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Checklist for third-party attorney opinions

By Anthony J. Jacob, Hinshaw & Culbertson LLP

Various business transactions, whether concerning the sale of a business or the borrowing of funds from a financial institution, typically require the issuance of an attorney opinion letter to a party of a transaction who is not the opinion provider's client. These types of opinions are referred to a third-party attorney opinions. They are typically delivered in connection with the closing of a business transaction. The opinions are relied upon by a third party to give certain assurances to the third party with respect to your client as part of a particular transaction. Lawyers issuing these opinions encounter the risk of being sued over these opinions when fraud or other improper action by a transaction party arises after the transaction closes.

This article seeks to give a lawyer a list of actions items and considerations when conducting the due diligence needed to issue a third-party opinion.

1. Start very basic by identifying the client and the other entities for which the opinion will apply, i.e., subsidiaries, related companies, guarantors or other borrowers. Identify when and for what purpose the opinion is needed. Determine which form of opinion will be used, i.e. your form or lender's form. If you use your form opinion, be mindful of any changes or deviations from your opinion and the reason for the change or deviation.
2. Identify who will be drafting the opinion and whether someone in your law firm will be reviewing the opinion. Consider any applicable law firm policy and procedure for issuing third-party legal opinions.
3. You have to be familiar with the facts and cir-

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Major reform to rules governing the broker-investor relationship is on the way

By Laurence M. Landsman, Esq. Partner, Block & Landsman

On July 21, 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protections Act ("Dodd-Frank Act") in response to the 2008 financial meltdown in the U.S. economy. Among the many challenges the statute is intended address are long-simmering battles concerning the relationship between brokers, broker-dealers and their customers. After protracted clashes between investor advocates and industry representatives, the Dodd-Frank Act has authorized the Securities and Exchange Commission ("SEC") to engage in rule-making that will overhaul the securities laws in ways long sought by investors. Soon, brokers will be held to higher standards of care toward their clients, and investors will have access to greater protections where brokers have breached their standards of care.

I. Background

a. Brokers' Owe Limited Standard of Care to Investors.

Under current law, brokers are required to

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cumstances of the specific transaction for which the opinion is being given. This will require that you review: (a) existing operative and background documents for your client and all other entities for which the opinion is given, and (b) the transaction documents.

a. **Operative and Background Documents**. The following documents should be obtained for your client and all other entities for which the opinion is given. Be sure to obtain all amendments to the documents identified below. State whether any of the documents have not been fully executed. Also, consider describing any other relevant circumstances or facts with regard to the client or other entities that may be relevant in issuing the opinion.
   i. Articles of Incorporation/Articles of Organization/Charter documents/Certificate of Limited Partnership;
   ii. Good Standing Certificate(s)/Qualifications to do business in other states;
   iii. By-Laws/Buy-Sell Agreements/Operating Agreements/Proxy or Voting Agreements;
   iv. Resolutions/Consents of Board of Directors/Managers/Members authorizing and approving transaction/Certificates of Incumbency with specimen signatures;
   v. Stock Certificates/Member Certificates/ownership ledger;
   vi. Search results for UCC/Tax/Federal and State Litigation, Judgment and Bankruptcy/Federal and State Lien (be sure to check all applicable jurisdictions);
   vii. Securities and securities transaction registration/exemption requirements;
   viii. Research any existing or pending litigation;
   ix. Identify any other relevant documents, i.e. leases, service agreements, restrictive covenants, easements, and intellectual property agreements; and
   x. Keep notes of any interviews or attorney conferences needed with respect to a particular issue raised or concerned matter.

b. **Transaction Documents**. List the exact name and date of each document for the transaction. Consider using the transaction/closing checklist to determine which documents need to be reviewed. You need to actually possess and review each transaction document to issue the opinion.

4. If the situation is appropriate, inquire as to whether you should use a form set of opinions provided by another party to the transaction and analyze opinions. Otherwise, analyze which opinions are necessary. Be aware of whether the opinion requires any written advice concerning a significant issue of federal tax law. If so, you will need to determine whether the opinion complies with the requirements of the Internal Review Service's Circular 230 and any particular policy of your law firm.
5. Communicate with your client the need for you to give a legal opinion. Review with client legal opinions you will and will not give. Determine whether local counsel is necessary to give certain opinions.
6. Determine what assumptions, qualifications and limitations apply to your opinions.
7. Each opinion will require you to conduct and document the due diligence performed in order to give such opinion. Below are some of the more common opinions given and the due diligence considerations for each. Because there are various types of opinions that may be given with respect to a particular transactions, this checklist does not provide an comprehensive list of opinions or the necessary due diligence.

   a. *Company is a [corporation/ limited liability company/ partnership/ etc.] duly organized, validly existing and in good standing under the laws of the State of _____________.* You should consider reviewing the company's formation documents, annual reports, good standing certificates, corporate records (including consents, approvals and resolution), foreign qualification certificates and filings (if applicable), and any amendments to the foregoing.

   b. *Company has all of the requisite [corporate/company/partnership] authority to execute and deliver the __________ Documents to which it is a party and to perform its obligations thereunder. The ________ Documents have been properly executed and delivered by or on behalf of Company, and constitute the legal, valid and binding obligations of Company, enforceable against Company in accordance with their respective terms.* With regard to an opinion on authorization, execution and delivery of certain documents by your client, you should consider the following: (a) determine whether the board of directors, shareholders, members, managers or other took action to approve the documents, (b) review the documents giving the authority to approve the documents to confirm authority and that proper procedures were followed, (c) determine if other approvals are necessary, (d) list any regulatory requirements or restrictions affecting transaction, (e) list requirements of any market in which the client's securities are traded, (f) list the requirements of identified in the transaction documents, and (g) obtain incumbency certificate or other documentation to verify who is permitted to execute the transaction documents.

   c. *The execution and delivery by Company of each of the _______ Documents to which it is a party will not result in a violation of any applicable law, statute, ordinance or regulation of the United States or the State of _____________, including, without limitation, _____________ [INSERT NAME(S) OF STATE BUSINESS STATUTES], as applicable.* To give this opinion, you should be mindful of to which documents this opinion applies, i.e. just the transaction documents or other documents of the client. Consider discussing with your client's in-house counsel, if any, which laws and regulations apply to the company's business that are covered by the opinion. Identify the specific laws and reg-

ulations that are covered by the opinion. If necessary, consult with local counsel regarding a particular state's laws and regulations. You ultimately will need to verify that the transaction documents and the obligations of your client thereunder do not violate (or are prohibited by) the identified applicable laws and regulations.

8. Negotiate legal opinions identifying which opinions will and will not be given, whether certain opinions will be given in modified form and what assumptions, qualifications and limitations are necessary.
9. Draft officer's/manager's/member's/partner's certificate(s) identifying certain statements of fact to be relied upon by you when giving legal opinion. Be sure to get original signed certificate back before finalizing opinion.
10. Draft memorandum to file summarizing the documents and information used to support the legal opinions given in connection with specific transaction and why it is appropriate to give such opinion. Also, attach the support documents and information to memorandum.
11. Consider having another lawyer in your firm who is familiar with the specific transaction review the draft opinion, office's/manager's/member's/partner's certificate(s) and memorandum to file.
12. Set aside some time to take a final review of the opinion to sign opinion. ■

Major reform to rules governing the broker-investor relationship is on the way

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adhere to relatively lax standards of care as compared to investment advisers whose conduct is governed by the Investment Advisors Act of 1940. Brokers, who are regulated by the Financial Industry Regulatory Authority ("FINRA"), are required only to recommend investments that are "suitable," meaning that a broker need only have a reasonable basis to recommend the security in light of the client's investment objectives and financial circumstances. Investment advisers, on the other hand, must abide by a more stringent fiduciary standard of care which mandates a duty of loyalty and obligates them to act only in the best interests of their clients. The principal distinction is that brokers need not put the clients' interests ahead of their own, while an investment adviser must. The Dodd-Frank Act is poised to eliminate this difference.

From the investor's perspective, it is difficult to discern that the "advice" given by brokers is held to a lesser standard than that given by investment advisers. In a 2008 study commissioned by the SEC, the Rand Corporation found that the roles of brokers and investment advisers are confusing to investors, who are not clear about their respective legal duties. Indeed, a majority of participants erroneously believed that both brokers and investment advisers were required by law to act in the client's best interest and to disclose any conflicts of interests. The study found that investors were confused on key distinctions between investment advisers and brokers – their duties, the titles they use (brokers often designate themselves as "financial consultant" or "financial advisor") or the services they offer.

The difference in these standards of care has a significant impact on investors. The obvious effect is in the propriety of the securities in an investor's portfolio—whether or not they were selected in the best interests of the client. Less apparent, but equally significant, is the impact of the broker's lower standard of care on arbitration proceedings filed by clients who allege their investment losses were caused by broker misconduct. Because brokers' liability is judged according to a suitability standard rather than the more stringent fiduciary standard of care, they are less likely to be held accountable for a client's losses from investments that were contrary to the investors' best interests.

b. Investors Must Arbitrate Disputes with their Brokers Pursuant to Arbitration Rules that Favor the Securities Industry.

In 1987, the U.S. Supreme Court ruled that brokerage firms had the right to enforce pre-

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dispute arbitration clauses in their customer agreements. As a result of the Court's decision in *Shearson/American Express v. McMahon*, brokerage firms were entitled to mandate that all disputes by an investor against a broker or broker-dealer be resolved through arbitration rather than in court. Today, securities firms uniformly require investors to sign mandatory arbitration agreements when opening a brokerage account. The vast majority of securities disputes between investors and brokers are arbitrated through the dispute resolution forum maintained by FINRA.

Securities arbitrations involve, collectively, enormous sums of money. Between 2001 and 2009, aggrieved investors filed, on average, nearly 6,500 arbitration claims per year against their brokers and/or broker-dealers. According to an in-depth analysis of investor arbitration proceedings sponsored by the Securities Industry Conference on Arbitration ("SICA"), more than 65 percent of the investor arbitration claims that were studied sought damages in excess of $100,000. Thus, at any given time, FINRA is responsible for ensuring the fair adjudication of claims for alleged investment fraud responsible for losses exceeding one billion dollars. It is, accordingly, no surprise that investors as well as industry participants have a vested interest in the significant changes to the rules governing these disputes that will be ushered in by the Dodd-Frank Act.

The stated goals of the existing securities arbitration framework are to streamline and make more accessible the dispute resolution process. To be sure, the arbitral forum in its present state offers concrete benefits to investors and industry participants alike. For example, statements of claim need not satisfy the pleading requirements applied to complaints filed in court, and respondents are precluded, with limited exception, from filing motions to dismiss. Additionally, the rules of evidence which govern courtroom trials do not apply to FINRA arbitrations, thereby allowing the parties greater flexibility to present information they believe relevant to their case. Moreover, arbitration awards constitute a final resolution of the dispute, as the bases to appeal the arbitrators' decision are severely restricted by federal and state statutes.

The benefits, however, come at significant monetary and strategic costs which are disproportionately borne by members of the investing public. For example, the cost of bringing a FINRA arbitration proceeding can be prohibitively expensive to an investor compared to the relatively well-funded brokerage firm. In a claim seeking more than $100,000 in damages, an investor faces fees of thousands of dollars regardless of the outcome—significantly more than the cost of filing a lawsuit. Investors also face substantial costs of retaining expert witnesses to testify on issues of liability and/or damages, whereas respondent brokers and brokerage firms often rely on the testimony of employees rather than outside experts to provide such evidence.

Investors also face extremely limited ability to obtain discovery in arbitration, which allows only requests for production of documents and limited requests for information. Interrogatories and depositions are not permitted. While these limitations apply to all parties, they pose a greater disadvantage for investors facing brokerage firms that have far superior understanding of their inner workings and have unilateral access to all employees who can explain to respondents' attorneys how and why certain actions were taken.

Perhaps the most controversial aspect of FINRA arbitration procedures is the existence of an "industry" member on the three-arbitrator panels for all cases seeking damages in excess of $25,000. The vast majority of FINRA investor disputes are decided by a panel that includes one arbitrator who has significant ties to the securities industry in addition to two "public" arbitrators. Investor advocates strenuously object to the perceived unfairness of the "industry" arbitrator deciding these claims while securities organizations dispute the presence of any resulting pro-industry bias.

The impact of such disparate burdens on investors in arbitration is subject to much debate. It is indisputable, however, that as arbitrations have become more expensive, time consuming and dependent on court-room style litigation tactics, the success rate for investors has declined. Between 1997 and 1999, investors won between 56 percent and 59 percent of arbitration claims that proceeding to a hearing. Ten years later, investors are faring far worse; between 2007 and 2009, claimants won between 37 percent and 45 percent of hearings. Even these figures inflate the true success rate for claimants because FINRA records any award in an investor's favor, regardless of amount, as a "win." For example, as reflected in the SICA report on securities arbitration, 5.3 percent of the investor "wins" it studied returned an award to the claimant of less than 1 percent of the amount claimed to have been lost.

II. Dodd-Frank Will Usher in a New Focus on Investor Protections

a. The SEC Will Likely Impose Fiduciary Duties on Brokers.

Section 913 of the Dodd-Frank Act requires the SEC to conduct a study and report to Congress, by January 21, 2011, on the effectiveness and deficiencies of the existing standards of care for brokers and investment advisers who provide personalized investment advice and recommendations about securities to retail customers. The SEC is further empowered to promulgate rules for the protection of retail customers to address identified deficiencies and provide that the standard of conduct for brokers providing such advice shall be the same as that for investment advisers governed by the Investment Advisers Act of 1940.

Although the SEC has yet to conclude its study and issue its report, indications are the SEC is prepared to exercise the authority provided by the Dodd-Frank Act. The Rand report commissioned by the SEC found that current securities laws and regulations are based on distinctions between brokers and investment advisors that date back to the early 20th century, "and that these distinctions appear to be eroding today." Additionally, in a recent post on a Harvard Law School Forum, the Chairperson of the SEC, Mary Schapiro, recognized that "investors who turn to a financial professional often do not realize there's a difference between a broker and an adviser—and that the investor can be treated differently based on who they're getting their investment advice from." Ms. Schapiro further advocated that the duty owed to investors flow "from the perspective of the investor we are seeking to protect" rather than "from the perspective and legal regimes of the adviser or broker." Given this background, Ms. Schapiro has advocated a uniform fiduciary standard and is "pleased" that the new legislation gives the Commission the authority to implement it.

While the SEC Chairperson's position does not constitute an official decision by the Commission, it is apparent that there is clear support to equalize the standards of care of brokers and investment advisers, and rules achieving that goal can be expected to be implemented. Such a result will provide significant protections to investors by making their interests the controlling concern for any financial adviser.

b. Investors Will Likely Have a More Level Playing Field to Litigate Disputes with Brokers.

Section 921(a) of the Dodd-Frank Act authorizes the SEC to use its rule-making authority to prohibit, or impose conditions or limitations on the use of agreements that require customers of any broker-dealer to arbitrate any future dispute arising between them. The SEC thus has broad powers to design a dispute resolution mechanism that satisfies the demands of investors for more fairness as well the desire of industry participants to use arbitration as a preferred alternative to courts and juries.

Arbitrations should not be prohibited outright. The procedure does provide benefits that are not available in a court of law, and investors should be given a meaningful and voluntary opportunity to choose arbitration. The arbitration option cannot exist, however, without revision to the rules governing arbitrations to assuage investors' legitimate concerns regarding fairness. If substantive reforms addressing such inequities are enacted, investors should be more willing to exercise their choice to arbitrate disputes rather than go to court. Indeed, even though the SEC has yet to act, Dodd-Frank has already ushered in a significant benefit to investors in arbitration. On October 26, 2010, FINRA filed with the SEC a proposed rule change to permit investors with claims of more than $100,000 to select three member arbitration panels that do not include the contentious "industry" arbitrator.

While the elimination of the "industry" arbitrator is a substantive step toward fairness, the SEC will have to consider additional measures to reverse the existing bias against investors in order to make arbitration a viable alternative. Such changes should allow investors greater access before an arbitration hearing to evidence in the exclusive possession of respondents, should prevent well-documented discovery abuses by brokers and brokerage firms in arbitration, and should establish burdens of proof to end the need for expensive expert witnesses who are more appropriate to a courtroom trial than an arbitration hearing.

III. Conclusion

By obligating brokers to comport to a fiduciary standard of care, investors will feel more confident that the investment advice they receive is based on their best interests. For those investors who believe their losses were the result of broker misconduct, they will have the option and incentive to select arbitration to resolve their disputes. The Dodd-Frank Act has created a workable framework to protect investors' rights while instilling confidence in the fairness of the industry's preferred dispute resolution mechanism. The SEC should embrace the opportunity with swift action. ■

The ethics of outsourcing: An evolving necessity in the modern practice of law

By Jason W. Mosley

Contract attorneys and legal outsourcing is not a new phenomenon; referrals and contract work is done on a daily basis. However, with law professors predicting the collapse of the large law firm business model,[1] prominent law firms laying off significant amounts of associates, and many legal publications—including the ABA—advising young lawyers to consider hanging up their own shingle,[2] the significance of having a thorough understanding of the ethical responsibilities associated with outsourcing legal work has dramatically increased. Without such knowledge, many attorneys not familiar with these ethical rules may be subject to malpractice claims and disciplinary fallout.

In order to help address this recent phenomenon, the following article is designed to give attorneys a general understanding of the major ethical issues associated with domestically outsourcing legal work. It is not designed to address the issues associated with international outsourcing. It is also not designed to address the numerous ethical variations and distinctions that exist between different jurisdictions. However, the general concepts articulated are still relevant to many jurisdictions because many of the rules[3] referenced are substantively similar to the Model Rules of Professional Conduct and many state jurisdictions. That being said, all appropriate jurisdictional rules should be consulted before entering any outsourcing relationship.

Primary Liability

Generally, a contract lawyer will not become a counsel of record while working on an outsourced project. He or she will most likely be considered a subcontractor and will be working under the supervision of the lawyer who outsourced the work. As the attorney of record, the outsourcing attorney will be ethically responsible for any work produced by a contract attorney.[4] Not only is the lawyer ethically responsible for any work performed in furtherance of his clients, he is also responsible for taking reasonable steps to ensure that his subordinates are in compliance with the Rules of Professional Conduct.[5]

With this liability concern in mind, any responsible outsourcing lawyer will only hire contract attorneys who understand, and have implemented procedures, that uphold the ethical responsibilities that the outsourcing lawyer owes to his clients. Some of these responsibilities include: (1) possessing the requisite competence; (2) protecting the client's confidentiality; (3) adequately identifying conflicts of interests; and, (4) charging reasonable fees. These concerns are the focus of this article.

Competence

In order to competently represent a client, a lawyer must possess the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6] Determining whether this competence exists requires looking at many factors. Some of these include: subject matter complexity; a lawyer's general and specific subject matter experience; and, the amount of preparation and study a lawyer is able to give to a mat-

ter.[7] However, there is no "unique blueprint" in determining whether competent legal services have been rendered.[8] The only relevant factor—outsourced or not —is whether the attorney of record provides competent legal services in some manner.[9] Therefore, the two main issues an outsourcing attorney must consider are whether the contract attorney has the competence for a particular project and whether the outsourcing attorney can properly supervise the work.[10] These issues are analyzed below.

Potential Contract Attorneys

The first, and most important, issue an outsourcing attorney needs to address is the credibility of any potential contract attorney. How long has the attorney been practicing? Does the attorney specialize in any specific area of law? And most importantly, can the attorney competently handle the project assigned?

Answering these questions should start by asking respected colleagues for specific referrals. This allows an outsourcing attorney to receive personal insights and candid advice. If none are available, a lawyer should then proceed to check the internet and other resources.[11]

Once a potential contract attorney is located—regardless of how the attorney is found— a lawyer's ethical duty requires him to personally assess the competence of this potential contract attorney. This includes, but is not limited to, reviewing credentials, reading writing samples, and surveying testimonials and references.[12] If after conducting this due diligence the outsourcing lawyer is not completely satisfied that the contract attorney can competently handle the projected assigned, the lawyer has an ethical duty not to outsource the project to that particular contract attorney.

The Importance of Oversight

After finding a competent contract attorney, an outsourcing lawyer has an independent ethical duty to properly oversee all work done on behalf of his client.[13] However, even though the rule was designed to reduce the ethical violations of inexperienced associates, some courts have found young and inexperienced lawyers responsible for the violations of seasoned attorneys.[14] Therefore, an outsourcing attorney should not disregard his responsibility merely because an experienced contract attorney was retained. Such experience does not diminish the responsibility to adequately supervise all work done on behalf of the client, even if the contract attorney is more experienced then the outsourcing attorney. If such supervision is inefficient or undesirable, the work should not be outsourced or the possibility of dual representation should be further discussed.

Even though there are no hard rules governing what procedures would constitute adequate oversight, the largely "overlooked" rules governing supervisor oversight need to be adequately understood in order to prevent being held responsible for ethical violations of others.[15] This necessity is also heightened by the generalized and unpredictable case law governing the issue.[16] At one end, some courts have punished violations with mild public censure.[17] In contrast, other courts have imposed significant fines and multi-year suspensions.[18] Regardless of how an outsourcing attorney chooses to supervise contract attorneys, it is clear that the higher the sensitivity and complexity of the project the more time and resources should be spent supervising.[19]

Confidentiality

With limited exceptions, a lawyer may not reveal client information, unless the client gives informed consent. It has been said that this rule is the "hallmark of the attorney client relationship."[20]

Outsourcing legal work does not diminish this responsibility. In fact, because of the necessity of transferring client information from the outsourcing firm to the contract attorney, outsourcing inherently increases the need to be particularly sensitive to confidentiality issues. In particular, client consent and the methods for preventing breaches in confidentiality need to be adequately understood.

Client Consent

Because it is hard to imagine that client information will not be revealed throughout an outsourcing relationship, client consent should be obtained before any information is given to a contract attorney.[21] While some believe that this disclosure may be accomplished by adding an "outsourcing" clause to their engagement agreements, the reasons and procedures for outsourcing work should be fully explained to the outsourcing lawyer's client. Without this explanation, "informed" consent is not actually satisfied, which could ultimately leave an outsourcing lawyer liable for any information disclosed to a contract attorney.

However, at least one jurisdiction has held that informed consent is based on a client's reasonable expectations.[22] Therefore, in an economy that seems to be pushing the legal industry toward a commodity driven model, it isn't too farfetched to believe that a client's reasonable expectations could someday include allowing an attorney, without explicit consent, to outsource his work-product to the most efficient and cost-effective provider available.[23] That being said, this is outlook is still the minority view. Therefore, any outsourcing relationship should be fully explained to the client.

Preventing Breaches in Confidentiality

An outsourcing lawyer also has a duty of competently taking steps to prevent the inadvertent or unauthorized disclosure of confidential information by persons participating in the representation of their clients.[24] In particular, project based lawyers should be required to sign a strict confidentiality and non-disclosure agreement. Such agreements would ensure that the project based lawyer would be as zealous at maintaining the confidentiality of any information received in the same manner as if an attorney-client relationship existed between the project based attorney and the contracting attorney's client.[25] Not only would such agreements ensure that information obtained while working with a contract lawyer is not inadvertently disclosed to third parties, they would also help ensure that such information is not used for personal benefit of the contract attorney.

Such policies may also include taking steps to ensure that the outsourcing lawyers properly secures his computer and internet technology devices, uses some method of adequately disposing of discarded papers that may contain confidential information, and conduct a reasonable background check on the character of the outsourcing lawyer. However, this duty does not require that the outsourcing lawyer use special security measures as long as the actions afford a reasonable expectation of privacy, unless a particular client requests additional security measures.[26]

In addition to the steps taken above, an outsourcing lawyer may also wish to ensure that potential contract attorneys understand the ethical considerations associated with the practice of law in a 24/7 online world.[27] For example, requesting an opposing party's private Facebook or MySpace page in order to gather information regarding an assigned

project may inadvertently be breaking a host of ethical rules, such as inappropriately contacting a represented client or the rules governing truthfulness in statements to others.[28] Though such policies may seem like overkill, the prudent approach to avoiding ethical pitfalls in a world filled with constantly evolving Internet-based and wireless devices may include advising not only contract attorneys, but subordinates in general, about the potential ethical concerns associated with evolving technologies.[29]

Conflicts of Interest

As any lawyer knows, loyalty and independent judgment are essential to the lawyer-client relationship.[30] However, the ethical rules associated with these issues are inherently amplified by any outsourcing relationship.

While there may be other ways of addressing these concerns, the safest and most ethical means of preventing conflicts of interest associated with outsourcing legal work is to assume that any contract attorneys hired are considered employees of the outsourcing firm.[31] By making this assumption, an outsourcing attorney has the benefit of utilizing previous opinions and expert commentary to guide his actions. Failing to make this assumption provides little guidance and inevitably leaves an outsourcing attorney at the mercy of unsettled case law.

Just as any traditional firm should adopt reasonable procedures to determine if conflict of interests exists, an outsourcing attorney should also take reasonable steps to determine whether any potential contract attorney has any conflicts that would ethically prevent that attorney from proceeding with a project.[32] In order to fulfill this duty, an outsourcing attorney should determine the contract attorney's internal conflict procedures, insist that the contract attorney review his current and previous project lists, and employ necessary procedures to protect against potential conflicts. Without such procedures, little if any deference will be given to a conflict that is discovered after the fact.[33]

Reviewing Internal Procedures

One of the most important actions an outsourcing attorney needs to accomplish before any work is conducted by a contract attorney is determining the attorney's internal procedures. The three major elements to any conflict of interest system are: "establishing a thorough, well-maintained list of names; ensuring that the conflict-checking procedure becomes a part of firm's routine; [and, requiring that] everyone in the firm is trained in the procedures and involved in the system.[34] In order to satisfy these elements, a firm can utilize software checking software, forms based systems, or even creating a simple database in Microsoft Word.[35] Without these, or similar procedures, a contract attorney's services should not be utilized.

Determining Whether Conflicts Exist

The next step in determining whether any conflicts exist is specifically asking whether the contract attorney is performing, or has performed, any services that may be adverse to the outsourcing attorney's client.[36] In order to adequately ensure the truth of these statements, an outsourcing attorney needs to make sure that an adequate representation and warranties clause is properly inserted in any engagement letter or services agreement. In addition, an outsourcing attorney may also want to create a list of specific questions that may be helpful in determining whether a contract attorney has any unknown conflicts that may be adverse to the outsourcing attorney's client.

The Necessity of Reasonable Fees

A lawyer is prohibited from charging an unreasonable fee.[37] Therefore, an outsourcing lawyer is also prohibited from charging their clients an unreasonable premium above what he pays a contract lawyer for his or her services.[38] However, a lawyer is not obligated to inform the client how much the firm is paying the outsourcing lawyer.[39] In the words of the American Bar Association:

> This is not substantively different from the manner in which a conventional law firm bills for the services of its lawyers. The firm pays a lawyer a salary, provides him with employment benefits, incurs office space and other overhead costs to support him, and also earns a profit from his services; the client generally is not informed of the details of the financial relationship between the law firm and the lawyer.

Just like any traditional lawyer-client relationship, the reasonableness of fees charged by an outsourcing lawyer is based on many factors.[40] Some of these factors include: time and labor required, the likelihood of the project precluding other employment, local customs, client-imposed time limitations, the lawyer-client relationship, and the reputation of the lawyer performing the services. However, these factors are not exclusive, and are only relevant in certain circumstances.[41] Therefore, outsourcing lawyers—as well as all lawyers—should have a reasonable basis for their pay structure before any work is billed to the client.

Conclusion

If the ethical issues discussed above are adequately addressed, outsourcing legal work can be very beneficial for both the outsourcing and contract attorney. However, if these issues are forgotten or intentionally disregarded, a mutually beneficial outsourcing relationship can easily turn into malpractice claims and disciplinary fallout. For that reason, a review of the appropriate jurisdictional rules governing the ethics of outsourcing should be undertaken before any outsourcing relationship is established.

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1. Ribstein, Larry E.,*The Death of Big Law*, University of Illinois Law & Economics Research Paper No. LE09-025, Sept. 3, 2009.
2. G.M. Filisko, *Job Search Stalled? Consider Hiring Yourself*, Student Lawyer, Feb. 2010, at 15-19.
3. *See generally* Ill. Rules of Profl'l Conduct.
4. A.B.A Standing Committee on Ethics and Professional Responsibility, *Lawyers Obligations When Outsourcing Legal and Nonlegal Support Services*, at 1(2008); *See also* Ill. Rules of Prof'l Conduct R. 1.1 (2010).
5. Ill. Rules of Prof'l Conduct R. 5.1(2010).
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