeking to hold the lawyer vicariously liable for the embezzlement.

The court's opinion in *Tormo* is important for two reasons. First, it rejected on public policy grounds, the client's argument that the New York lawyer had an independent obligation to conduct a comprehensive investigation into the character of the New Jersey lawyer.<sup>159</sup> Second, it concluded that the New York lawyer could be held liable for the embezzlement if the lawyer failed to make

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<sup>158</sup> 398 F.Supp. 1159 (D. N.J. 1975).

<sup>159</sup> *Id.* at 1169-1171.

"such an inquiry as was required by ordinary prudence."<sup>160</sup> The court denied the New York lawyer's motion for summary judgment except for the investigation claim because the pre-trial testimony of the lawyer, the client, and the client's father raised genuine issues of material fact with respect to whether the circumstances under which the referral was made triggered "such an inquiry as was required by ordinary prudence."

*Tormo* thus stands for the proposition that a lawyer may have *some* duty of inquiry before referring a client to another lawyer, especially one admitted in another jurisdiction.<sup>161</sup> Its holding does not address the related question of the referring lawyer's vicarious liability for the negligence of the lawyer receiving the referral. The courts have almost uniformly rejected such a claim.<sup>162</sup> The lesson to be learned from *Tormo* is simple. In making the decision to offshore back office,

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<sup>160</sup> Not all courts agree with *Tormo*. *E.g.*, *Bourke v. Kazaras*, 746 A.2d 642 (Pa. Sup. Ct. 2000); *accord Felker v. O'Connell*, 1990 WL 31912 (E.D. Pa. Mar. 20, 1990). Whether any weight at all should be given to *Bourke* and *Felker* is highly questionable. To begin with, the Supreme Court of Pennsylvania has not addressed the issue of liability for a negligent referral. Furthermore, the courts' analysis was extremely terse and seemed to be heavily swayed by the prospect that the creation of such a cause of action might have an unfavorable impact on bar association referral services. *See also Weisblatt v. Chicago Bar Ass'n*, 684 N.E.2d 984 (Ill. App. Ct. 1997); *see generally Gonzalzes v. Am. Express Credit Corp.*, 733 N.E.2d 345, 351-53 (Ill. App. Ct. 2000).

<sup>161</sup> *See generally* David A. Grossbaum, *Watch Your Back of Referrals – Check Out the Other Attorney First, Then Put the Arrangement in Writing*, A.B.A. J., May 1997, at 86; Christine M. Guerci, *Annotation, Vicarious Liability of Attorney for Acts of Associated Counsel*, 35 A.L.R.5th 717 (1996 & 2004 Supp.); Comment, Andrew W. Martin, Jr., *Legal Malpractice: Negligent Referral as a Cause of Action*, 29 CUM. L. REV. 679 (1998-1999).

<sup>162</sup> *E.g.*, *Christensen, O'Connor, Garrison & Havelka v. State, Dep't of Revenue*, 649 P.2d 839 (Wash. 1982); *Wilderman v. Wachtell*, 149 Misc.2d 623, 267 N.Y.S. 840 (N.Y. Sup. Ct. 1933). *See also Cohen v. Lipsig*, 459 N.Y.S.2d 98, 98 (N.Y. App. Div. 1983) (among the issues of fact precluding summary judgment were "whether respondent used reasonable care in his choice of . . . trial counsel . . ."). *See generally Vicarious Liability of Attorney for Acts of Associated Counsel*, *supra* note 102.

law-related, or legal services, a lawyer should make "such an inquiry as [is] required by ordinary prudence." The scope of that inquiry should reflect the sensitivity of the information and data being offshored. At a minimum, the lawyer will have to interview the prospective contracting party's business references thoroughly.

Prudence may call for a more exhaustive investigation of the foreign lawyer, law firm, or vendor that the lawyer is considering directly retaining or recommending that the client retain, if trade secrets, confidential client information, and work product are involved. In matters of extraordinary sensitivity, it may be necessary to hire an outside investigator to evaluate the prospective contracting party's professional integrity and competence.

#### **IV: Conclusion: The Future of Outsourcing**

Professional regulation does not prevent offshore outsourcing but constrains it by requiring control and monitoring by U.S. lawyers. For GCs, offshore outsourcing is in many respects simply more of the same: instead of retaining their typical outside counsel for certain matters, they might outsource through an outsourcing intermediary or directly to non-US lawyers working offshore. But referring work to the corporation's regular independent law firm and outsourcing to a foreign vendor generates entirely different consequences for

the GC: the trust and confidence GCs typically place in the work of their outside counsel will be replaced by the need to monitor and review the work of the offshore outsourced worker. This monitoring function will reduce the cost savings from offshore outsourcing as well as require GCs to accept a more active and aggressive role. And while professional regulation requires monitoring in terms of the content of the advice, GCs also will need to be mindful of the impact of offshore outsourcing on their internal communication and control systems.<sup>163</sup>

The use of offshore outsourcing by corporate GCs adds a new element of competition for their typical outside counsel that may especially impact law firms that advise on more routine matters. In addition to outsourcing offshore, there is competition from non-law firms that specialize in particular substantive areas and whose staff may be comprised at least partly of lawyers, so that while the firm is not technically offering legal advice, the services offered reduce the use of outside counsel.<sup>164</sup> These firms serve as real competition for lawyers, especially the midsize market, despite their being unable to market themselves as providing legal services, as a result of the rejection and prohibition of multidisciplinary forms of organizations for lawyers.<sup>165</sup> They operate as a sort of “stealth”

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<sup>163</sup> Internal controls are the subject of disclosure and certification by the corporation and its auditors; see Rule 13a-15 adopted by the Securities Exchange Commission pursuant to the Securities Exchange Act of 1934.

<sup>164</sup> Joel A. Rose, *Midsized Firms: Key Trends Affecting Competitiveness and Profitability*, ACCOUNTING FOR LAWYERS, Jan. 10, 2005, at 1.

<sup>165</sup> Of course, professional regulation of lawyers is accomplished at the state level; see <http://www.abanet.org/cpr/regulation/scpd/disciplinary.html> for a listing of state agencies responsible for lawyer disciplinary matters. The District of Columbia’s Rules of Professional

multidisciplinary practice firm.

‘Stealth’ MDPs are non-law professional service firms that offer services traditionally performed by lawyers through employees educated in the law. These services include corporate investigations, where the identification of material information is crucial, and tax advisory activities, where the clash between the accountants and lawyers traditionally has been waged. Entities offering business advice in other areas, such as mergers and acquisitions, environmental matters, or human resources, also employ law graduates and draw on their expertise.<sup>166</sup>

By sending work to non-US lawyers working offshore as well as to those working in non-legal roles, corporate GCs avoid regulatory hurdles intended to protect the public from unqualified advisors. Their hiring of these advisers, in spite of the regulatory problems, indicates their lack of concern for protection.

For law firms considering whether to engage in offshore outsourcing themselves, different issues are relevant. The risk for law firms is that the

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Conduct authorize lawyers to share fees with nonlawyers under limited circumstances, pursuant to Rule 5.4; *see* [http://www.dcbart.org/for\\_lawyers/ethics/legal\\_ethics/rules\\_of\\_professional\\_conduct/Rule\\_five/rule05\\_04.cfm](http://www.dcbart.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/Rule_five/rule05_04.cfm) (last visited Apr. 29, 2006). But the American Bar Association rejected a proposal to allow multidisciplinary practice in 2000; *see* materials at <http://www.abanet.org/cpr/multicom.html> (last visited Apr. 29, 2006).

<sup>166</sup> Bryant G. Garth & Carole Silver, *The MDP Challenge in the Context of Globalization*, 52 CASE W. RES. L. REV. 903, 914 (2002) (footnotes omitted).

outsourcing will tarnish their reputations. This is particularly serious because the most efficient offshore outsourcing relationship will include only minimal time spent on supervision and training of the outsourced lawyers, and this raises concerns of quality control. In addition, outsourcing may hinder a firm's ability to provide sufficient training opportunities for its own new lawyers.

Law firms already employ significant numbers of lawyers who work offshore, and in many offices and firms the vast majority of these are non-U.S. lawyers.<sup>167</sup> But firms expect their foreign office lawyers to work on transactions at a similar level of sophistication to those performed by domestic lawyers in the firm. This organizational framework is irrelevant for outsourcing if the purpose is to lower legal fees.<sup>168</sup>

Firms could, however, revise their structures to accommodate a sort of in-house outsourcing arrangement. One version might involve the organization of a second law firm, related through training and referral agreements, for example, which might function as a training firm for the primary firm in much the same way that minor league baseball teams offer training for players hoping to shift to the major league. The training firm would perform more routine services for significantly lower costs than the primary firm, and the relationship between the

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<sup>167</sup> Fewer than one-quarter of all lawyers working in the non-U.S. offices of 60 of the largest United States-based law firms earned the basic JD degree in a United States law school. *See* Silver, *supra* note 50.

<sup>168</sup> U.S. firms already have geographically-based hierarchies in terms of compensation; *see id.* (describing compensation of lawyers in different offices of a single law firm as different, based on the law license of the individual).

two might be analogous to that between a major league baseball team and its training team.<sup>169</sup> As lawyers in the training firm became more experienced, one career trajectory would allow them access to the original, higher-end firm. Of course, this sort of sister-firm structure could be accomplished domestically, and it resembles the relationship described between certain of London's Magic Circle firms and provincial English firms to which they regularly refer routine matters.<sup>170</sup>

Whether offshore outsourcing will motivate law firms to reconsider their relationships with firms occupying different tiers in the legal market remains to be seen, but the attention devoted to offshore outsourcing in the legal and business press indicates its perception as a threat to the status quo. The states' rules of professional conduct and principles of tort liability will not prevent offshore outsourcing, although they may well render it less efficient. Rather, the competition for role of corporate adviser will be settled by the rules of the marketplace, including price, of course, but also quality and prestige.

In the realm of legal services, the importance of prestige and the relationships that status may support and engender, as well as the role of judgment and experience in the services offered, undermine to some extent the "flattening" impact of outsourcing. While there is no doubt that offshore outsourcing creates

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<sup>169</sup> A somewhat similar arrangement is described by Scott C. Harris in *Outsourcing, Offshoring*, NAT'L L. J., Sept. 12, 2005 ("Under the captive firm model [of offshoring], a U.S. firm opens a private office in, for example, India. Dedicated local managers are hired to train the local people. Everyone in the office works for the single firm. This requires a huge investment by the law firm opening the office, but in return provides the best offshoring service.").

<sup>170</sup> Paul Hodkinson, *supra* note 15.

new opportunities for foreign lawyers, these opportunities do not put foreign lawyers on an equal footing with U.S. lawyers. Rather, they enable foreign lawyers to escape the strictures of their home legal professions. But there is an enormous space between finding new opportunities in the home jurisdiction market and gaining position in the U.S. market. Offshore outsourcing only emphasizes these divisions, which are characteristic of globalization generally. While we cannot predict the future, we see offshore outsourcing as one more factor contributing to the existing divisions in the legal market while simultaneously enabling shifting positions among the purchasers and sellers of those services.