

1-1-2005

Outsourcing of Legal Work: Tonic or Trojan Horse?

Brenda Doty

Michigan State University College of Law

Follow this and additional works at: <http://digitalcommons.law.msu.edu/king>

Recommended Citation

Brenda Doty, *Outsourcing of Legal Work: Tonic or Trojan Horse?* (2005),
Available at: <http://digitalcommons.law.msu.edu/king/58>

This Article is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Student Scholarship by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact domannbr@law.msu.edu.

Brenda Doty
King Scholar Paper

Outsourcing of Legal Work: Tonic or Trojan Horse?

Introduction

Outsourcing, the practice of one company hiring another company to perform and manage a business process,¹ is not a new business concept.² Neither is the practice of outsourcing to companies in other countries, or “offshoring.”³ Moving certain business functions offshore for strategic and financial gain is in fact so prevalent in American business today that it has become a hot issue for election year debate.⁴ Typically seen in operational positions of manufacturing industries, advances in technology have made outsourcing a real possibility for many other types of industries and is affecting professional positions.⁵ It is common knowledge that the software industry has begun to use outsourcing on a regular basis. Other businesses, such as credit card processing centers, have relied on outsourcing for many years, and the magnitude of such outsourcing has greatly increased in recent years.

The legal profession is not immune to this practice as law firms are businesses affected by changes in the economy and seek to be competitive like every other business. Law firms have long ago turned to outsourcing as the solution to cost cutting of non-legal support services.⁶ Today, a few firms are successfully experimenting with offshoring of legal work including research, brief writing, patent work and Employee Retirement Income Security Act work.⁷ The

¹ Economic Policy Institute, *Offshoring Frequently asked Questions* (June 2004) at http://www.epinet.org/content.cfm/issueguide_offshoring_faq [hereinafter *Offshoring FAQ*].

² Daniel W. Drezner, *The Outsourcing Bogeyman*, FOREIGN AFFAIRS, May/June 2004 available at <http://fullaccess.foreignaffairs.org/20040501faessay83304/daniel-w-drezner/the-outsourcing-bogeyman.html>.

³ *Offshoring FAQ*, *supra* note 1.

⁴ Christine Hines, *Fending Off Political Attacks On Offshoring*, LEGAL TIMES, Mar. 15, 2004, at 3.

⁵ Drezner, *supra* note 2.

⁶ Anthony Lin, *India Too Far? Call Fargo*, LEGAL TIMES Aug. 9, 2004, at 12 [hereinafter Lin, *Fargo*].

⁷ Geanne Rosenberg, *Offshore Legal Work Continues To Make Gains Ethics And Malpractice Are Among The Key Issues That May Arise In Outsourcing*, NAT'L L. J. May 17, 2004, at S3 (col.1).

question then becomes how far law firms can advance this trend, in the domestic and international arenas, given the legal profession's ethical constraints.

In examining the question of the ethical constraints on the outsourcing and offshoring of legal work, this paper contends: outsourcing of core legal services is likely in conflict with current ethical standards regarding client confidentiality, responsible supervision and restrictions on multi-jurisdictional practices. Changing these standards to take advantage of current technological capabilities and the correlated cost savings would detrimentally alter the legal profession, creating multiple classes of lawyers and the perception of legal services as a price-driven commodity.

Professionalism

The practice of law is referred to as a profession; attorneys as professionals. Such a reference begs the question as to what exactly those terms embody. In 1953, Roscoe Pound defined "profession" as the pursuit of a learned art with the primary purpose of public service and the ability to earn a living being incidental.⁸ The A.B.A. in the preamble to its Model Rules for Professional Conduct embraces the spirit of this definition, that the profession of law is more about others than about one's self: "As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education."⁹ Furthermore, lawyers are charged "to exemplify the legal profession's ideals of public service."¹⁰ Even in making the rules which govern the profession the preamble reiterates this theme: "The profession has a responsibility to

⁸ STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 11-12 (Aspen Publishers 6th ed. 2002) (2001) [hereinafter GILLERS, REGULATION].

⁹ MODEL RULE FOR PROF'L CONDUCT pmbl. (2003).

¹⁰ *Id.*

assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”¹¹

All of this extolling of virtues and responsibilities could be easily dismissed as propaganda or wishful thinking except that the depth of the profession’s commitment to such ideals is reflected within the Rules themselves.¹² Well known are the admonitions about keeping client confidences¹³ or that conflicts of interest in its various forms must be avoided.¹⁴ Lesser known is that confidences are to be kept for former clients¹⁵ as well as for consultations with potential clients regardless of whether or not they ever become actual clients.¹⁶ The Rules go so far as to set forth the fee an attorney may charge and the acceptable basis for the fee.¹⁷

Outside the Rules, the merits and the bounds of professionalism are debated constantly. One particular area where this occurs is in regard to an attorney’s ability to advertise his/her practice, despite the Supreme Court’s recognition that an attorney has a First Amendment¹⁸ right to some limited commercial speech.¹⁹ Cautions abound that the attorney should exercise that

¹¹ *Id.*

¹² This is only one view. Many practitioners would argue that the Model Rules actually serve to protect the interests of the attorneys rather than those of the client. For example, consider Model Rule 5.5 which prohibits the unauthorized practice of law. Touted as protective of clients from the incompetent or unscrupulous, those skeptical of the value of this Model Rule would argue that the prohibition essentially forms a localized cartel. The rule prevents lower-cost competition from non-lawyers and acts as a barrier to interstate competition from lawyers licensed in other states. (See Ronald D. Rotunda, *Legal Ethics – The Lawyer’s Deskbook On Professional Responsibility* § 39-2 (2002-2003 ed. 2002)).

¹³ MODEL RULE FOR PROF’L CONDUCT R. 1.6 (2003).

¹⁴ MODEL RULE FOR PROF’L CONDUCT R. 1.7-1.11 (2003).

¹⁵ MODEL RULE FOR PROF’L CONDUCT R. 1.9 (2003).

¹⁶ MODEL RULE FOR PROF’L CONDUCT R. 1.18 (2003).

¹⁷ MODEL RULE FOR PROF’L CONDUCT R. 1.5 (2003).

¹⁸ U.S. CONST. amend. I.

¹⁹ See generally *Bates v State Bar of Arizona*, 433 U.S. 350 (1977) (advertising by lawyers is commercial speech entitled to First Amendment protection); *Ohralik v Ohio State Bar Assn.*, 436 U.S. 447 (1978) (in-person solicitation by lawyer is not protected by the First Amendment); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (targeted advertisements permissible); and *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988) (targeted mailings permissible).

right tastefully and with dignity²⁰ lest the attorney forget that the practice of law is a profession and not a “trade or occupation like any other.”²¹

The reasons for these cautions were well articulated by Justice O’Connor in her dissent for *Shapero*.²² As members of a learned profession, attorneys have ethical obligations to observe certain standards of conduct and to serve the public.²³ Such membership also means they have specialized knowledge not easily gained by the public.²⁴ With this knowledge comes power; power which if abused undermines the integrity and the efficiency of the judicial system; power which places the client-consumer at a disadvantage and makes it unrealistic to expect that the client-consumer can strike a fair bargain for representation; for access to the legal system.²⁵ “[M]arket forces and the ordinary legal prohibition against force and fraud [being] insufficient to protect the consumers,” an attorney’s ethical obligations then, are “properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a [] system like ours.”²⁶

Economic Reality

While these arguments for professionalism come from a debate over attorney advertising, the basic need that necessitated the debate is pure economic survival. Attorneys need to attract clients somehow, or integrity intact; they will remain professionals, yet forfeit their livelihood. Advertising, however, is just one part of the larger economic whole; of the reality that the

²⁰ GILLERS, REGULATION, *supra* note 8, at 1022 (citing 4 LAWYERS MAN. ON PROF. CONDUCT (ABA/BNA) 96 (Mar. 30, 1988)) (A.B.A. Commission on Professionalism proposed “aspirational goals” for legal ads).

²¹ *Shapero v. Kentucky Bar Association*, 486 U.S. 466, 490 (1988) (O’Connor J. dissenting).

²² *Id.* at 480-91.

²³ *Id.* at 488-89.

²⁴ *Id.* at 489.

²⁵ *Id.* at 489-90.

²⁶ *Id.*

practice of law is a business endeavor. A reality the A.B.A. concedes creates the lion's share of ethical conflicts.²⁷

General economy

Since economics is so influential to the profession, it is important to understand the factors and circumstances that are currently wielding the most influence and those that are likely to shape the future. These factors and circumstances are found within both the general economy of the country and within the microeconomic climate of the legal industry.

Unemployment

The United States' economy has struggled since the last official recession began in March 2001. As part of that struggle the nation has been combating one of its highest unemployment insurance exhaustion rates.²⁸ The economy is still feeling the effects of this fact since many of these same people have stopped seeking work and are therefore no longer counted among the statistically unemployed.²⁹ The result is an artificially suppressed unemployment rate.³⁰ Consequently, while statistically the United States appears to be approaching a full employment level, the reality is not quite as encouraging.³¹

²⁷ MODEL RULE FOR PROF'L CONDUCT pmb1. (2003).

²⁸ Lee Price & Sujana Vasavada, *Annual unemployment insurance exhaustion rate at highest level in 60 years*, ECONOMIC SNAPSHOTS, Sept. 22, 2004, (Unemployment insurance benefits are for a fixed term and amount. When these limits are reached, the person is said to have exhausted their benefits.), at http://www.epinet.org/content.cfm/webfeatures_snapshots_09222004.

²⁹ Lee Price & Yulia Fungard, *Understanding The Severity Of The Current Labor Slump*, ECONOMIC POLICY INSTITUTE BRIEFING PAPER, updated Feb. 19, 2004, original Nov. 2003, at http://www.epinet.org/briefingpapers/146/epi_bp146.pdf.

³⁰ Jared Bernstein & Yulia Fungard, *Employment growing, but labor slack remains*, JOBS PICTURE, Feb. 4, 2005, at http://www.epinet.org/content.cfm/webfeatures_econindicators_jobspict_20050204; Price & Fungard, *supra* note 29 (last estimate places true unemployment rate 1.5% higher).

³¹ Bernstein & Fungard, *supra* note 30 (current unemployment rate is 5.2%); Mark Gongloff, *How bad is the jobless rate? Historically speaking, unemployment could be a lot worse, but it should be an awful lot better*, CNNMONEY, June 19, 2003, (full employment is anywhere between 5.0% and 5.5%), at http://money.cnn.com/2003/06/19/news/economy/jobless_rate/.

Job losses

Coupled with the unemployment rate is the actual number of jobs lost from the economy as a result of the recession and the extent to which those jobs will be recovered. Initially what was a “jobless recovery” is no longer considered “jobless” overall.³² However, it took an unprecedented 46 months for the labor market to regain the jobs it lost in the last recession versus an average of only 21 months.³³ This statistic counts simply the total number of jobs in the economy. To see the true impact of the recession and where the recovery actually has occurred, a more segmented look is needed. For example, looking at private versus government, private sector jobs remain 703,000 below their pre-recession level.³⁴ Going further and dividing the private sector into industries, the numbers show an increase in services, but a continuing decline in manufacturing jobs.³⁵

Some dismiss these gains and losses in various sectors as a natural restructuring of the economy.³⁶ Outside the economic model, however, are industries and people who must cope with the resulting changes. To remain in business, to retain what jobs they can, many will look to outsourcing as the solution. One forecast of national outsourcing trends places the number of jobs to be lost over the next fifteen years at 3.3 million.³⁷

Basic Economics of the Legal Profession

In just a ten-year span between the mid-1980s and the mid-1990s, the changes in the balance of costs and revenues within law firms were significant. According to the Altman Weil Pensa *Survey of Law Firm Economics*, “[P]er-lawyer overhead in U.S. law firms has increased

³² Jared Bernstein, 2004: *Jobless recovery begets wageless recovery*, ECONOMIC SNAPSHOTS, Jan. 19, 2005, at http://www.epinet.org/content.cfm/webfeatures_snapshots_20050119.

³³ Bernstein & Fungard, *supra* note 30.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Drezner, *supra* note 2.

³⁷ Drezner, *supra* note 2.

more than 81 percent, while per-lawyer revenues have increased only 73 percent. Likewise, price competition has limited the increase of billing rates at 55 percent, and billable hours recorded by partners increased by six percent.’’³⁸

Demographics: More Lawyers Equals More Competition

Adding to the economic pressures and competition is the sheer number of lawyers practicing today. The past several decades have seen the percentage of lawyers, as a percentage of the American population, increase significantly.³⁹ In the mid 1980s, the ratio was 1 lawyer for every 360 persons.⁴⁰ By the mid 1990s, the ratio had dropped to 1 lawyer for every 290 persons.⁴¹

Technology

Technology has changed the way in which legal work is done: increasing the speed, accuracy, and volume of work that can be produced. Internet access is now a required investment for any business, as it has become an indispensable multifunctional tool.⁴² It provides numerous sources for research, e-mail and fax communications with clients, forums for dispute resolutions, even electronic filing of court documents.⁴³ Telecommuting, electronic storage of documents, and on-line legal resources, at minimum, all translate to reduced overhead for law firms in the form of a reduced need for physical space.⁴⁴

³⁸ Ward Bower, *Law Office Management: Economic Trends In The Legal Profession: Planning Implications For Law Firms*, 32 ARIZ. ATT’Y 16, 17 (May 1996).

³⁹ *Feature: Working Notes: Deliberations of the ABA Committee on Research about the Future of the Legal Profession on the Current Status of the Legal Profession*, 17 MAINE BAR J. 48, 53 (2002) [hereinafter *Feature*].

⁴⁰ Bower, *supra* note 38.

⁴¹ Bower, *supra* note 38.

⁴² See Michael R. Arkfeld, *Front: Technology & Law: Trends In Legal Technology – Advantages And Challenges*, 37 AZ ATTORNEY 12 (January 2001).

⁴³ *Feature*, *supra* note 39, at 51-52.

⁴⁴ Bower, *supra* note 38, at 19.

Technology has also changed where legal work can be done. To begin, the difficulties posed by geographical distances between clients and attorneys are now overcome.⁴⁵ Marketing of legal services is now global; providing more information to the potential client than more traditional forms of advertising.⁴⁶ Moreover, through the use of on-line questionnaires, attorneys can gain the basic information necessary to initially evaluate the clients' legal positioning.⁴⁷

Beyond clients, current technology allows law firms to choose where employees, resources and services are located. For employees, this allows individuals the freedom to work from home or while traveling. On-line legal research services nullify the need for an extensive in-office legal library, or the accompanying personnel.⁴⁸ Patent proofreading can be done overnight in India and ready for review the next morning.⁴⁹ Even secretarial support need not be on the other side of the office door anymore.⁵⁰

Maturing Marketplace

A basic concept of free market economics and trade is that of comparative advantage. The term refers to the opportunity costs of each participant in relation to every other participant with regard to the production of any given product or service.⁵¹ Note that every participant has a comparative advantage in something, even if one's trading partner has an absolute advantage in

⁴⁵ Arkfeld, *supra* note 42, at 12.

⁴⁶ *Feature*, *supra* note 39, at 50.

⁴⁷ *Feature*, *supra* note 39, at 51.

⁴⁸ Renee Deger, *Firms Scramble For Cost-Cutting Legal Model*, THE LEGAL INTELLIGENCER, Nov. 14, 2003, at 4.

⁴⁹ Molly McDonough, *IP Goes Indian*, 3 A.B.A. J. EREPORT 16, Apr. 23, 2004, at 6.

⁵⁰ Lin, *Fargo*, *supra* note 6.

⁵¹ STEVEN SURANOVIC, INTERNATIONAL TRADE THEORY AND POLICY: THE RICARDIAN MODEL OF COMPARATIVE ADVANTAGE, (The International Economics Study Center 1997-2005), <http://internationalecon.com/v1.0/ch40/40c000.html>. Using the fictitious example of wine and cloth production between England and Portugal to explain comparative advantage and opportunity cost: "[O]ne does not compare the monetary costs of production or even the resource costs (labor needed per unit of output) of production. Instead one must compare the *opportunity* costs of producing goods across countries. A country is said to have a comparative advantage in the production of a good (say cloth) if it can produce cloth at a lower opportunity cost than another country. The opportunity cost of cloth production is defined as the amount of wine that must be given up in order to produce one more unit of cloth. Thus England would have the comparative advantage in cloth production relative to Portugal if it must give up less wine to produce another unit of cloth than the amount of wine that Portugal would have to give up to produce another unit of cloth."

everything.⁵² The significance of these facts is articulated in the Law of Comparative Advantage which purports that in a free market, each participant responds to market forces producing and trading according to each one's relative advantage because doing so makes everyone better off than by remaining generalists and not trading.⁵³ Simplistically, everyone does what he or she does best, or least worst, and then trades for what is needed because then everyone gets more in return for their efforts.

While comparative advantage is the rationale that economics provides for free trade, outsourcing is comparative advantage in action.⁵⁴ Jobs move offshore when the comparative advantage in that industry shifts from one country to another. Historically, this shift happened in labor intensive sectors such as manufacturing. With the advances in communications technology though, white-collar jobs are shifting now too.⁵⁵ Whatever the industry or era, competition is what provokes such shifts.⁵⁶ Thus, as every industry faces some level of competition, knowing when an industry is at risk for losing jobs is key to assessing its vulnerability to outsourcing.

One signal that competition has reached a critical level is by the maturity of the marketplace. Mature markets are basically those industries with little growth potential so they seek ways to remain competitive by attempting to restructure and reinvent themselves; since profit margins have declined, they also seek ways of cutting costs.⁵⁷ Accounting firms are among many service industries that faced mature marketplaces in the past forcing the industry to make the alterations it did.⁵⁸ Some elements of a mature marketplace now present in the legal industry

⁵² *Id.*

⁵³ ALAN V. DEARDORFF, DEARDORFF'S GLOSSARY OF INTERNATIONAL ECONOMICS, (2001), (Last Changed 1/24/2005), at <http://www-personal.umich.edu/~alandear/glossary/1.html#pagetop>.

⁵⁴ Drezner, *supra* note 2.

⁵⁵ Drezner, *supra* note 2.

⁵⁶ Drezner, *supra* note 2.

⁵⁷ AmosWEB Economic GLOSS*arama: maturity stage at <http://www.amosweb.com/cgi-bin/gls.pl?fcd=dsp&key=maturity+stage>.

⁵⁸ Bower, *supra* note 38.

give clues as to the status of the industry.⁵⁹ Consolidation is the rapid increase in size of a service provider mainly due to mergers the demise of firms unable to compete. A few decades ago, only a few U.S. law firms employed over 100 attorneys. Now there are many such firms, with a few who employ over 1,000 attorneys.⁶⁰ Brand name recognition is also an important indicator of a mature market. While big name firms are well known in business circles,⁶¹ television advertising makes certain personal injury firms well known among consumers. Price competition and client sophistication complete this abbreviated list.⁶²

Client driven

Client Demographics

Individuals Take Control

In matters of concern to individuals, *pro se* representation has grown to the point that it is in many areas the rule rather than the exception.⁶³ Much of this change is the result of changes in the demographics of the country's general population; with more education, more mobility, and advances in technology, individuals are demanding more control over their legal endeavors.⁶⁴ When individuals have not sought exclusive control by proceeding *pro se*, they have sought partial, piecemeal assistance from attorneys forcing the legal profession to "unbundle" its traditional set of services.⁶⁵

Entities Embrace the Power Shift from Seller to Buyer

In matters of concern to business entities, the current economy is considered a "buyers market" for legal services. That is, the power to dictate the terms of the transaction has shifted

⁵⁹ Bower, *supra* note 38 at 18.

⁶⁰ *Id.*

⁶¹ Bower, *supra* note 38.

⁶² Bower, *supra* note 38 at 18.

⁶³ *Feature*, *supra* note 39, at 49.

⁶⁴ *Feature*, *supra* note 39, at 53.

⁶⁵ *Id.*

from the attorney-seller to the client-buyer.⁶⁶ Many larger more sophisticated clients have zealously embraced this power shift⁶⁷ especially since the recessionary climate has placed efficiency and cost cutting demands on these business too. One tool used to select an attorney is the Request For Proposal (RFP).⁶⁸ Designed as a means of comparing one attorney against another, clients have also used it strategically as a pretext for gaining negotiating leverage or as a covert way to eliminate whom their adversaries may hire.⁶⁹

With this in mind, attorneys must formulate their own strategies and goals for participating cost-effectively in a RFP, but the point of the exercise is clear: the client is in control.

Billing methods

Clients are now finding strength in complaining about the traditional attorney billable hour, the historical cornerstone of the legal profession.⁷⁰ For clients, it is prohibitive of budgetary accuracy.⁷¹ Monitoring work as it is done and the billing as it comes in only increases the cost of the service for the client.⁷² Additionally, hourly billing can function as a disincentive to the attorney to act efficiently.⁷³

In response, some clients have sought flat fee arrangements.⁷⁴ Such arrangements bring budgetary certainty to the client and shift the risk of cost overruns to the law firm.⁷⁵ Clients who

⁶⁶ William J. Flannery, Jr., *Just Say No: When Law Firms Should NOT Participate In Beauty Contests*, THE WJF INSTITUTE, at http://www.wjfinstitute.com/articles_3.htm.

⁶⁷ *Id.*

⁶⁸ Bower, *supra* note 38.

⁶⁹ *Id.* (If the potential client reveals too much information in the RFP process it could be covered by MRPC 1.18 protecting the confidentiality of potential clients thus creating a possible conflict of interest under MPRC 1.7 or 1.9 and limiting for who else the attorney may work. “Sounds paranoid? It happened a few years ago to one of the nation’s ten largest firms. All the evidence suggests that a preliminary interview was a purposeful tactic used by the prospective client to make sure this great firm was put out of commission.”).

⁷⁰ William J. Flannery, Jr., *10 Reasons Why Law Firm Marketing Is Failing And How To Fix The Problems*, THE WJF INSTITUTE, at http://www.wjfinstitute.com/articles_9.htm.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Peter D. Zeughauser, *Flat Fees: The Hidden Risk*, THE AMERICAN LAWYER, Sept. 1996, at 50.

⁷⁵ *Id.*

value this certainty are willing to pay a premium to obtain it.⁷⁶ For these clients, budgetary certainty signals corporate health, which translates to increases in stock prices and the executives' own portfolios.⁷⁷ Where the billable hour detracts from attorney efficiency, the flat fee enhances it.⁷⁸ Generally this is done at the expense of the quality of the attorney's work product as attorneys seek shortcuts to maintain the profitability of the arrangement.⁷⁹

Outsourcing In The Medical Profession

To understand exactly how the outsourcing of core legal services will affect the profession it will aide to look at a similar industry which already uses the practice. The medical profession has sought numerous solutions over the years to combat the high costs inherent to quality medical care. Stemming from a combination of reasons including education costs, malpractice insurance rates, and a need for specialized equipment, these costs have forced direct providers of medical care to seek relief where they can. In large part, technological innovations were and are the answer. Beginning with the outsourcing of medical records transcription, the medical profession is now using technology to outsource the reading of radiological scans and lab slides.⁸⁰ These new practices are part of a larger area of medicine known as telemedicine.⁸¹ Other recent uses of technology in telemedicine are not outsourcing per se, but they help illustrate to what extent the boundaries and requirements of a profession can be altered: now school children in Arizona and Alzheimer patients living in rural Oklahoma both can visit the

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *More U.S. jobs coming to India*, REDIFF.COM, Jan. 07, 2004, at <http://www.rediff.com/money/2004/jan/07bpo.htm>; Lindsey Tanner, *CT scans, MRIs sent overseas in outsourcing twist*, N. COUNTRY TIMES, Dec. 6, 2004, available at http://www.nctimes.com/articles/2004/12/06/news/nation/16_37_3912_6_04.txt.

⁸¹ ATSP TELEMEDICINE GLOSSARY at <http://www2.telemedtoday.com/glossary/index.html> (definition of telemedicine).

doctor via videoconferencing, and cellular camera phones were tested successfully for their value in transmitting useable pictures to doctors for wound evaluations.⁸²

Overall, these alterations in the way medical care is delivered to the patient seem to be positive. These alterations mean more people have access to services that were previously unavailable by removing the barriers of physical distance and time, with apparently little detriment.⁸³ In the case of radiologists, outsourcing overseas has helped alleviate a real shortage of qualified personnel for a service needed around the clock as most of the outsourced scans are read by U.S. trained and licensed doctors.⁸⁴ Admittedly, the effects of outsourcing here are not typical, in part because it is equally credentialed personnel performing the work. However, the possibility that this may change is real: a pilot program in India is testing a limited service using “Indian doctors who are neither U.S. licensed nor board certified.”⁸⁵

In spite of its many virtues, the practice of outsourcing in medicine raises many of the same concerns and potential liabilities seen in the practice of law; issues surrounding the quality of service provided, adequate training of personnel, proper licensing and the confidentiality of information. All of these issues deserve consideration, but only two will be highlighted here. First, medical professional are licensed and regulated by the individual states in which they practice just as attorneys are. Thus, they also have a similar prohibition to the legal professions’ Model Rule 5.5 against unauthorized practice and similar difficulties with consistency of

⁸² Mary Bustamante, *Telemedicine Program: Aching ear on TV*, TUCSON CITIZEN Feb. 4, 2005, http://www.tucsoncitizen.com/index.php?page=local&story_id=020405a5_tele_doc; *Cell Phones Cameras Put Doctors in the Picture*, Health Day News, Feb. 21, 2005, http://health.yahoo.com/news/_58750; *UT Southwestern doctors track Oklahoma Alzheimer’s patients via telemedicine*, UT SOUTHWESTERN MED. CENTER CURRENT NEWS RELEASE, Feb. 10, 2005, at <http://www.utsouthwestern.edu/utsw/cda/dept37389/files/206918.html>.

⁸³ Holly Epstein Ojalvo, *Exploring the video frontier High-tech transmissions of sight and sound let physicians give patients more – and better – care*, ACP OBSERVER, June 1995, <http://www.acponline.org/journals/news/jun95/telemed.htm>

⁸⁴ Tanner, *supra* note 80.

⁸⁵ *Id.*

definition and enforcement.⁸⁶ In the age of outsourcing and telemedicine, current regulations on the practice of medicine are outmoded, but attempts to create a national license for physicians have failed.⁸⁷ Interestingly, nurses have been relatively successful on this front creating a licensure compact based on mutual recognition between jurisdictions which several states have adopted.⁸⁸

The second area worth highlighting is the confidentiality of patient information. In the medical field, maintaining the privacy of patient information is mandated by federal law.⁸⁹ The security of outsourced information was called into question a couple of years ago over a wage dispute. A woman in Pakistan was employed transcribing patient records. When a dispute with her employer over back wages had not been resolved to her satisfaction, she threatened to expose personal patient information.⁹⁰ Regardless of who was right in the wage dispute, this shows the power possessed by such a subcontractor, and the ease of using or abusing that power. A client's legal information can be as personal as medical information. The fact that the security of the latter could be so easily breached is warning to the legal profession of the potential risks involved. And while contracts may decide who assumes that risk between the law firm and the outsourcing company, the ill will such a breach would create among current clients and the loss of reputation generally, cannot be contracted around and will fall fully upon the law firm.

⁸⁶ See *infra* Unauthorized Practice of Law.

⁸⁷ Ronald L. Scott, *State Licensure Issues Hamper Telemedicine*, Nov. 25, 1998, at <http://www.law.uh.edu/healthlawperspectives/HealthPolicy/981125State.html>.

⁸⁸ Glenn W. Wachter, *Interstate Licensure for Telenursing*, The TIE, May 2002 at http://tie.telemed.org/articles/article.asp?path=consumer&article=telenursingLicensure_gw_tie02.xml.

⁸⁹ Health Insurance Portability and Accountability Act of 1996 (HIPAA).

⁹⁰ Deger, *supra* note 48.

Outsourcing in the Legal Profession – What has been done so far

Domestic

The offshoring of legal work is a relatively recent occurrence. Outsourcing domestically within the legal profession, however is not. Like every other type of business, law firms motivated by potential cost savings and better resource allocation began experimenting with the practice by contracting out basic functions incidental to running a business such as accounting or data processing.⁹¹ Since this conservative beginning, law firms find evermore creative ways to outsource. Secretarial support is now just a phone call away in Fargo, North Dakota.⁹² Editors for almost any document are as close as the internet.⁹³ Legal research companies, by supplying reliable information, have established their worth to small firms, large corporations and even legal publishers.⁹⁴ Entrepreneurial attorneys hold themselves out as “wholesale” attorneys, capitalizing on their research and writing skills while avoiding the adversarial arena.⁹⁵ For the less entrepreneurial, there are attorney staffing agencies akin to temporary work agencies for other types of work. In fact, one of the best known temporary work agencies is involved in the placement of attorneys in temporary assignments under the name Kelly Law Registry.⁹⁶

In spite of its popularity, some firms have yet to outsource. Beyond the boilerplate concerns over reputation or increased exposure to malpractice liability, the primary truth for a few is simply their firm has yet to be economically induced.⁹⁷ According to the economic indicators discussed previously in this paper, in time, such firms will find economics come to

⁹¹ Lin, *Fargo*, *supra* note 6.

⁹² *Id.*

⁹³ See e.g. Editavenue.com The Online Editing Service Marketplace, available at http://www.editavenue.com/about_us_1.asp.

⁹⁴ Lisa Stansky, *Going outside for legal research*, MIAMI DAILY BUS. REV., Sept. 6, 2002, at A10.

⁹⁵ David A. Robinson, *Some Attorneys Find Happiness Selling Their Services “Wholesale”*, 23 A.B.A. LEGAL ECON. 22 (1997).

⁹⁶ Deger, *supra* note 48.

⁹⁷ See Julie Forster, *Law firm cuts rates by outsourcing to India*, ST. PAUL PIONEER PRESS (MINN), Mar. 3, 2004, at 1C, available at 2004 WL 56309016.

call. Interestingly, when that time comes, the law firm may be asking which of its own functions can be outsourced, but it is just as probable that the law firm may be asked to be the outsource provider. In-house counsel of large corporations was one of the first groups to outsource legal work. Taking a cue from fellow departments within the corporation, in-house counsels began treating law firms like any other service provider the corporation contracted with soliciting bids through a Request For Proposal (RFP).⁹⁸ Traditionally solicited and submitted on paper, some companies are experimenting with online formats likened to Priceline, the online discount travel site.⁹⁹ In this format, law firms are invited to bid for a company's business in different "competitive bidding rooms" based on areas of expertise and hosted by an online auction provider.¹⁰⁰

"Priceline for corporate lawyers," may be the forefront, but the pioneer and current giant of corporate legal outsourcing is Dupont. Incredibly successful and popular for Dupont as well as numerous other firms, the 13 year-old Legal Model has meant a loss of billable hours and training opportunities for law firms.¹⁰¹ The reason for this is Dupont's Model restructured what it meant to outsource legal services by functionalizing and then directly controlling the legal work at the corporate level; taking what work can be done by non-lawyers, for example initial witness interviews or document review, and outsourcing that work directly to non-law firms that specialize in those services leaving only that which must be done by lawyers to the lawyers.¹⁰² Candidly, Dupont has said, beyond immediate savings, a large motivation in using the Model is to pressure law firms into improving their service and change their billing.¹⁰³ To that end,

⁹⁸ Anthony Lin, *Now For Law Firms Too: Competing For Business Online*, THE LEGAL INTELLIGENCER, Nov. 12, 2003, at 4.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Deger, *supra* note 48.

¹⁰² *Id.*

¹⁰³ *Id.*

Dupont is reportedly satisfied with the financial results of the Model.¹⁰⁴ Dupont's example does leave open the question of whether this extreme fragmentation detrimentally impairs the synergy of proximity and totality essential to certain matters.¹⁰⁵

Practices such as the online bidding and the Dupont model show how easily certain work can and has become impervious to restrictions of physical location and/or of the perceived totality of a process. This modern reality coupled with constant economic pressures, whether systemic or client driven, has led to the newest practice of outsourcing overseas or offshoring.

Offshore

Offshoring of legal work, although in its infancy,¹⁰⁶ seems to be drawing a certain measure of interest from all levels of the legal industry. The more adventuresome are making solid commitments. Large corporations with their own legal departments are seeing offshoring tested by the likes of General Electric Co. and Cisco Systems.¹⁰⁷ Some recent law school graduates, such as the founders of Lexadigm Solutions a company which outsources legal research to India, are seizing the opportunity to steer their own course and are already seeing the rewards.¹⁰⁸ Zachary Bossenbroek, a 2002 law school graduate and Puneet Mohey, a 2003 graduate started the Michigan-based Lexadigm in February 2004. Only months into the endeavor, the firm had to increase its billing rates by 1/3 in an attempt to control demand. Still other adventures can be found in the area of Intellectual Property (IP) law as many patent attorneys have sent the tedious and time-consuming chore of patent proofreading overseas.¹⁰⁹

¹⁰⁴ *Id.*

¹⁰⁵ Peter D. Zeughouser, *A New Look At "Full Service"*, THE AMERICAN LAWYER, Oct. 1996, at 42.

¹⁰⁶ Rosenberg, *supra* note 7.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ McDonough, *supra* note 49.

The more skeptical in the legal profession are testing the practice piecemeal to see if and how it might enhance or complement their existing practice. Smaller law firms have sought the assistance of outsourcing firms when they needed to compete with larger, better financed opponents and in doing so, managed to hold their own.¹¹⁰ The general counsel for BorgWarner first chose to test outsourcing when she had a multi-state employment law question she needed researched, because it was much less expensive than other resources available to her.¹¹¹ Satisfied, she has since sent the same firm a second project.¹¹² Not everyone who has tried outsourcing has been satisfied from the outset, however. Two different IP firms experienced similar start-up difficulties having to try multiple firms and invest in the training of the overseas workers to receive a usable product.¹¹³ These difficulties ranged from substandard writing, sometimes to the point of having to completely rewrite the final product, to the borderline comical when one law firm had sent the inventor's notes and a template for the final product to India and received back the notes pasted into the template with a bill for \$1,500.¹¹⁴

For the truly skeptical, it is these initial disasters that reinforce the many reasons why they have not, or will not, offshore legal work. For now, this is skepticism is the prevailing attitude of the industry, much to the disappointment of outsourcing's proponents considering the potential outsourcing market for legal support services alone is conservatively estimated to be two billion dollars.¹¹⁵ Numerous reasons are cited for this attitude, including the legal industry's propensity for slower growth, attorney concerns over quality of the work done and maintaining

¹¹⁰ William O'Shea, *Caseload grows for advocates in absentia: LEGAL OUTSOURCING: William O'Shea examines the range of work that western companies and law firms are handing over to Indian companies.*, FIN. TIMES, Oct. 4, 2004, at 10, available at 2004 WL 95419690.

¹¹¹ Ellen L. Rosen, *Corporate America Sending More Legal Work to Bombay*, N.Y. TIMES, Mar. 14, 2004, § 10 at 1 (col. 4).

¹¹² *Id.*

¹¹³ Brenda Sandburg, *India Inked: Local Law Firms And Their Clients Save Money With Indian Patent Shops*, RECORDER (SAN FRANCISCO), Jan. 14, 2005 at 1.

¹¹⁴ *Id.*

¹¹⁵ O'Shea, *supra* note 110.

their reputations, the current political nature of the issue, and client concerns over the security and privacy of their information.¹¹⁶

Specific to the issues of information security and privacy, financial services companies and call centers have lobbied for years to get the Indian data protection laws to mirror those of the U.S. and Europe, without progress.¹¹⁷ Lacking such legal protection in the country where the work is performed, companies providing legal outsourcing services have taken different approaches to alleviating client concerns over the handling of information. One chose to set up a U.S. presence, seeing it as a “vote of accountability.”¹¹⁸ Another sought a technological solution: disallowing its Indian workers the ability to work on files locally, instead, the workers temporarily access the files, “and all information is stored on client servers in the home country.”¹¹⁹

Realizing that the forays taken thus far into outsourcing will have to prove out, and realizing that workable solutions must be found to the additional complexities of outsourcing, those hazarding projections still expect outsourcing to become a standard practice of the legal industry¹²⁰ and estimate a potential 20% -25% of legal work could be offshored.¹²¹ Thus, the question of whether or not to take up the practice of outsourcing is one individual law firms are likely to be asking themselves in the near future. In answering the question, law firms need to go beyond number crunching and the bottom line and explore the areas of ethical concern laid out in the next section.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ McDonough, *supra* note 49.

¹²¹ Rosenberg, *supra* note 7.

Areas of Ethical Concern for Legal Profession

Like any business, when attorneys chose to outsource numerous legal concerns must be addressed: how the risk of potential law suits will be allocated,¹²² how the courts define an employee,¹²³ and particular to Intellectual Property (IP) is the risk that outsourcing overseas may run afoul of export control laws.¹²⁴ However, because attorneys are professionals bound to a code of ethics, they must consider the ethical implications of their business decisions and not simply the legal ones. The A.B.A. Model Rules of Professional Conduct are comprehensive, covering most every aspect of legal practice. Thus, when examining the ethical implications of outsourcing, multiple rules come into play. Although many of the rules intertwine, this paper will attempt to explore separately merely the areas of greatest concern namely Conflicts of Interest, maintaining Client Confidences, Disclosures to the Client generally and specifically to Legal Fees and Responsible Supervision, and also the Unauthorized Practice of Law.

Conflicts of Interest

Outsourcing legal work is analogous to using temporary attorneys and touches on some of the same areas of ethical concern: conflicts of interest, confidentiality, and fee sharing. The practices are analogous because in both cases the principal attorney or firm is subcontracting a portion of work, which the principal had contracted to do for the client. In 1988, the A.B.A. addressed the issue of temporary attorneys in Formal Opinion 88-356.¹²⁵ Thus the discussion in

¹²² Rosenberg, *supra* note 7; Karin B. Sinniger, *High Tech Or Bye Tech? Things to watch out for in It Outsourcing*, 13 BUS. L. TODAY 59, 59-60.

¹²³ Tony Mauro, *Court Lets Hostile Work Environment Ruling Stand*, THE LEGAL INTELLIGENCER, Jan. 11, 2000, at 9.

¹²⁴ McDonough, *supra* note 49.

¹²⁵ A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988).

the following sections, while referring to temporary attorneys, is directly applicable to the practice of outsourcing legal work.¹²⁶

Conflicts of interest for potential or current clients are provided for under Model Rule 1.7; for former clients under 1.9.¹²⁷ Rule 1.7 recognizes that the conflicting interests of clients can exist to varying degrees and so it is not a blanket prohibition, but rather it sets the acceptable parameters within which the attorney must practice law. The Rule begins by stating that an attorney may not represent a client if that representation will be directly adverse to another client, or if the representation will be materially limited in either of two ways: by the attorney's own interests, or an attorney's duty to another client, former client, or to a third party.¹²⁸ It then retracts from this broad proclamation by allowing the attorney to represent a client despite the presence of a conflict if four conditions are met including the informed written consent of each affected client, and the attorney's reasonable belief that he/she will be remain able to represent each affected client competently.¹²⁹

M.R. 1.9 limits what new clients and matters an attorney can accept based on whether the matter is substantially related to one handled for the former client and whether the new/potential client's interests are materially adverse to those of the former client.¹³⁰ Rule 1.9 also prohibits an attorney from using information gained in prior matters if doing so would disadvantage the former client, permissible disclosures under Rule 1.6 or 3.3 aside.¹³¹

Any attorney who directly represents a client is bound by the constraints of these two Rules. Any attorney that is only associated with a firm who represents the client may also be

¹²⁶ Note also that the use of the word "firm" here is a reference to any size law practice, even that of a sole proprietor.

¹²⁷ MODEL RULE FOR PROF'L CONDUCT R. 1.7, 1.9 (2003).

¹²⁸ MODEL RULE FOR PROF'L CONDUCT R. 1.7 (a) (2003).

¹²⁹ MODEL RULE FOR PROF'L CONDUCT R. 1.7(b) (2003).

¹³⁰ A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988).

¹³¹ *Id.*

bound by these same constraints. Under the first scenario, the A.B.A. clearly found “that a temporary attorney who works on a matter for a client of a firm with whom the temporary lawyer is temporarily associated ‘represents’ that clients for the purposes of Rules 1.7 and 1.9.”¹³² In practice this means a temporary attorney would not be able to work on matters for different clients of different firms if those matters were materially adverse under Rule 1.7,¹³³ and that Rule 1.9 would limit what work the temporary attorney could do in the future.¹³⁴

The A.B.A. found the second scenario more difficult to determine. Often, attorneys who are members of the same firm are considered to have represented a client just as the attorneys who work directly on a matter.¹³⁵ This can be true for temporary attorneys as well if they are found to be “associated” with the conflicting firm. The question then becomes under what circumstances does this occur? Here is where the difficulty of the scenario lies and why the A.B.A.’s answer was essentially – it depends.¹³⁶ Formal agreements, mutual access to confidential information, even the manner in which the attorneys publicly present the relationship; all are factors to be considered in determining if the firm’s conflict has been imputed to the temporary attorney.¹³⁷

Complicating the issue further, consider to what extent a temporary attorney who does not work directly on a matter should be imputed with that firm’s conflicts when the association with the firm is ended. In other words, what degree of loyalty, to any given client, should the profession expect, from those members that are no longer, and were only originally fictionally

¹³² *Id.*

¹³³ *Id.* (note that the informed consent of both clients may be able to overcome this restriction).

¹³⁴ *Id.*

¹³⁵ MODEL RULE FOR PROF’L CONDUCT R. 1.10 (2003).

¹³⁶ A.B.A. Comm. On Ethics and Prof’l Responsibility, Formal Op. 88-356 (1988). “The question whether a temporary lawyer should be treated as associated with a firm at any time must be determined by a functional analysis of the facts and circumstances involved in the relationship between the temporary lawyer and the firm consistent with the purposes for the Rule.”

¹³⁷ *Id.*

connected to that particular client? Broad and strict enforcement of Rules 1.7, 1.9 and 1.10 would result in lost opportunities for attorneys, as well as the loss of choice of counsel for the client.¹³⁸ Ultimately, the A.B.A. determined that the more remote the connection between the temporary attorney and the firm, the less enforcement served the purpose of these rules.¹³⁹ This determination may serve for now, but consider that as outsourcing of legal work becomes more prevalent, such conflicts may be more common. Additionally, as the offshore market also matures, such outsourced work may end up being done by a limited number of legal shops focusing on specific types of activity. U.S. law firms may then find their outsource providers conflicted out by previous work for adverse parties, or that they themselves are conflicted out by the prior alliances of the outsource provider.

Client Confidentiality

Entwined in the issue of conflicts and client loyalty is the issue of maintaining the confidentiality of a client's information. Access to information regarding any of a firm's clients can be a determinative factor in deciding whether or not an attorney is associated with that firm.¹⁴⁰ Such access can also determine whether or not an attorney has impermissibly breached the confidence of a client under Rule 1.6.¹⁴¹ Note however, that the scope of Rule 1.6's prohibition against revealing client confidences is not limited to information gained through the representation of the client.¹⁴²

Two practices can help both the firm and the individual temporary attorney avoid problems in this area: good record keeping and screening. Accurate and detailed records maintained by both the firm and the temporary attorney tell which clients and which matters the

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ MODEL RULE FOR PROF'L CONDUCT R. 1.6 (2003).

¹⁴² *Id.*

temporary attorney was exposed to during his/her association with the firm. Screening, if acceptable methods are followed, preemptively strikes at the question of exposure in an attempt to render it moot by isolating attorneys from information regarding other clients.

Screening issues can arise in the context of either concurrent representations or successive representations. The acceptance by the courts of the defense seems to rest on which context is present; accepting screening more readily involving subsequent representations. Speculative analysis proffers as explanation the fact that screening cannot solve the problem of dual, conflicting loyalties.¹⁴³

The courts are not alone in their trepidation towards screening. Screening is a contentious issue among attorneys as well and some distinctions should be made. The debate between attorneys rests on whether one feels clients deserve greater peace of mind and control over the release of their information, or whether one feels a client's choice of counsel and a lawyer's professional autonomy are paramount.¹⁴⁴ Recognizing this debate among its members, the A.B.A. most recently undertook the issue of screening with its Ethics 2000 Commission. The Commission proposed changing Rule 1.10(c) to permit screening as a means to remove an imputed disqualification and the requisite consent of the affected client. When the final vote came down in 2002, though, the proposal was defeated.¹⁴⁵ Thus the current A.B.A. Model Rules of Professional Conduct do not allow screening as an acceptable cure for imputed conflicts¹⁴⁶ except in the case of government lawyers who move to the private sector.¹⁴⁷

The A.B.A. notwithstanding, screening is recognized in a handful of jurisdictions as a

¹⁴³ Comment, *The Chinese Wall Defense To Law-Firm Disqualification*, 128 U. Pa. L. Rev. 677, 690 (Jan. 1980).

¹⁴⁴ John Gibeaut, *Switching Teams Mid-Game Screening Not Enough to Avoid Firm's Disqualification*, 1 A.B.A. J. EREPORT 36, Sept. 20, 2002, at 4.

¹⁴⁵ MODEL RULE FOR PROF'L CONDUCT R. 1.10 cmt. (2003) (Leg. Hist. of M.R. 1.10, 2002 Amendments).

¹⁴⁶ MODEL RULE FOR PROF'L CONDUCT R. 1.10 (2003).

¹⁴⁷ MODEL RULE FOR PROF'L CONDUCT R. 1.11 (2003).

defense to the rebuttable presumption of imputed disqualification.¹⁴⁸ This is because either the state has incorporated it into its ethics code, or because courts in those jurisdictions have found it an acceptable measure of protection against exposure of client confidences.¹⁴⁹ Whether a court finds the measures taken by a firm to be adequate is fact specific and decided on a case by case basis.¹⁵⁰

Regardless of one's philosophy or a particular courts attitude towards screening, it is a good proactive business practice whenever the possibility of imputed disqualifications arises. This is doubly true when outsourcing, as firms must not only be cognizant and diligent in the work records and screening of its own attorneys, but they must ensure the same confidence and competence in those of a vendor. The responsibility for upholding U.S. professional legal standards and the corresponding risk of litigation if those standards are not upheld rests solely on the U.S. firm.¹⁵¹ Possibilities for exposure run from the inadvertent assignment of a conflicting matter by the overseas firm to an ineligible employee, to the more fantastical yet actual occurrence within the medical field where a woman in Pakistan who was hired to transcribe medical records threatened to expose confidential patient information if she were not paid the wages owed her.¹⁵² In either case, the U.S. firm's best protection beyond a strong working relationship with the overseas vendor is a comprehensive contract imposing U.S. legal ethical standards on the vendor as well as choice of law, choice of venue, and binding arbitration clauses.¹⁵³

¹⁴⁸ MODEL RULE FOR PROF'L CONDUCT R. 1.10 cmt. (2003) (Leg. Hist. of M.R. 1.10, 2002 Amendments).

¹⁴⁹ Gibeaut, *supra* note 144.

¹⁵⁰ Vergos v. Timber Creek, Inc., 200 B.R. 624, 628-29 (W.D. Tenn. 1996).

¹⁵¹ Rosenberg, *supra* note 7.

¹⁵² Deger, *supra* note 48.

¹⁵³ *See generally*, Rosenberg, *supra* note 7 (vendor firm employees bound by confidentiality agreements and conflicts checks); Sinniger, *supra* note 122, at 59-60 (contractual considerations when Offshoring including suggestion of arbitration agreement).

Disclosure to the Client

Disclosure to the client is a recurring theme in the Model Rules, appearing in almost every context. Three areas in particular interact to form a trifecta of concern when outsourcing. These are the lawyer's services, the supervision of the work and the fees charged by the lawyer.¹⁵⁴ An attorney's services are addressed in Rule 7.1. This rule speaks not to the type of services that a lawyer may provide, rather, the rule's focus is the client, stipulating that the client know and understand exactly who is representing him/her.¹⁵⁵ Rule 7.1 is in the same vein as other Model Rules concerned with what the client knows about his/her representation and what the client consents to concerning the same.¹⁵⁶ The purpose of M.R. 7.1 is to prevent the client from being misled as to the true nature of the professional relationships and resources available to the contact attorney for the client's representation.¹⁵⁷ Since even the A.B.A. has conceded the impossibility of defining categorically and clearly such terms as "alliance," "network," or "associated,"¹⁵⁸ their use requires the accompaniment of a meaningful description.¹⁵⁹ As broad as the scope of M.R. 7.1 appears on its face, it does not demand full disclosure under all circumstances. Rather its requirements are tempered by M.R. 5.1 and M.R. 5.3 concerning the supervision of those performing the work, and by M.R. 1.5 concerning fee arrangements. To best illustrate the interplay of these rules with the requirements of M.R. 7.1, the particulars of each area will be discussed separately.

¹⁵⁴ See MODEL RULE FOR PROF'L CONDUCT R. 1.5, 5.1, 5.3, 7.1 (2003).

¹⁵⁵ MODEL RULE FOR PROF'L CONDUCT R. 7.1 (2003).

¹⁵⁶ *e.g.* MODEL RULE FOR PROF'L CONDUCT R. 1.2, 1.4 (2003) (M.R. 1.2(a) requiring consultation with the client as to the means by which representation will be effectuated) (M.R. 1.4 requiring communication generally with client).

¹⁵⁷ A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 94-388 (1994).

¹⁵⁸ A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 84-351 (1984).

¹⁵⁹ A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 94-388 (1994).

Responsible Supervision

Rule 5.1 and its companion 5.3 speak to the supervisory responsibilities of attorneys towards other attorneys and towards non-lawyer assistants.¹⁶⁰ 5.1(a) charges all partners or managers of firms with the oversight of all the attorneys in the firm.¹⁶¹ Individually, regardless of managerial authority or partnership status, under 5.1(b) any attorney with direct supervisory authority over another must make reasonable efforts to ensure the supervised attorney follows the Model Rules.¹⁶² 5.1(c) then lays out the circumstance for when one attorney shall be held responsible for the conduct of another.¹⁶³ The comments explain that without more, a supervising attorney who does nothing to ensure the ethical conduct of those being supervised can still violate paragraph (b).¹⁶⁴ Rule 5.3 reads similarly, but applies to non-lawyer assistants.¹⁶⁵

As applied to outsourcing, the consensus of industry experts is that the work acceptably adheres to these rules because the work remains under the supervision and control of the contracting lawyers, the assumption being that the contracting lawyers actively monitor and review the work as well as the outsource providers.¹⁶⁶ Additionally, because the contracting attorney is considered the supervising attorney for purposes of 5.1 and 5.3, industry experts also agree it is the contracting lawyer that is liable for any problems with the work or any ethical violations committed by the outsource provider.¹⁶⁷ ¹⁶⁸ This is one of the reasons that some refuse

¹⁶⁰ MODEL RULE FOR PROF'L CONDUCT R. 5.1, 5.3 (2003). Offshored work is normally characterized as done by non-lawyers. Domestically, the work may be done by either lawyers or non-lawyers.

¹⁶¹ MODEL RULE FOR PROF'L CONDUCT R. 5.1(a) (2003).

¹⁶² MODEL RULE FOR PROF'L CONDUCT R. 5.1(b) (2003).

¹⁶³ MODEL RULE FOR PROF'L CONDUCT R. 5.1(c) (2003).

¹⁶⁴ MODEL RULE FOR PROF'L CONDUCT R. 5.1 cmt.6 (2003).

¹⁶⁵ See MODEL RULE FOR PROF'L CONDUCT R. 5.3 (2003).

¹⁶⁶ Rosen, *supra* note 111 (quoting Stephen Gillers, "the review by American lawyers sanitizes the process."); Rosenberg, *supra* note 7 (quoting Thomas D. Morgan, "[American Lawyers] were ultimately responsible for the upholding of professional standards").

¹⁶⁷ Rosen, *supra* note 111 (quoting Stephen Gillers, "the review by American lawyers sanitizes the process."); Rosenberg, *supra* note 7 (quoting Thomas D. Morgan, "[American Lawyers] were ultimately responsible for the upholding of professional standards").

to send legal work offshore or outsource domestically to a centralized location.¹⁶⁹ Such people feel that the loss of physical proximity and the inability for immediate face to face communication impairs the process to the point that the quality of the end product is significantly lessened and the supervising attorneys' liability for that end product unacceptably increased.¹⁷⁰

Beyond the basic duties and liabilities laid out above, Rules 5.1 and 5.3 can trigger the additional duty of disclosure to the client under 7.1 depending on the form of the arrangement. In analyzing the varying arrangements firms might have with temporary attorneys, the A.B.A. set for the following guidelines in its Formal Opinion 88-356.¹⁷¹ If the work is done independently, then the use of the temporary attorney must be disclosed to the client and the client must give consent for use of the temporary attorney.¹⁷² If however, the temporary attorney is to work under the direct supervision of the retaining firm, use of the temporary attorney need not be disclosed to the client nor is the client's consent necessary.¹⁷³

These guidelines seem to suggest that the deciding factor in whether disclosure and client consent is required is the mere locality of personnel. In reality, it is the control and oversight involved that is at issue. These broad proclamations leave unclear whether outsourcing as a form of business alliance falls in the category requiring disclosure to and consent from the client. Some believe clients who are not told of the arrangement to outsource in advance will file for malpractice subsequently.¹⁷⁴ Those who believe the Rules impose no professional obligation to

¹⁶⁸ Note that if the outsource provider is a U.S. licensed attorney bound to ethical obligations, he/she would also be liable for his/her own actions under M.R. 5.2.

¹⁶⁹ See Jennifer Fried, *Change Of Venue: Cost-conscious general counsel step up their use of offshore lawyers, creating fears of an exodus of U.S. legal jobs*, Am. Law., Dec. 2003, at col.; Anthony Lin, *Legal Outsourcing Turns To The East: To Save Money, Law Firms Call Upon India For Support Staff And Even Lawyers*, LEGAL TIMES, Aug. 9, 2004, at 12; Rosenberg, *supra* note 7.

¹⁷⁰ See Fried, *supra* note 169; Lin, *supra* note 169; Rosenberg, *supra* note 7.

¹⁷¹ A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Rosenberg, *supra* note 7.

disclose still readily admit that “there is a ‘relationship obligation’ to bring such arrangements to the attention of the clients.”¹⁷⁵ At minimum, by choosing a course of nondisclosure, an attorney risks alienating the client; at maximum, the attorney risks potential malpractice.

Legal Fees

The second rule that tempers the broad disclosure requirement of M.R. 7.1 is M.R. 1.5, simply entitled “Fees.” This rule proclaims that an attorney may not charge an “unreasonable” fee setting forth a non-exclusive list of eight criteria for determining what is reasonable.¹⁷⁶ These criteria range from the difficulty of the work, the experience and reputation of the lawyer, to the customary amount charged for the locality and to whether the fee is fixed or contingent.¹⁷⁷ Later, paragraphs (c) and (d) clarify the use of contingency fees, while paragraph (b) first ensures that whatever the financial arrangement, the details are communicated to the client, promptly, and preferably in writing.¹⁷⁸ Most important to the discussion here, however, are M.R. 1.5’s limits on the division of fees between lawyers who are not in the same firm in paragraph (e).¹⁷⁹

Paragraph (e) states that for there to be a proper division of fees each attorney assumes joint responsibility, each attorney receives an amount proportional to the services provided, the client’s agreement to the division is secured in writing, and the total fee is reasonable.¹⁸⁰ Reflective of M.R. 1.5 as a whole and seemingly complete, in dictating how lawyers may share fees paragraph (e) leaves open the question of how fees are to be shared with non-lawyers. Model Rule 5.4 answers the question directly in its first two paragraphs: (a) prohibits a lawyer’s sharing of legal fees with non-lawyers, noting a few exceptions, and (b) blanketly prohibits

¹⁷⁵ *Id.*

¹⁷⁶ MODEL RULE FOR PROF’L CONDUCT R. 1.5(a) and cmt. 1 (2003).

¹⁷⁷ MODEL RULE FOR PROF’L CONDUCT R. 1.5(a) (2003).

¹⁷⁸ MODEL RULE FOR PROF’L CONDUCT R. 1.5(b)-(d) (2003).

¹⁷⁹ MODEL RULE FOR PROF’L CONDUCT R. 1.5(e) (2003).

¹⁸⁰ *Id.*

lawyers from partnering with non-lawyers; both prohibitions in place to protect a lawyer's professional independence.¹⁸¹

At first glance, the practice of outsourcing would seem to conflict with the first of these prohibitions even if the specifics of the outsourcing arrangement did not go so far as to violate the second. Some clarification of terms at this point will assist the analysis. First, the Model Rules use the word "sharing" to mean a direct division of the legal fee received by the lawyer from the client.¹⁸² Second, reasonable compensation paid for services rendered by a non-lawyer from the legal fee is not considered sharing.¹⁸³ Last, clarifying what might be obvious, non-lawyer is anyone who is not a lawyer.¹⁸⁴ Going forward, analyzing first the prohibition against partnering with non-lawyers in the context of outsourcing, then becomes an easy violation to avoid. This is because outsourcing is normally done under a service contract, not a partnership agreement. If stronger business ties are sought, partnering with other attorneys in other jurisdictions, even foreign jurisdictions, is permissible as long as the integrity of applicable ethical mandates is maintained.¹⁸⁵

Turning to the fees themselves, the equation becomes more complex and the answer more fact specific. Lawyer or non-lawyer, if the fee is charged to the client as a disbursement M.R. 1.5(e) is inapplicable, the outsourcing arrangement must be disclosed to the client, and no surcharge may be added beyond those cost directly related to the service unless agreed to by the client.¹⁸⁶ Lawyer or non-lawyer, if the outsourcing is charged to the client as a fee for legal

¹⁸¹ MODEL RULE FOR PROF'L CONDUCT R. 5.4(a), (b) (2003).

¹⁸² A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988).

¹⁸³ *Id.*

¹⁸⁴ *See* MODEL RULE FOR PROF'L CONDUCT R. 1.10 cmt. 4 (2003) (paralegal or legal secretary as examples of nonlawyers).

¹⁸⁵ MODEL RULE FOR PROF'L CONDUCT R. 7.5(b) (2003) (law firm letterhead must reflect jurisdictional limitations of each listed attorney); A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 01-423 (2001) (partnering with foreign attorneys is permissible given certain parameters and assurances).

¹⁸⁶ A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 00-420 (2000).

services and the outsource provider is paid a reasonable compensation from the fee, then M.R. 1.5(e) is inapplicable, although M.R. 1.5 (a)'s mandate that the total fee be reasonable remains in effect.¹⁸⁷ Finally, only if the outsource provider is a lawyer may the fee be billed as a legal fee and directly divided subject to both M.R. 1.5 (a) and (e)'s requirements of reasonableness and disclosure.¹⁸⁸ The typical arrangement described by this last scenario is a percentage division of a contingency fee. It is important to note that such an arrangement with a legal research firm is not allowed as it would be an impermissible sharing of legal fees with a non-lawyer because although lawyers are employed to perform the research, the research firm itself is considered non-lawyer under the Model Rules.¹⁸⁹

Unauthorized Practice of Law

The last area of ethical concern this paper will address is the Unauthorized Practice of Law. At its most basic, the unauthorized practice of law is the performance of legal work in the absence of proper licensing.¹⁹⁰ Unfortunately, the phrasing of M.R. 5.5 lends little more to this basic statement. M.R. 5.5 does clarify that a lawyer can violate the rule by his/her own acts or by assisting others to practice law without authorization.¹⁹¹ Where the rule deteriorates, though, is in deferring the definition of "the practice of law" to that of each jurisdiction.¹⁹² Allowing for individualized definitions was easier for the A.B.A., but has proven significantly more difficult

¹⁸⁷ A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988); *c.f.* [A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 00-420 n.15 (2000) (for states that require disclosure to the client regardless of whether the outsourced service is a disbursement or charged as a legal fee).

¹⁸⁸ A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988).

¹⁸⁹ A.B.A. Comm. On Ethics and Prof'l Responsibility, Formal Op. 86-1519 (1986).

¹⁹⁰ MODEL RULE FOR PROF'L CONDUCT R. 5.5 & cmt. 7 (2003).

¹⁹¹ MODEL RULE FOR PROF'L CONDUCT R. 5.5 (2003).

¹⁹² *Id.* ("in violation of the regulation of the legal profession in that jurisdiction").

for each jurisdiction and its practitioners, resulting in a confusing variety of definitions and conflicting case law with several jurisdictions failing to establish any definition at all.¹⁹³

This inconsistency in definition and enforcement coupled with the dynamic evolution of the profession from its traditional form of general practitioner is cultivating vociferous cries for the renovation of this cornerstone rule.¹⁹⁴

Ostensibly enacted to protect the public from the unqualified,¹⁹⁵ the Rule's detractors insist instead that the original and continuing purpose is protectionism pure and simple.¹⁹⁶ More serious than its intent, though, are the questions raised as to whether the prohibition is effective; whether it measurably protects the public from unregulated incompetence.¹⁹⁷ Arguably, lessening restrictions will serve the public better because doing so would create a greater availability of lower cost legal services, in turn making the protection or vindication of rights more cost effective for more people.¹⁹⁸

When outsourcing, there are two ways an attorney could run afoul of the restriction on the unauthorized practice of law. The first and most likely way is for the attorney to outsource a task or function that is considered to be the practice of law to persons lacking the proper credentials thereby impermissibly aiding others in the unauthorized practice of law. For this situation to occur, the outsource provider could be located anywhere, and regardless of whether the outsourcing attorney's home jurisdiction finds the violation or the jurisdiction where the

¹⁹³ Ronald D. Rotunda, *Legal Ethics – The Lawyer's Deskbook On Professional Responsibility* § 39-1 (2002-2003 ed. 2002).

¹⁹⁴ Keith R. Fisher, *The Higher Calling: Regulation Of Lawyer Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1040-41 (2004).

¹⁹⁵ MODEL RULE FOR PROF'L CONDUCT R. 5.5 cmt. 2 (2003).

¹⁹⁶ Fisher, *supra* note 194.

¹⁹⁷ See Andrew M. Perlman, *Toward A Unified Theory Of Professional Regulation*, 55 FLA. L. REV. 977, 1028-40 (2003).

¹⁹⁸ *Id.* at 1029-30, 1039.

work was performed finds it,¹⁹⁹ it will be the outsourcing attorney who is held accountable.²⁰⁰ The second, more remote yet still probable way is for the attorney to transiently practice law or offer to practice law²⁰¹ in a jurisdiction within which he/she is not authorized. In California, for instance, this second form of transgression is less remote than is comfortable for most attorneys as merely a virtual presence in the state can warrant sanctions.²⁰²

As valid as these scenarios are, there are those that see an attack on the practice of outsourcing under M.R. 5.5 as dubious.²⁰³ Partly, this is due from the general lack of a workable definition of what the practice of law is and because provisions elsewhere in the Model Rules allow for legal work to be done by a variety of people as long as the work is properly supervised by a properly authorized attorney.²⁰⁴ It is this allowance for supervision that disinfects outsourcing in the eyes of most experts.²⁰⁵ Additionally, outsource providers themselves steer clear of offering legal advice.²⁰⁶ The savvier ones have disclaimers disavowing any practice of law, forming of attorney-client relationships, or authoritative finality over the work.²⁰⁷

Policy Considerations - Effect on Profession

Public Perception

Making certain that the practical choices the profession makes do not constitute outright violations of the ethical rules, it is equally important to ensure those choices do not lessen the integrity of the profession either. Debating the merits of outsourcing of legal work, the current

¹⁹⁹ domestic outsourcing only

²⁰⁰ Stephen Gillers, *Lessons From the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 696-99 (2002) (available remedies include civil actions in client's home state and long-arm discipline); Rosenberg, *supra* note 7 (U.S. lawyer is ultimately responsible for offshored legal work).

²⁰¹ Gillers, *supra* note 200, at 698.

²⁰² *Id.* (discussing *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998)).

²⁰³ Rosenberg, *supra* note 7.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

President of the A.B.A. found the practice acceptable and supportive of clients who were seeking way to cut legal cost.²⁰⁸ Alternatively, a former A.B.A. President goes so far as to describe outsourcing as the exploitation of the workers overseas.²⁰⁹ While the focus of this paper is not so far reaching, the underlying essence of this view is applicable. Cost cutting focuses on money whereas seeing outsourcing as exploitation focuses on morality.²¹⁰ In order to maintain the integrity of the profession it is often forgotten that the integrity of individual members must be maintained as well.²¹¹

With the plethora of disparaging lawyer jokes in existence, with both the Congress and the President attacking litigation,²¹² it is easy to see that much of the public holds a tainted view of the profession. At issue is not the general public's sense of humor, rather it is the effect this image has on the profession. Andrew M. Perlman in his article, *Toward A Unified Theory Of Professional Regulation*, put forth that substantial evidence exists to indicate the public's image of lawyers has little correlation to the public's confidence in the justice system as a whole, along with the recommendation that lawyers should concentrate more on ethical substance rather than image.²¹³ Assuming the truth of this contention, arguably, image still matters. Consider the aforementioned federal legislation. The legislation basically attacks attorneys and either demonstrates how deeply some believe the negative image of the profession, or it demonstrates how far some are willing to use the image to advance their own interests. Wherever the truth lies is irrelevant because the effect of either motivation is directly detrimental to the profession.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Morality as expressed by Jeffery A. Maine, *Importance of Ethics and Morality in Today's Legal World*, 29 STETSON L. REV. 1073, 1087 (2000) (morality in terms of universal principles, not religion).

²¹¹ See generally Maine, *supra* note 210.

²¹² Steve Lohr, *Bush's Next Target: Malpractice Lawyers*, N.Y. Times, Feb. 27, 2005, §3, at 1.

²¹³ Andrew M. Perlman, *Toward A Unified Theory Of Professional Regulation*, 55 FLA. L. REV. 977, 1011 & n.209 (2003).

The profession has struggled unsuccessfully to refute its sullied image. Partly this is due to the fine line that attorneys must tread between zealous advocacy and ethical decorum, a line that is sometimes difficult enough for lawyers to discern let alone obvious or reasonable to the public. Another reason this view persists is the limited personal interaction that most people have with attorneys. Personal interaction can be highly influential since the nature of people is to trust more that which is experienced personally over that which the profession or others contend it to be. It is also the nature of people to relay their experiences with a tendency to relay the bad more often than good. On a limited scale, this is why reputation can make or break an attorney's practice.²¹⁴ On a larger scale, it contributes to the public retaining its tainted view of the profession and points to the persuasive power of individuals within the profession to alter that perception.

This persuasive power is inherent to the lawyer/client relationship. People turn to lawyers because they need counseling on a matter or an expert in a given area. Thus the very reason people seek lawyers, for their knowledge and professional judgment, sets up the power differential of the relationship: one in need of help and the other with the ability to provide it. It is the responsibility of the attorney to ensure that this disparity is not exacerbated nor the inherent power of his/her position abused. The Model Rules place this responsibility upon the attorney in numerous ways: by requiring decisions regarding the objectives of representation be made by the client, by requiring the attorney to inform and consult with the client, and by limiting what the client can be charged.²¹⁵

Beyond the Model Rules though, if a client does not perceive himself or herself to be the attorney's equal, the value that the attorney places on a service or a skill will likely be the value

²¹⁴ Maine, *supra* note 210, at 1089.

²¹⁵ MODEL RULE FOR PROF'L CONDUCT R. 1.2, 1.4, 1.5 (2003).

the client adopts for that service or skill. So while on the one hand an attorney may insist that the legal research sent overseas be performed by highly educated, well trained personnel, the attorney implies with the other hand that the basic skills of legal research and writing now requisite of most law degrees conferred in the U.S. is really only worth a fraction of that paid to similarly educated workers located here in the United States.²¹⁶ By discounting these skills, the attorney subtly discounts his/her own value. Less subtle and more immediate, is the impact that such decisions will have on the newest lawyers who tend to be the ones assigned such work: decreasing the rates a client can be charged for their services and in turn the salary they can command.²¹⁷

For those attorneys who are being driven to outsourcing by their clients, the end result is the same devaluation of the basic skills and worker, but the damage to the senior attorney is far greater. Instead of a subtle self degradation, accommodation of the client here is a concession by the attorney that the client's lesser valuation of his/her skills is the truer valuation making future negotiations more difficult and leaving the attorney constantly justifying his/her own worth.

Contrary to what some promote, image may not be everything. It does, however, have a measure of power.²¹⁸

An attorney whose actions reinforce the traditional view of lawyers as more reptilian than human only serves to perpetuate the public's belief that all attorneys soullessly focus on money rather than the client or even the law.²¹⁹ Conversely, an attorney whose choices reflect an adherence to a basic moral code promotes an image of the profession as ethically sound, one whose focus goes

²¹⁶ See generally Jill Schachner Chanen, *Moving To Mumbai: More Firms Are Outsourcing Support Services to India. Will Legal Work Be Next?*, 90 A.B.A.J. 28, (Apr. 2004); Lin, *supra* note 169; Rosenberg, *supra* note 7.

²¹⁷ Rosen, *supra* note 111.

²¹⁸ *Contra* Perlman, *supra* note 213, at 1011 & n.209 (2003) (public image of profession has little connection to public trust in judicial system and to trust/distrust of individual attorneys).

²¹⁹ Susan Saab Fortney, *Soul For Sale: An Empirical Study Of Associate Satisfaction, Law Firm Culture, And The Effects Of Billable Hours Requirements*, 69 UMKC L. REV. 239, 291-92 (2000) (billable hours pressure reinforces public view that attorneys are driven by money).

beyond the bottom line.²²⁰ As stated in the beginning of this section, maintaining the integrity of the profession involves maintaining the integrity of individual members. Even if one agrees with the criticism that the Model Code of Professional Responsibility fails in this regard, being nothing more than a guide to the minimal behaviors necessary to avoid sanctions, the fact remains that it is the individual attorney who chooses his/her course of action and the professional image he/she conveys.²²¹

Creation of Inferior Class of Lawyers

As technology advances and client demands for lower cost and greater control commoditize legal services, lawyers may find themselves commoditized as well. Presented as an argument against the legal industry's wholesale switch to flat fee arrangements from the traditional hour rate is something called the "ValueJet proposition." Named for the infamous low-cost airline, one of whose fleet crashed into the Florida Everglades because of a mislabeled oxygen canister, this proposition illustrates how a something simple can have tremendous reach and impact.²²² The basis of the proposition is that "In a free marketplace, rewards create an incentive for behavior, and if you take away a reward, the behavior likewise goes away."²²³ In the case of the different billing methods, the incentive to produce a quality work product is lost.²²⁴

Outsourcing could have an effect on the legal industry similar to the flat fee, but with a twist. Whereas the choice of billing methods may decrease the quality of the work produced, outsourcing may also decrease the quality of attorney produced. Outsourcing necessarily means

²²⁰ Maine, *supra* note 210, at 1090.

²²¹ For the proposition that the ethical troubles of the profession need market-based solutions compare David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203 (2004).

²²² Zeughausen, *Flat Fees: The Hidden Risk*, *supra* note 74.

²²³ *Id.*

²²⁴ *Id.*

that legal work becomes functionalized; segmented into discreet actions to be performed by various people in various places, some of whom may not know or understand the larger picture. Where once each case was handled almost entirely by one attorney, where new associates could research and write memos and then follow a case through to completion, learning the remainder of the legal process from the supervising attorneys, with outsourcing, many of these opportunities for learning and professional diversification are lost. The worry is twofold. First, despite the competitive nature of most attorneys, without these opportunities many attorneys will lack the incentive to seek personal improvement. Similarly, many who might have chosen to be attorneys will choose other professions where the potential for rewards are more in line with the investment made. Second, the profession itself is likely to lose the incentive to provide comprehensive training for all of its members. If in the struggle between business concerns and the less tangible rewards of professionalism business always wins, the knowledge members possess will become concentrated in specialties of function rather than in areas of law and those capable and experienced in the connections and nuances of a broader view of the law will become the exception rather than the rule.²²⁵

The consequence of this loss of broad experience across the profession is likely the complete restructuring of the profession. Currently a new law school graduate expects to begin his/her career taking on whatever is assigned, gathering a range of experience, and building professional depth. Under a regime heavily shaped by outsourcing, most graduates will be hired into the functional area at which they are already most proficient, e.g. litigating or writing. This will thereby stunt their ability to expand their portfolio of professional skills, and deprive the legal community of their full potential. As this trend progresses, the continued

²²⁵ See generally Saab Fortney, *supra* note 219, at 282-83 (how the bottom-line focus of law firms adversely affects associate training).

compartmentalization of people by their skills will transform the profession from collegial to classist. The true value of any attorney is the knowledge, judgment, and wisdom he or she possesses.²²⁶ The profession must strive to promote the value of all its members, or chance divesting itself of the essence of its identity.

Conclusion

As the practice of outsourcing grows, the legal industry will have to seriously address the concerns presented in this paper. Against this practice the Model Rules are treated more as cautionary flags to form than as roadblocks to substantive action. Cutting costs and increasing efficiency are admirable goals, but as is illustrated here, can be directly in conflict with traditional values of the profession, such as competence, wise counsel, and confidentiality. Likely, law firms will persist in discounting this conflict and zealously embrace outsourcing under the force of continuing economic pressures, remaining ignorant of the practices' true cost to the profession and its members.

²²⁶ *Feature, supra* note 39, at 51.