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### Malpractice Liability Related to Foreign Outsourcing of Legal Services

Vincent R. Johnson

*St. Mary's University School of Law*, [vjohnson@stmarytx.edu](mailto:vjohnson@stmarytx.edu)

Stephen C. Loomis

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# ARTICLE

*Vincent R. Johnson | Stephen C. Loomis*

## Malpractice Liability Related to Foreign Outsourcing of Legal Services

**Abstract.** The outsourcing of client-related tasks to service providers in other countries is likely to generate malpractice claims against American law firms. This Article discusses the wide range of theories under which an outsourcing American law firm may be liable for its own negligence or for the actions of outsourcing providers. These theories include negligence by the outsourcing law firm, vicarious liability for the conduct of firm principals and employees, vicarious liability for the conduct of independent contractors, and vicarious liability for the conduct of business partners.

**Authors.** Vincent R. Johnson is a Professor of Law and Director of the Institute on Chinese Law & Business, St. Mary's University. LL.M., Yale University.; J.D., University of Notre Dame; B.A., LL.D., St. Vincent College. Professor Johnson's books include *Legal Malpractice Law in a Nutshell* (West 2011), *Advanced Tort Law: A Problem Approach* (LexisNexis 2010), and *Legal Malpractice Law: Problems and Prevention* (2008) (with Susan Saab Fortney).

Stephen C. Loomis is an Articles Editor, *St. Mary's Law Journal*. J.D., St. Mary's University; B.A., University of Texas.

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## I. THE RISE AND RISKS OF FOREIGN OUTSOURCING

American law firms increasingly outsource client-related tasks to service providers in foreign countries,<sup>1</sup> such as India,<sup>2</sup> the Philippines,<sup>3</sup> and China.<sup>4</sup> This trend,<sup>5</sup> which has significant growth potential,<sup>6</sup> parallels the

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1. See generally Vincent R. Johnson & Stephen C. Loomis, *United States*, in 33a COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS, "OUTSOURCING LEGAL SERVICES: IMPACT ON NATIONAL LAW PRACTICES" (forthcoming 2012) (discussing the ethical considerations of outsourcing legal work from the United States).

2. See Priyanka Bhardwaj, *India Courts Foreign Legal Work*, ASIA TIMES, Nov. 18, 2005, [http://www.atimes.com/atimes/South\\_Asia/GK18Df02.html](http://www.atimes.com/atimes/South_Asia/GK18Df02.html) (reporting that, as of 2005, "India's software body, the National Association of Software and Service Companies . . . [stated that] India has so far tapped only 2–3% of an estimated \$3–\$4 billion US market of 'outsourcable' legal services"); Andhra Pradesh, 'Go by Your Own Aptitude When Choosing a Career', THE HINDU (India), Nov. 27, 2011, <http://www.thehindu.com/todays-paper/tp-national/tp-andhrapradesh/article2664558.ece?css=print> (identifying preparation for a career as a legal process outsourcing provider as an emerging trend in India). The era of India's dominance as a legal process outsourcing location may be waning as one commentator has stated that, because "India's costs have risen fifteen percent within the past few years, other Asian [legal process outsourcing] locations have gained in popularity." Sasha Borsand & Amar Gupta, *Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance*, 1 PACE INT'L L. REV. ONLINE COMPANION 1, 5 (2009), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1000&context=pilonline>. In particular, the Philippines is an attractive alternative for many of the same reasons why India is the top choice for outsourcing, but the country also lacks a solid infrastructure compared to its competitors. *Id.* at 5–6. For a more detailed discussion on why India is the preferred destination for legal outsourcing, see Part I in Vincent R. Johnson & Stephen C. Loomis, *United States*, in 33a COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS, "OUTSOURCING LEGAL SERVICES: IMPACT ON NATIONAL LAW PRACTICES" (forthcoming 2012).

3. See Kathleen A. Martin, *Philippines Seen Developing As Major KPO Service Site*, BUS. WORLD (Philippines), Nov. 8, 2011, available at 2011 WLNR 23021020 (claiming that the Philippines "is emerging as a premier knowledge process outsourcing (KPO) service location").

4. Although India takes the majority of legal-outsourcing jobs, other countries have companies that provide legal process outsourcing services. See Sasha Borsand & Amar Gupta, *Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance*, 1 PACE INT'L L. REV. ONLINE COMPANION 1, 5 (2009) (remarking that although India is the top outsourcing destination, "the Philippines, Australia, China, and South Korea are also in the market of offshore [legal process outsourcing]"); Brandon James Fischer, Note, *Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad*, 16 SW. J. INT'L L. 451, 458 (2010) (stating that "China, the Philippines, and many other countries also provide similar services"); see also Mimi Samuel & Laurel Currie Oates, *From Oppression to Outsourcing: New Opportunities for Uganda's Growing Number of Attorneys in Today's Flattening World*, 4 SEATTLE J. FOR SOC. JUST. 835, 861 (2006) (suggesting that Uganda's legal community has many similarities with its Indian counterpart and thus should be able to realize the benefits from offshore outsourcing).

5. See Martha A. Mazzone, *Ethics Rules Require Close Supervision of Offshore Legal Process Outsourcing*, 55 BOS. B.J. 25, 25 (2011) (describing legal process outsourcing as a "distinctive trend in legal services today"); see also William D. Henderson & Rachel M. Zahorsky, *Paradigm Shift*, A.B.A. J., July 1, 2011, at 40, 47, available at [http://www.abajournal.com/magazine/article/paradigm\\_shift/](http://www.abajournal.com/magazine/article/paradigm_shift/) (discussing Pangea3 and noting that the company is "building facilities across the U.S. modeled after its India operations").

use of professional outsourcing in other developed nations.<sup>7</sup> For American lawyers, these practices are certain to generate legal malpractice claims. The reason is quite simple. Serious deficiencies in the performance of outsourced work are just as likely to occur as are the many kinds of professional shortcomings that routinely impair the quality of legal services performed domestically.<sup>8</sup> Indeed, the complexities of foreign outsourcing<sup>9</sup> may exacerbate the usual risks of malpractice when work for clients is performed abroad.<sup>10</sup> Those challenges include, among other things, language barriers,<sup>11</sup> cultural differences,<sup>12</sup> corrupt foreign practices,<sup>13</sup>

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6. See Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1660 (2011) (opining that “the outsourcing industry is dynamic and could grow significantly depending on future technologies for monitoring outsourcers”); *Overhyped, Underused, Overrated: The Truth About Legal Offshoring*, INSIDE COUNSEL, Aug. 2005, available at <http://www.insidecounsel.com/2005/08/01/overhyped-underused-overrated-the-truth-about-legal-offshoring> (“Massachusetts-based Forrester Research predicted in a recent study that by 2015, more than 40,000 U.S. legal jobs will be sent overseas, costing lawyers \$4.3 billion in lost wages.”). Just how much this market is expected to grow varies depending on the source. Compare Arin Greenwood, *Manhattan Work at Mumbai Prices*, A.B.A. J., Oct. 1, 2007, at 36, 39, available at [http://www.abajournal.com/magazine/article/manhattan\\_work\\_at\\_mumbai\\_prices/](http://www.abajournal.com/magazine/article/manhattan_work_at_mumbai_prices/) (reporting that, although exact numbers are difficult to attain, the value of offshoring services in India was about \$80 million in 2007 with the number estimated to “reach \$4 billion by 2015”), with Pankaj Parnami, *Legal Process Outsourcing Industry—An Analysis*, CHARTERED ACCT., Nov. 2006, at 760, 761–62, available at [http://www.ica.org/resource\\_file/9898760-764.pdf](http://www.ica.org/resource_file/9898760-764.pdf) (estimating that by 2015 the potential demand for outsourcing legal services will be \$3 billion with 60% of that going to India).

7. See, e.g., Joshua Freedman, *Focus: Legal Process Outsourcing—Distance Earning*, THE LAWYER (Nov. 21, 2011), <http://www.thelawyer.com/focus-legal-process-outsourcing-distance-earning/1010314.article> (stating that “[legal process outsourcing] is booming” and UK law firms “can make large savings by using legal, paralegal[,] and business services capacity in locations away from London, and can cut costs dramatically by using offshore locations such as India and the Philippines”); see also Ainslie Van Onselen, *Regulators Endorse More Outsourcing Work Offshore*, AUSTRALIAN, Nov. 11, 2011, available at 2011 WLNR 23216350 (“Legal regulators and insurers [in Australia] have given a cautious green light to the offshore legal outsourcing industry[,] but have warned that law firms will be held liable for the work undertaken in other countries on their behalf.”); Simon Petersen, *Eurozone Crisis Sees UK Partners Predict a Tough 2012 Despite Positive H1 Results*, LEGAL WEEK, Dec. 8, 2011, available at 2011 WLNR 25338016 (stating that UK law firms are likely to place “greater emphasis on added-value services and legal process outsourcing”).

8. See generally AM. BAR ASS’N, PROFILE OF LEGAL MALPRACTICE CLAIMS: 2004–2007 (2008) (analyzing malpractice claims trends).

9. See Heather Timmons, *Legal Outsourcing Firms Creating Jobs for American Lawyers*, N.Y. TIMES, June 2, 2011, [http://www.nytimes.com/2011/06/03/business/03reverse.html?\\_r=1&pagewanted=1](http://www.nytimes.com/2011/06/03/business/03reverse.html?_r=1&pagewanted=1) (reporting that some legal-outsourcing companies, such as Pangea3, are creating offices in the United States due to problems with logistics or American law that may be difficult to perform overseas).

10. See Joshua A. Bachrach, Current Development, *Offshore Legal Outsourcing and Risk Management: Proprietary Limitation of Liability Agreements Under Model Rule 1.8(h)*, 21 GEO. J. LEGAL ETHICS 631, 631–32 (2008) (identifying the growing tensions between the benefits of legal outsourcing and the increased risk for violations of professional conduct rules).

11. See Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43

digital information vulnerability,<sup>14</sup> variations in lawyer training and regulation,<sup>15</sup> obstacles to supervision of outsourced tasks,<sup>16</sup> and

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ARIZ. ST. L.J. 125, 141 (2011) (reporting that “one U.S. company ended its practice of offshoring deposition summaries after it spent too much time changing British–English idioms into American English”); Keith Woffinden, Comment, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 BYU L. REV. 483, 492 (“The cost savings outsourcing proponents flaunt may not account for the increased risk or the additional training costs firms and corporations face from utilizing attorneys trained in a different legal regime, with a different form of English, performing their work thousands of miles away.”); cf. Joshua Freedman, *Focus: Legal Process Outsourcing—Distance Earning*, THE LAW. (Nov. 21, 2011), <http://www.thelawyer.com/focus-legal-process-outsourcing-distance-earning/1010314.article> (stating that “around 70[%] of qualified lawyers [in India] can write English fluently compared with at least 80[%] in the Philippines and 95[%] in South Africa”). Although Indian lawyers are typically proficient in English, “the formality of the Indian style of English can differ from the style utilized by a domestic attorney.” Keith Woffinden, Comment, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 BYU L. REV. 483, 492. *But see* Carlo D’Angelo, *Overseas Legal Outsourcing and the American Legal Profession: Friend or “Flattener”?*, 14 TEX. WESLEYAN L. REV. 167, 172–73 (2008) (“The fact that law schools in India and the Philippines teach an English-language based curriculum that is rooted in English common-law principles makes for an easy base of knowledge upon which U.S. firms can draw.” (footnote omitted)). The American legal system has had a profound impact on India’s courts, so much so that “[i]t is not uncommon for Indian judges, when writing their opinions, to cite American case law.” Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2211 (2007).

12. Cf. N.Y.C. Comm. on Prof’l & Judicial Ethics, Formal Op. 2006-3, at \*4 (2006), available at <http://www2.nycbar.org/Ethics/eth2006.htm> (cautioning lawyers to be “mindful that different laws and traditions regarding the confidentiality of client information” are applicable overseas).

13. See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2209 (2007) (noting a tradition of bribery in India); see also Vincent R. Johnson, *Corruption in Education: A Global Legal Challenge*, 48 SANTA CLARA L. REV. 1, 1 n.1, 12–15 (2008) (discussing educational corruption abroad and the prevalence of academic corruption in India).

14. “Attorneys have an ethical obligation to . . . protect data stored electronically from unintended disclosure either through inadvertent release of the information or from failure to secure the data against unauthorized access . . . [, and] must act reasonably to prevent, detect, and remedy security breaches.” Bill Piatt & Paula deWitte, *Loose Lips Sink Attorney–Client Ships: Unintended Technological Disclosure of Confidential Communications*, 39 ST. MARY’S L.J. 781, 815 (2008); see N.C. State Bar, 2007 Formal Ethics Op. 12, at \*3 (2008), available at <http://www.ncbar.gov/ethics/ethics.asp?page=2&keywords=outsourcing> (stating that an outsourcing lawyer must use reasonable care in transmission of confidential information); see also RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE 221 (2007) (noting that “[e]-mail is not secure in the same sense that a sealed letter is secure [because] [k]nowledgeable people can, in effect, tap into e[-]mail”). See generally Vincent R. Johnson, *Credit-Monitoring Damages in Cybersecurity Tort Litigation*, 19 GEO. MASON L. REV. 113, 149 n.224 (2011) (noting that “law firms have been slow to recognize cybersecurity threats and reluctant to disclose information about data security breaches”); Vincent R. Johnson, *Cybersecurity, Identity Theft, and the Limits of Tort Liability*, 57 S.C. L. REV. 255, 259 (2005) (recognizing that hackers are often located outside the United States).

15. However, some foreign legal process outsourcing providers take steps to minimize these differences. Many Indian providers require their potential employees to take a standardized exam that tests them on “English, substantive law, lawyering skills[,] and ethics.” See Arin Greenwood,

political<sup>17</sup> and professional<sup>18</sup> instability in countries that provide legal outsourcing.

This Article examines legal malpractice liability as it relates to the foreign outsourcing of legal services. Part II considers emerging professional views and academic scholarship relevant to these types of claims. Part III discusses the complex nature of the outsourcing liability question. Part IV explores policy considerations that are relevant to the imposition of civil responsibility. Part V surveys the many legal theories under which outsourcing lawyers might be held accountable for malpractice arising from their own conduct or the conduct of others. Part VI then considers how law firms can limit their exposure to liability in connection with the outsourcing of legal services.

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*Manhattan Work at Mumbai Prices*, A.B.A. J., Oct. 1, 2007, at 36, 41, available at [http://www.abajournal.com/magazine/article/manhattan\\_work\\_at\\_mumbai\\_prices/](http://www.abajournal.com/magazine/article/manhattan_work_at_mumbai_prices/) (finding that Pangea3 requires its employees to take a "Global Legal Professional Certification Test," which is "a new standardized exam for Indian lawyers who want to work in outsourcing"). One major legal process outsourcing provider, "Lexadigm, the Michigan-headquartered vendor with its office near New Delhi, boasts that each of its lawyers has graduated from one of the top five law schools in India, practiced law for at least three years, received extensive legal training from U.S. attorneys, and passed Lexadigm's rigorous legal research and writing exam." Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2207–08 (2007).

16. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) (lamenting that the physical separation of a typical outsourcing relationship makes supervision difficult).

17. See Sasha Borsand & Amar Gupta, *Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance*, 1 PACE INT'L L. REV. ONLINE COMPANION 1, 11 (2009), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1000&context=pilronline> (discussing the risk of host country instability). *But see* Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2210 & n.102 (2007) (stating that India has functioned "as a representative democracy since gaining independence from Britain in 1947[,] save for between 1975 and 1977 when "Prime Minister Indira Gandhi declared Emergency Rule and suspended the country's democratic constitution"). In late 2008, ten gunmen stormed several buildings in India's financial capital of Mumbai, killing 172 people and wounding 239. Somini Sengupta & Keith Bradsher, *India Faces Reckoning As Terror Toll Eclipses 170*, N.Y. TIMES, Nov. 29, 2008, <http://www.nytimes.com/2008/11/30/world/asia/30iht-30mumbai.18247623.html>. This attack led many to question whether India has the ability to provide security against escalating terrorism. *Id.* Unfortunately, this question is only bound to be asked again, as "Indian Home Minister P[.] Chidambaram . . . reiterated [in May 2011] that India lives in perhaps the most difficult region and that the global epicentre of terrorism is in the country's immediate neighborhood." *Pak Fuelling Anti-India Terror: Alleges India*, THE NATION (May 27, 2011), <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Politics/27-May-2011/Pak-fuelling-antiIndia-terror-alleges-India>.

18. In 2009, an accounting scandal was revealed in Satyam Computer Services, an Indian outsourcing firm, that raised "fears that similar problems might lurk in other Indian companies, particularly in its vaunted outsourcing industry." Heather Timmons, *Financial Scandal at Outsourcing Company Rattles a Developing Company*, N.Y. TIMES, Jan. 7, 2009, <http://www.nytimes.com/2009/01/08/business/worldbusiness/08outsources.html>. This scandal was so significant that some referred to Satyam as "India's Enron." *Id.*



## II. LEGAL MALPRACTICE WITH INTERNATIONAL DIMENSIONS

When American clients represented by American lawyers are harmed by errors or other misconduct related to what is often called foreign “legal process outsourcing,”<sup>19</sup> they may seek to hold their American lawyers accountable. In many instances, it is easier for a client to sue and collect a judgment from a domestic law firm than to secure redress from a foreign outsourcing provider. Moreover, in some cases, it may be fair to impose liability on American lawyers for harm resulting from outsourced tasks. Often, those lawyers practicing law in the United States conceived, implemented, and, to some extent, benefitted from the outsourcing arrangements.<sup>20</sup> Even if outsourcing was the client’s idea,<sup>21</sup> and in fact took business away from American lawyers for the purpose of cutting costs,<sup>22</sup> the client may reasonably have expected the American lawyers involved with such efforts to perform a quality-control function.<sup>23</sup>

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19. See Sasha Borsand & Amar Gupta, *Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance*, 1 PACE INT’L L. REV. ONLINE COMPANION 1, 1 (2009) (“Legal-process outsourcing . . . involves the use of foreign lawyers to conduct, perform[,] and apply domestic law, most often for cost-saving purposes.”).

20. Employing a foreign legal process outsourcing provider may confer significant advantages on an outsourcing law firm. Among other things, a law firm may recognize substantial savings due to differences relating to wages, benefits, working hours, and taxation. See Joshua A. Bachrach, Current Development, *Offshore Legal Outsourcing and Risk Management: Prospective Limitation of Liability Agreements Under Model Rule 1.8(h)*, 21 GEO. J. LEGAL ETHICS 631, 633–34 (2008) (discussing some of the benefits of using legal process outsourcing providers, such as cost savings and the ability to employ a twenty-four hour workforce).

21. See Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 136–37 (2011) (“Interestingly, even though many of the ethics opinions and legal scholarship dealing with outsourcing seem to assume that law firms will be the ones leading the way, this is not the case. Instead, it is corporations in need of legal services . . . that so far have taken the lead in sending work offshore.” (footnote omitted)).

22. Cf. Martha A. Mazzone, *Ethics Rules Require Close Supervision of Offshore Legal Process Outsourcing*, 55 BOS. B.J. 25, 26 (2011) (“Clients who have watched similar labor arbitrage occur in their businesses for over a decade now are not going to be convinced that ‘it just can’t work for lawyers.’”).

23. See ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451, at 2–4 (2008) (recommending that outsourcing lawyers conduct reference checks and perform other quality-control functions). The New York City Bar Association suggested several steps that outsourcing lawyers should take to supervise outsourced assistants:

Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or engaging the non[]lawyer, and obtain the professional resume of the non[]lawyer; (b) conduct reference checks; (c) interview the non[]lawyer in advance, for example, by telephone or by voice-over-Internet protocol or by web cast, to ascertain the particular non[]lawyer’s suitability for the particular assignment; and (d) communicate with the non[]lawyer during the assignment to ensure that the non[]lawyer

In some instances, the nature of the outsourced work will increase the likelihood of a malpractice action being filed, both because of the difficulty of the assignment and the high stakes involved. Intellectual property work is a prime example. Malpractice actions involving invalid patents<sup>24</sup> often produce astoundingly large claims<sup>25</sup> and settlements.<sup>26</sup> Yet, “high-end” intellectual property work is increasingly outsourced to providers in other countries.<sup>27</sup> When errors occur in the provision of outsourced services, aggrieved clients will likely seek to recover damages.

It took longer than one might have predicted, but legal malpractice claims related to international aspects of American law practice have begun to result in reported decisions.<sup>28</sup> However, as of yet, there are no published opinions dealing with malpractice involving legal process outsourcing. When such claims arise, it is far from certain how they will be decided. Some theories of liability—such as those based on the

understands the assignment and that the non[]lawyer is discharging the assignment according to the lawyer's expectations.

N.Y.C. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006), *available at* <http://www2.nycbar.org/Ethics/eth2006.htm>.

24. Andrew Lavoott Bluestone, *A Patent Lost, A Legal Malpractice Case*, N.Y. ATT'Y MALPRACTICE BLOG (Dec. 20, 2011), <http://blog.bluestonelawfirm.com/legal-malpractice-news-a-patent-lost-a-legal-malpractice-case.html> (discussing a decision allowing a malpractice claim related to abandonment of a patent application to go forward).

25. See Warren v. Eckert Seamans Cherin & Mellot, 45 Pa. D. & C. 4th 75, 77 (Com. Pl. 2000) (involving a \$12 million legal malpractice claim based on alleged failure to obtain a patent of appropriate breadth and scope); Minton v. Gunn, 355 S.W.3d 634, 638 (Tex. 2011) (discussing a legal malpractice claim for more than \$100 million in damages arising from dismissal of a patent infringement suit); *Patent Malpractice Litigation: State Versus Federal Jurisdiction*, PATENTLY-O: PAT. L. BLOG (July 14, 2011, 11:58 PM), <http://www.patentlyo.com/patent/2011/07/patent-malpractice-litigation-state-versus-federal-jurisdiction.html> (discussing a multi-million dollar claim).

26. Andrew Lavoott Bluestone, *Patents and a Huge Legal Malpractice Payout*, N.Y. ATT'Y MALPRACTICE BLOG (July 14, 2011), <http://blog.bluestonelawfirm.com/legal-malpractice-news-patents-and-a-huge-legal-malpractice-payout.html> (discussing a settlement that could total \$214 million).

27. See Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 132 (2011) (“For intellectual property work, . . . the trend has shifted to include offshoring of more high-end work; in this area, ‘more than 50% of the [offshored] work is high end.’” (citing Evalueserve, *LPO and the Great Recession*, IP FRONTLINE (Apr. 27, 2010), <http://www.ipfrontline.com/depts/article.asp?id=24227&depid=3>) (last alteration in original))).

28. See DiStefano v. Greenstone, 815 A.2d 496, 498 (N.J. App. Div. 2003) (discussing an action concerning an American law firm's failure to sustain communication with an Italian firm that it used to handle an international tort claim); GUS Consulting GMBH v. Chadbourne & Parke LLP, 905 N.Y.S.2d 158, 159 (App. Div. 2010) (involving an American law firm's structuring of a Russian natural-gas investment for Austrian clients); see also Ethan S. Burger, Essay, *International Legal Malpractice: Not Only Will the Dog Eventually Bark, It Will Also Bite*, 38 ST. MARY'S L.J. 1025, 1064 (2007) (opining that attorneys committing international legal malpractice will eventually be held accountable for their actions).

garden-variety negligence principles that would govern claims against law firms for careless selection or supervision of foreign outsourcing providers—are well established.<sup>29</sup> However, other theories of responsibility—particularly those related to whether outsourcing law firms should be vicariously liable for the torts of foreign actors—are less understood.

### A. Distinguishing Discipline and Forfeiture from Civil Liability

Ethics opinions issued by national,<sup>30</sup> state,<sup>31</sup> and local<sup>32</sup> bar associations or similar groups<sup>33</sup> have addressed an array of ethical issues related to foreign outsourcing of representation-related tasks.<sup>34</sup> The issues raised in ethics opinions typically focus on the professional duties of outsourcing lawyers concerning provider selection and supervision, client

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29. See *Tormo v. Yormark*, 398 F. Supp. 1159, 1171–72 (D. N.J. 1975) (holding that there was a question of fact as to whether the New York lawyer was negligent in referring a matter to a New Jersey lawyer). The court discussed the well-established common-law rule that holds “[a]n actor generally has no duty to use care to prevent harm to another through the criminal acts of third parties not subject to his control.” *Id.* at 1169 (quoting WILLIAM PROSSER, TORTS § 33 (4th ed. 1971)). However, where a party “expressly assumes a duty” or intentionally wrongs a third party, this general rule may not prevent liability for harm to third parties. *Id.* at 1170–71 (citing *De la Bere v. Pearson, Ltd.*, 1 K.B. 280 (1908)).

30. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) (discussing the outsourcing of legal-support services).

31. State bar associations have also weighed in on the issue of legal outsourcing and its potential effect on practitioners in their respective states. Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2004-165 (2004), available at <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=cN-000Bo11s%3D&tabid=838>; Colo. Bar Ass'n Ethics Comm., Formal Op. 121 (2008), available at <http://www.cobar.org/index.cfm/ID/386/subID/25320/CETH//>; Fla. Comm. on Prof'l Ethics, Op. 07-2 (2008), available at <http://www.floridabar.org/TFB/TFBETOpin.nsf/SMTGT/ETHICS,%20OPINION%2007-2>; N.C. State Bar, 2007 Formal Ethics Op. 12 (2008), available at <http://www.ncbar.gov/ethics/ethics.asp?page=2&keywords=outsourcing>; Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2009-6 (2009), available at [http://www.sconet.state.oh.us/Boards/BOC/Advisory\\_Opinions/2009/Op\\_09-006.doc](http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/2009/Op_09-006.doc); Va. State Bar Ethics Counsel, Op. 1850 (2010).

32. L.A. Cnty. Bar Ass'n Prof'l Responsibility & Ethics Comm., Op. 518 (2006), available at <http://www.lacba.org/Files/LAL/Vol29No9/2317.pdf>; N.Y.C. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www2.nycbar.org/Ethics/eth2006.htm>; San Diego Cnty. Bar Ass'n, Op. 2001-1 (2001), available at <http://www.sdcbabar.org/index.cfm?Pg=ethicsopinion01-1>.

33. In some states, such as Texas, ethics opinions are issued by a committee appointed by the state supreme court. *Cf. Opinions*, TEX. CTR. FOR LEGAL ETHICS, <http://www.legalethictexas.com/Ethics-Resources/Opinions.aspx> (last visited Jan. 14, 2012) (listing the various ethics opinions that have been published by the Texas Supreme Court Professional Ethics Committee).

34. See Mark L. Tuft, *Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-Examining Current Ethical Standards*, 43 AKRON L. REV. 825, 832–40 (2010) (offering a narrative summary of the ABA, New York, California, Florida, North Carolina, Colorado, and Ohio ethics opinions).

communication, confidentiality of client information, billing for outsourced tasks, conflicts of interest, fee splitting with foreign providers, and unauthorized practice of law by foreign counterparts.<sup>35</sup> However, such ethics opinions are only advisory in nature.<sup>36</sup> Moreover, ethics opinions focus on disciplinary consequences,<sup>37</sup> rather than malpractice liability. The committees that write ethics opinions normally decline to express any opinion on “questions of law,”<sup>38</sup> such as whether a particular type of unethical conduct will support a claim for civil liability.

A significant breach of duty to a client may require a lawyer to relinquish attorney’s fees in whole or in part.<sup>39</sup> Thus, some disciplinary violations will support a claim for fee forfeiture.<sup>40</sup> A court will order the

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35. See Vincent R. Johnson & Stephen C. Loomis, *United States, in 33a COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS*, “OUTSOURCING LEGAL SERVICES: IMPACT ON NATIONAL LAW PRACTICES” (forthcoming 2012) (discussing ethical implications of outsourcing legal work); see also John Levin, *Guidance on Outsourcing from the Commission on Ethics 20/20*, CHI. B. ASS’N RECORD, Apr. 2011, at 50 (discussing a proposed amendment to the Model Rules of Professional Conduct to address concerns related to outsourcing).

36. See Vincent R. Johnson, *Legal Malpractice Litigation and the Duty to Report Misconduct*, 1 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 40, 50 (2011) (“While . . . [ethics] opinions are not binding on courts or disciplinary authorities, they are important to a proper understanding of the duty to report misconduct because they generally reflect the wisdom, understanding, and customs of responsible lawyers engaged in the practice of law.”).

37. Cf. MICHAEL S. ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS 184–87* (2011) (discussing the historical development of Texas’s ethical standards and the disciplinary consequences resulting from those standards).

38. See, e.g., N.Y. State Bar Ass’n, Comm. on Prof’l Ethics Op. 835 (2009), available at [http://www.nysba.org/AM/Template.cfm?Section=Ethics\\_Opinions&ContentID=55621&template=/CM/ContentDisplay.cfm](http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&ContentID=55621&template=/CM/ContentDisplay.cfm) (“The question whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York for that purpose is not answered by the New York Rules of Professional Conduct, but rather is a question of law beyond the Committee’s jurisdiction.”); Tex. Comm. on Prof’l Ethics, Op. 586 (2008), available at <http://www.law.uh.edu/libraries/ethics/opinions/501-600/EO586.pdf> (“It is beyond the authority of this Committee to address questions of substantive law relating to the validity of arbitration clauses in agreements between lawyers and their clients.”).

39. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) (“A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer’s compensation for the matter.”); see also Jeffrey A. Webb & Blake W. Stribling, *Ten Years After Burrow v. Arce: The Current State of Attorney Fee Forfeiture*, 40 ST. MARY’S L.J. 967, 968–69 (2009) (discussing the potential punishment of fee forfeiture and the characteristics that amount to a clear and serious breach).

40. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 cmt. c (2000) (indicating that “[t]he source of the duty can be civil or criminal law, including, for example, the requirements of an applicable lawyer code or the law of malpractice”). However, the culpability of a disciplinary violation may be important because “whether negligence not amounting to breach of fiduciary duty is sufficient to warrant total or partial loss of a fee is an open question in many states.” VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 140 (2011) (discussing relevant precedent).

loss of fees to prevent unjust enrichment<sup>41</sup> and to protect “the public interest in maintaining the integrity of attorney–client relationships.”<sup>42</sup> Importantly, a client seeking forfeiture need not show that a breach of duty caused damages,<sup>43</sup> only that the breach was a clear and serious violation of the lawyer’s obligations.<sup>44</sup>

The fact that a lawyer may be subject to discipline or fee forfeiture does not mean that a lawyer is automatically liable for legal malpractice.<sup>45</sup> A host of rules related to issues such as scope of duty,<sup>46</sup> factual and proximate causation,<sup>47</sup> and proof of damages<sup>48</sup> may insulate a lawyer who has violated the standard of care, resulting in harm. The same is true of defenses based on the statute of limitations,<sup>49</sup> or on the plaintiff’s own comparative negligence<sup>50</sup> or unlawful conduct.<sup>51</sup> A plaintiff in a malpractice action must prove much more than a violation of the disciplinary rules.<sup>52</sup>

41. *See generally* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 49 (2011) (identifying ways in which unjust enrichment may be determined).

42. *See* *Burrow v. Arce*, 997 S.W.2d 229, 238 (Tex. 1999) (“[T]he central purpose of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents’ disloyalty.”).

43. *See id.* at 240 (stating that “client[s] need not prove actual damages in order to obtain forfeiture”). “The Texas rule accords with the rule adopted in several other states.” *Huber v. Taylor*, 469 F.3d 67, 77 (3d Cir. 2006).

44. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) (listing among the relevant factors that determine a clear and serious violation: “the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer’s work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies”).

45. *See id.* § 52(2) (“Proof of a violation of a rule or statute regulating the conduct of lawyers . . . does not give rise to an implied cause of action for professional negligence or breach of fiduciary duty.”). *See generally* Douglas R. Richmond, *Why Legal Ethics Rules Are Relevant to Lawyer Liability*, 38 ST. MARY’S L.J. 929, 946–60 (2007) (addressing whether ethical rules should establish a standard of care for malpractice liability).

46. *See* VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 43–52 (2011) (discussing scope of representation).

47. *See id.* at 101–24 (discussing factual and proximate causation).

48. *See id.* at 235–46 (discussing compensatory damages).

49. *See* *Denbo v. DeBray*, 968 So. 2d 983, 990 (Ala. 2006) (dismissing as untimely a legal malpractice claim against an attorney who allegedly failed to notify insurers of a third-party claim against the lawyer’s client).

50. *See* VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 264–66 (2011) (discussing contributory negligence, comparative negligence, and comparative fault).

51. *See generally* Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43 (2008) (noting the variety of rationales under which unlawful conduct on the part of the plaintiff can bar a legal malpractice action).

52. For example, the Supreme Court of Florida recently listed three elements of a legal malpractice action: “[1] the attorney’s employment; [2] the attorney’s neglect of a reasonable duty; and [3] the attorney’s negligence as the proximate cause of loss to the client.” *Larson & Larson, P.A. v. TSE Indus., Inc.*, 22 So. 3d 36, 50 n.10 (Fla. 2009) (quoting *Sec. Nat’l Servicing Corp. v. Law Office of David J. Stern, P.A.*, 916 So. 2d 934, 936–37 (Fla. Dist. Ct. App. 2005), *quashed by*

Disciplinary rules say almost nothing about issues of vicarious liability. There are ethics rules that prohibit lawyers from violating applicable strictures through the conduct of others,<sup>53</sup> or that impose disciplinary liability on a supervising lawyer or partner for failing to remedy the misconduct of subordinate lawyers in very limited circumstances.<sup>54</sup> However, there is nothing in the disciplinary realm comparable to vicarious liability that plays a significant role in legal malpractice litigation.<sup>55</sup>

### B. *Scholarship and Relevant Malpractice Principles*

Foreign outsourcing has attracted the attention of legal commentators.<sup>56</sup> However, thus far, academic scholarship has only skirted the edges of the malpractice liability issues related to foreign legal-process outsourcing.<sup>57</sup> One of the key questions is whether lawyers

969 So. 2d 962 (Fla. 2007)) (internal quotation marks omitted). Violation of an ethical rule would presumably only help satisfy the second element and would generally not assist the plaintiff in defeating the various defenses mentioned above.

53. See MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2002) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct . . . through the acts of another.").

54. The Model Rules give guidance on liability for supervising employees:

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

*Id.* R. 5.1(c); cf. Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2009-6 (2009), available at [http://www.sconet.state.oh.us/Boards/BOC/Advisory\\_Opinions/2009/Op\\_09-006.doc](http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/2009/Op_09-006.doc). (mirroring the Model Rules in stating that a lawyer may be held accountable for another lawyer's unethical actions if the lawyer "orders, or with specific knowledge of the conduct, ratifies the conduct involved").

55. See VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 319-51 (2011) (discussing vicarious liability).

56. See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2192 (2007) (describing the impact of legal outsourcing in India); Darya V. Pollak, Comment, *"I'm Calling My Lawyer . . . in India!": Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 147-54 (2006) (addressing the various vulnerabilities to malpractice and tort liability that arise from international outsourcing); see also Marcia L. Proctor, *Considerations in Outsourcing Legal Work*, MICH. B.J., Sept. 2005, at 22, 22-24 (surveying some of the ethical consequences of legal outsourcing).

57. See J. Benjamin Lambert, *Professional Liability and International Lawyering: An Overview*, 77 DEF. COUNS. J. 69, 78-80 (2010) (stating the potential liability of domestic lawyers who outsource legal work for foreign providers); see also Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 174-75 (2011) (describing the possibility for malpractice liability when two law firms collaborate to outsource a client's legal work and

who outsource legal work to service providers in other countries are subject to liability only under negligence principles or also under principles of strict vicarious liability.<sup>58</sup> In the domestic context, public policy considerations favoring enterprise liability often hold law firms accountable for errors and misconduct committed by persons working within those entities.<sup>59</sup> Do those same principles also dictate that law firms outsourcing selected tasks to providers in other countries should be responsible if the foreign work product, or conduct related thereto, proves to be deficient?

To be sure, there are rules of American law that can, and certainly will, be applied to liability claims arising from the foreign outsourcing of legal services. For example, well-established concepts such as respondeat superior<sup>60</sup> and nondelegable duty<sup>61</sup> will likely be called into play. However, those legal concepts originally emerged in a far different world—a world where instant global communication was not the norm, and where tasks were rarely delegated to persons on the other side of the globe. It is fair to ask whether traditional notions of tort liability—which often allow employers to escape responsibility for harm caused by conduct falling outside of an employee’s scope of employment<sup>62</sup> or performed by an

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addressing whether vicarious liability might result from outsourcing).

58. See Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 174–75 (2011) (predicting the possibility that a domestic lawyer may incur vicarious liability); see also Douglas R. Richmond, *Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions in a Bottle?*, 98 KY. L.J. 461, 495 (2010) (analyzing methodologies that allow two co-counsels to avoid shared responsibilities and liabilities).

59. Law firms are held liable for malpractice that occurs in the “ordinary course” of business. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. d (2000). According to the Restatement:

The ordinary course of business of a law firm includes the practice of law and various activities normally related to it. Thus, liability is imposed for legal malpractice . . . by any firm lawyer; . . . misapplication of funds in the custody of the firm or its personnel . . . ; and torts committed by a principal or employee while acting in the scope of employment, for example for the negligent driving of an employee who is on firm business.

*Id.*

60. See RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) (defining respondeat superior as a legal doctrine invoked when “[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment”).

61. See RESTATEMENT (SECOND) OF TORTS note preceding § 416 (1965) (indicating that a principal will be held liable for the torts of an independent contractor that involve the breach of a nondelegable duty).

62. See RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006) (defining the modern test for scope of employment); RESTATEMENT (SECOND) OF AGENCY § 228 (1958) (defining the classic test for scope of employment).

independent contractor<sup>63</sup>—are still appropriate in a “flattened” world,<sup>64</sup> where providers of goods or services often work with, and compete against, businesses located on other parts of the globe.<sup>65</sup>

### III. THE COMPLEX NATURE OF LEGAL PROCESS OUTSOURCING

It is difficult to discuss civil liability for harm related to foreign legal-process outsourcing because the term “outsourcing” covers exceptionally broad territory.<sup>66</sup> Depending on how the term is used, various activities may be categorized as “outsourcing” and yet differ greatly from one another in terms of the nature of the services performed, the structure of the work arrangement, and even the identity of the proponent of this mode of task performance.

#### A. *The Wide Range of Outsourced Tasks*

Legal process outsourcing includes the performance in other countries of both “legal” and “nonlegal” tasks that are incidental to the practice of law.<sup>67</sup> Thus, at one of end of the spectrum, this type of professional outsourcing encompasses legally oriented tasks such as legal research,<sup>68</sup> argument formulation, brief writing,<sup>69</sup> and legal planning.<sup>70</sup> At the other

63. See RESTATEMENT (SECOND) OF TORTS § 409 (1965) (stating that, generally, there is no liability for a tort committed by an independent contractor).

64. Globalization has now become so widespread that best-selling author Thomas Friedman argues “the world is flat,” meaning that, in selling goods and services, businesses must compete with enterprises in other countries. THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 6–7 (2005).

65. Cf. Susan Saab Fortney, *Challenges and Guidance for Lawyering in a Global Society*, 38 ST. MARY'S L.J. 849, 850 (2007) (“With globalization of capital and financial markets linking even the remotest parts of the world, cross-border practice is no longer restricted to lawyers who handle private and public international law matters.”).

66. See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2192 (2007) (describing various types of jobs that have commonly been outsourced, such as call centers, low-skilled and laborious jobs, the recruitment of software engineers, and the outsourcing of legal work).

67. See *id.* at 2203 (explaining how “legal processing outsourcing . . . companies” located overseas are now capable of performing legally oriented tasks, not just legal administration).

68. Cf. Tom Kucharvy, *The Growth of Knowledge Process Outsourcing*, BEYOND IT (Feb. 22, 2010), <http://beyond-it-inc.com/GKEblog/the-growth-of-knowledge-process-outsourcing.html> (identifying Lexadigm as an Indian “legal research and litigation support” provider).

69. See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2203–04 (2007) (discussing a tax brief submitted to the United States Supreme Court that was drafted by an outsourcing firm based in India).

70. See Joshua A. Bachrach, Current Development, *Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(h)*, 21 GEO. J. LEGAL ETHICS 631, 635 (2008) (indicating that legal outsourcing includes “litigation



end of the spectrum, professional outsourcing includes such things as photocopying, document management, data capture, proofreading,<sup>71</sup> and general office tasks.<sup>72</sup> Matters in the latter category usually do not involve specialized legal knowledge or the exercise of judgment concerning legal rights and obligations.<sup>73</sup> However, it is easy to see how the categories might blur.<sup>74</sup> Scanning documents is an essentially ministerial function; indexing documents requires some degree of evaluation; and abstracting documents may effectively necessitate some understanding of the legal issues in a case.<sup>75</sup>

For purposes of malpractice liability, little turns upon whether a client's grievance arises from a legal or a nonlegal task because lawyers have a duty to exercise reasonable care in all aspects of the representation of clients.<sup>76</sup> Indeed, lawyers are more exposed to civil liability for errors that *do not involve* the exercise of judgment than for errors that do. This is true because the rules of legal malpractice law, within limits, afford protection to choices involving professional discretion.<sup>77</sup>

In a malpractice action, the question is simply whether the deficient

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stemming from movies, 'legal planning,' and assessment of the 'best legal climate to shoot a film'").

71. See Sheri Qualters, *Outsourcing Pioneer Blazes a New Trail: Bringing Work Back from India*, NAT'L L.J., (July 5, 2011), available at <http://lapardin.wordpress.com/2011/07/06/outsourcing-pioneer-blazes-a-new-trail-bringing-work-back-from-india/> (discussing patent-application proof-reading).

72. See *Legal Services*, RR DONNELLEY, [http://www.rrdonnelley.com/financial/OutSourcing/Solutions/services\\_solutions\\_legalservices.asp](http://www.rrdonnelley.com/financial/OutSourcing/Solutions/services_solutions_legalservices.asp) (last visited Jan. 14, 2012) (describing a wide range of outsourcing services, including creative services, document review, and contract management).

73. See Darya V. Pollak, Comment, *"I'm Calling My Lawyer . . . in India!": Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 102 (noting that, until skill-intensive work began being outsourced, lawyers and paralegals felt immune from the risks of outsourcing).

74. See Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT'L L. 401, 408-09 (2007) ("[T]he activities currently being outsourced skate close to the divide between 'legal' and 'support' services.").

75. See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2201 (2007) (discussing the Indian subsidiary of a Dallas litigation firm which was formed to scan, index, and abstract documents).

76. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) (stating that "[a] lawyer shall provide competent representation to a client" without distinguishing between legal and nonlegal tasks).

77. See VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 60-64 (2011) (discussing how negligence law protects the exercise of professional discretion by lawyers); see also Vincent R. Johnson, *"Absolute and Perfect Candor" to Clients*, 34 ST. MARY'S L.J. 737, 739 (2003) (arguing that "evaluative discretion must extend just as readily to communicating with clients, as to investigating facts, examining witnesses, negotiating deals, drafting documents, or crafting solutions").

performance of duties related to the representation foreseeably caused harm of a legally cognizable nature, generally under tort or contract principles.<sup>78</sup> Thus, if a lawyer precipitates harm by handing over a box of client documents to opposing counsel without making copies, the lawyer may be sued for malpractice.<sup>79</sup> Any task outsourced to a foreign provider might possibly give rise to malpractice liability. Emphasizing that legal process outsourcing encompasses both legal and nonlegal tasks<sup>80</sup> shows how far liability potentially extends.

Ethics opinions addressing *disciplinary* issues related to foreign outsourcing have often grappled with the question of whether outsourcing amounts to unethically assisting the unauthorized practice of law by the foreign-services provider. In dealing with that question, the authorities have struggled with the quandary of what constitutes the “practice of law.”<sup>81</sup> Ethics opinions have sometimes concluded that an outsourcing

78. See Douglas R. Richmond, *Why Legal Ethics Rules Are Relevant to Lawyer Liability*, 38 ST. MARY'S L.J. 929, 932 (2007) (explaining that a malpractice action requires the plaintiff to prove up the four elements commonly associated with a negligence action in tort law).

79. Cf. *MB Indus., LLC v. CNA Ins. Co.*, 74 So. 3d 1173, 1187 (La. 2011) (holding that a “reasonable lay jury could certainly find handing over a box of client documents without making copies is negligent under any standard” and that “no expert testimony was necessary to establish these actions fell below the applicable standard of care,” but that the defendant lawyer was entitled to summary judgment because the plaintiff failed to show that the negligent conduct caused damage).

80. See Brandon James Fischer, Note, *Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad*, 16 SW. J. INT'L L. 451, 455–56 (2010) (stating that “virtually any work can be outsourced without requiring any physical contact between the parties involved”).

81. See Mary C. Daly & Carole Sliver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT'L L. 401, 408 (2007) (noting that “there is no general agreement on the definition of ‘the practice of law’”); see also, e.g., Fla. Comm. on Prof'l Ethics, Op. 07-2 (2008), available at <http://www.floridabar.org/TFB/TFBETOpin.nsf/SMTGT/ETHICS,%20OPINION%2007-2> (defining the practice of law as the performance of services or giving of advice for the protection of legal rights or property that requires advanced legal training or skill (citing Fla. Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962), vacated on other grounds, 373 U.S. 379 (1963))). See generally Vincent R. Johnson & Stephen C. Loomis, *United States, in 33a COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS, “OUTSOURCING LEGAL SERVICES: IMPACT ON NATIONAL LAW PRACTICES”* (forthcoming 2012) (discussing unauthorized practice of law issues in legal outsourcing). In that chapter, we state:

[T]he indispensable ingredient [in “practice of law”] is the process of relating relevant legal principles to the facts of a particular person's situation. This is what lawyers do when they undertake such tasks as drafting a lease to rent a client's property, arguing the client's claim or defense in court, or advising a client on how to minimize the risks of being sued by an unhappy employee. The practice of law entails relating general principles of law to the “client's” facts. Absent that type of exercise of judgment—about which rules are operative and which facts are material—a person dealing with legal principles is not practicing law. In contrast, if someone purporting to have legal knowledge draws upon those principles to advise another about the merits of potential claim or defense, or to craft a strategy to advance or protect the other's legal

lawyer would not be liable for aiding the unauthorized practice if the outsourcing task involved a nonlegal matter, for the foreign provider would then not be practicing law.<sup>82</sup> However, that distinction has no bearing upon malpractice liability. The injurious act or omission need not have any special law-related characteristic. Under negligence principles, the question is simply whether a reasonably prudent lawyer would have exercised greater care than did the defendant, and by doing so, would she have prevented harm to the client.<sup>83</sup>

A law firm might seek to limit its exposure to malpractice liability by outsourcing to providers in other countries only routine business-related tasks, such as billing, rather than the handling of complex substantive legal issues.<sup>84</sup> The reasoning might be that to the extent the task is simple, there is less chance the provider will “get it wrong.” However, limiting outsourcing to clerical assignments cannot eliminate the risk of civil

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rights, the person may well be engaging in the practice of law.

... [S]ome [legal process outsourcing] providers are assigned a task purely legal task, such as compiling a report about what the law is in the fifty states on a particular subject. In these situations, the outsourcing lawyer is not assisting the unauthorized practice of law. Legal principles are not being related to anyone’s personal circumstances, and no layperson is relying on the provider to protect his or her own interests. The provider is not practicing law. Thus, there is no risk of assisting unauthorized practice in a case where the outsourcing provider never learns confidential information about a client.

*Id.*

82. See Colo. Bar Ass’n Ethics Comm., Formal Op. 121 (2008), available at <http://www.cobar.org/index.cfm/ID/386/subID/25320/CETH//> (allowing outsourcing of legal work to nonlawyers in some circumstances as long as that work is properly supervised by a Colorado lawyer); Fla. Comm. on Prof’l Ethics, Op. 07-2 (2008) (“It is the committee’s opinion that there is no ethical distinction when hiring an overseas provider of such services versus a local provider, and that contracting for such services does not constitute aiding the unlicensed practice of law, provided that there is adequate supervision by the law firm.”); N.Y.C. Comm. on Prof’l & Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www2.nycbar.org/Ethics/eth2006.htm> (requiring lawyers to supervise foreign assistants to avoid unauthorized practice of law); see also *In re* Op. No. 24 of the Comm. on the Unauthorized Practice of Law, 607 A.2d 962, 966 (N.J. 1992) (holding that paralegals could engage in the practice of law as long as they were supervised by an attorney and the attorney took responsibility for any product of the paralegals’ work (citing N.J. STAT. ANN. § 2A:170–81 (West 1991), repealed by N.J. STAT. ANN. § 2A:170–85 (West 1994))).

83. See *Pierce v. Cook*, 992 So. 2d 612, 617 (Miss. 2008) (en banc) (“[A] lawyer owes his client the duty to exercise the knowledge, skill, and ability ordinarily possessed and exercised by the members of the legal profession similarly situated. Failure to do so constitutes negligent conduct on the part of the lawyer.” (quoting *Hickox ex rel Hickox v. Holleman*, 502 So. 2d 626, 634 (Miss. 1987), abrogated by Miss. Transp. Comm’n v. McLemore, 863 So. 2d 31 (Miss. 2003) (internal quotation marks omitted))).

84. See Joshua Freedman, *Focus: Legal Process Outsourcing—Distance Earning*, THE LAWYER (Nov. 21, 2011), <http://www.thelawyer.com/focus-legal-process-outsourcing-distance-earning/1010314>. article (stating that “White & Case...has only under-taken business, not legal, process outsourcing... including billing support”).

liability if the outsourced work proves to be deficient. For example, if client billing is outsourced, and a client is charged an improper amount for legal services due to the foreign provider's lack of care or more egregious misconduct, the outsourcing law firm is subject to liability for malpractice on any variety of theories.<sup>85</sup>

### B. Differing Outsourcing Structural Arrangements

Foreign outsourcing takes many forms. The only common thread among these structural arrangements is the decision to have certain tasks performed abroad rather than domestically. Thus, a law firm might outsource aspects of legal representation by doing things such as: (1) operating a foreign-branch law office or foreign law-related subsidiary;<sup>86</sup> (2) partnering with a foreign law firm to jointly handle a matter;<sup>87</sup> (3) hiring a foreign entity to have work performed by individuals that the foreign entity regularly employs or hires temporarily;<sup>88</sup> or (4) directly engaging the services of a person who lives in a foreign country.<sup>89</sup>

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85. See *Weiss v. Speer*, No. G041139, 2009 WL 1497507, at \*1 (Cal. Ct. App. May 28, 2009) (finding that overbilling was a proper basis for claims that an attorney breached the retainer agreement and fiduciary duties); *Cripe v. Leiter*, 703 N.E.2d 100, 107 (Ill. 1998) ("Fraudulent or excessive billing of a client violates the attorney's fiduciary duty to the client."); *Ginther v. Scinta*, 818 N.Y.S.2d 376, 376–77 (App. Div. 2006) (allowing an overbilling claim to proceed); see also *Shreveport Credit Recovery, Inc. v. Modelist*, 760 So. 2d 681, 685–86 (La. Ct. App. 2000) (treating overbilling as a contractual claim for purposes of the statute of limitations).

86. See Joshua Freedman, *Focus: Legal Process Outsourcing—Distance Earning*, THE LAW. (Nov. 21, 2011), <http://www.thelawyer.com/focus-legal-process-outsourcing-distance-earning/1010314>. article (explaining that White & Case, a global law firm founded in New York, "outsourced its back-office operations to India a decade ago and within five years opened a centre in the Philippines that now covers functions including billing support, financial analysis, conflict support, after-hours reception services and business development"); see also Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2202 (2007) (discussing Indian subsidiaries of American corporations); Darya V. Pollak, Comment, "I'm Calling My Lawyer . . . in India!": *Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 108–09 (2006) (describing the "in-house" model).

87. See Darya V. Pollak, Comment, "I'm Calling My Lawyer . . . in India!": *Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 109 (2006) (describing the "firm-to-firm" model).

88. See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2202–03 (2007) (discussing Silicon Valley law firms that hire workers in India to write patent applications and third-party vendors that serve as intermediaries between American law firms outsourcing work to persons in India); Darya V. Pollak, Comment, "I'm Calling My Lawyer . . . in India!": *Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 107 (2006) (describing the "firm-to-middleman" model).

89. See Darya V. Pollak, Comment, "I'm Calling My Lawyer . . . in India!": *Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 109–10 (2006) (describing the "international contract lawyer" model).

Presumably there are other variations, and therefore, it is difficult to generalize about the varieties of malpractice liability that may arise from legal process outsourcing.<sup>90</sup>

If the persons providing services at the foreign location are employees of the American firm, liability issues will presumably be resolved by reference to well-established legal principles, namely those governing whether the harm arose from the “ordinary course” of the law firm’s business.<sup>91</sup> In contrast, if the foreign provider is a separate entity that partnered with the American law firm to provide services to American clients, the principles governing joint ventures and common-law partnerships may be relevant.<sup>92</sup> Further, if the foreign provider (whether an entity or an individual) was an independent contractor—rather than an employee or partner—it may be important to determine whether the American law firm was negligent in delegating the task or in evaluating the quality of the work product,<sup>93</sup> or whether the harm arose from the misperformance of nondelegable duties.<sup>94</sup>

### C. *Varying Proponents*

Some lawyers are averse to foreign outsourcing for a variety of reasons, including the possibility of negative publicity that may arise when “American jobs” are lost to other countries.<sup>95</sup> However, in many

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90. Some ethics opinions paint with a broad brush in discussing the ethical responsibilities of lawyers.

91. See *infra* Part V.B.1 (outlining the legal principles associated with vicarious liability for the conduct of business partners).

92. “As a general rule the substantive law of partnerships is applicable in determining the rights and liabilities of joint venturers and third parties.” *Stone v. First Wyoming Bank N.A.*, 625 F.2d 332, 340 (10th Cir. 1980) (citing *Wood v. Western Beef Factory, Inc.*, 378 F.2d 96, 99 (10th Cir. 1967)). Where a joint venture or partnership exists, liability by one partner or joint venturer may be imputed onto the other party. See *Fed. Sav. & Loan Ins. Corp. v. McGinnis, Juban, Bevan, Mullins & Patterson, P.C.*, 808 F. Supp 1263, 1270 (E.D. La. 1992) (“[A] partnership and its individual members are vicariously liable for torts committed by any partner in the course and scope of the partnership business.”); *Roberts v. Ackley*, 405 S.W.2d 793, 794 (Tex. Civ. App.—Waco 1966, no writ) (refusing to impute negligence on a third party where no partnership existed).

93. The Restatement of Agency indicates that a principal may be liable for the harm that an agent causes if the principal was negligent “in selecting, training, retaining, supervising, or otherwise controlling the agent.” RESTATEMENT (THIRD) OF AGENCY § 7.05 (2006).

94. The nondelegable-duty doctrine allows a principal to be liable for the actions of an independent contractor. *Machado v. City of Hartford*, 972 A.2d 724, 730 (Conn. 2009). Nondelegable duties arise where public policy dictates that certain risk-creating tasks cannot be delegated to an independent contractor. *Breeden v. Anesthesia West, P.C.*, 656 N.W.2d 913, 920 (Neb. 2003).

95. See Sasha Borsand & Amar Gupta, *Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance*, 1 PACE INT’L L. REV. ONLINE

instances, lawyers are the proponents of legal process outsourcing. They see outsourcing as a way to cut costs or expand the range of services available to clients,<sup>96</sup> or as a vehicle to increase staffing or handle time-intensive tasks.<sup>97</sup> In such instances, outsourcing is believed to aid a lawyer or law firm in competing for and retaining clients or increasing the profits. Outsourcing has accomplished similar objectives in other business contexts,<sup>98</sup> especially in recessionary periods.<sup>99</sup>

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COMPANION 1, 2 (2009), available at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1000&context=pilronline> ("However, some American companies are reluctant to have their legal work performed by a company that is not located in the United States[] because of possible negative press and correlative public backlash." (citing Daniel Brook, *Are Your Lawyers in New York or New Delhi?*, LEGAL AFF. (2005), [http://www.legalaffairs.org/issues/May-June-2005/scene\\_brook\\_mayjun05.msp](http://www.legalaffairs.org/issues/May-June-2005/scene_brook_mayjun05.msp)); Keith Woffinden, Comment, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 BYU. L. REV. 483, 493 ("[S]ome corporations and law firms have avoided outsourcing legal work because outsourcing in general has become such a volatile political issue; even discussing outsourcing can stir extreme feelings from the public, employees, or labor unions."). "Such public and political hostility to the concept of outsourcing can pose a significant barrier to American corporations and law firms considering legal outsourcing." *Id.*

96. Outsourcing typically occurs for reasons related to cost, convenience, efficiency, or taxation. The process is part of the larger contemporary phenomenon called "globalization," a worldwide economic situation characterized by "the unprecedented reduction of tariffs, the growth in the volume of international commerce, and the fact that imported products and exported work are no longer seen as exotic or special." THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 83 (2010) (citing THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 9–11 (2005)). For a discussion on some of the taxation consequences of outsourcing work internationally, see Stephen C. Loomis, Recent Development, *The Double Irish Sandwich: Reforming Overseas Tax Havens*, 43 ST. MARY'S L.J. 825 (2012).

97. See Brandon James Fischer, Note, *Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad*, 16 SW. J. INT'L L. 451, 459–60 (2010) (remarking that outsourcing allows small firms to complete tasks, such as high-volume discovery, that require substantial manpower and to compete with larger firms); see also Arin Greenwood, *Manhattan Work at Mumbai Prices*, A.B.A. J., Oct. 1, 2007, at 36, 39, available at [http://www.abajournal.com/magazine/article/manhattan\\_work\\_at\\_mumbai\\_prices/](http://www.abajournal.com/magazine/article/manhattan_work_at_mumbai_prices/) (noting that the projects one foreign provider takes are "time-consuming and laborious" and are not cost-effective for American lawyers to handle personally).

98. The outsourcing of work from the United States to foreign countries is an established procedure for a wide variety of American businesses. See Brandon James Fischer, Note, *Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad*, 16 SW. J. INT'L L. 451, 455 (2010) ("The idea first gained prominence in the 1970s and 1980s when companies used independent domestic contractors to administer their manufacturing, information processing, customer service, and telemarketing functions" (citing MICHAEL D. SCOTT, *SCOTT ON OUTSOURCING LAW AND PRACTICE* xv n.6 (Supp. 2008))); Keith Woffinden, Comment, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 BYU. L. REV. 483, 483 (noting that outsourcing has been around since the late 1980s, and both blue-collar and white-collar jobs have been outsourced); see also Lee A. Patterson III, Comment, *Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation*, 7 RICH. J. GLOBAL L. & BUS. 177, 178 (2008) (noting that Motorola and Texas Instruments opened

However, sometimes the client, rather than the lawyer, proposes that certain tasks related to the legal representation should be outsourced to foreign providers. In these situations, outsourcing is not the lawyer's idea. For example, a client may decide that it is too costly to engage an American law firm to provide all of the services necessary for defending a defamation claim, and that it could reduce costs by hiring lawyers in India to conduct the necessary legal research and write the relevant motions and briefs, which would then be filed by an American lawyer playing a nominal role.<sup>100</sup>

In thinking through whether an American lawyer should be held liable for outsourcing related losses, it may be appropriate to consider who proposed the outsourcing arrangement. If the lawyer was seeking to benefit personally by recommending to a client that tasks be outsourced, that is one thing. If the client was seeking to relegate the lawyer to a nominal role by outsourcing selected aspects of the representation, that is something very different.

#### IV. RELEVANT POLICY CONSIDERATIONS

The law governing lawyers is a vast body of legal principles that reflects the influence of many different policy considerations. There is no comprehensive list of the rationales that have helped to shape this field. However, the law of attorney professional responsibility, for reasons of sound public policy, includes standards which are intended to: (1) protect clients from unnecessary harm; (2) ensure client control of legal representation; (3) promote enterprise responsibility on the part of law firms; and (4) protect lawyers from unfair claims. Each of these considerations is relevant to any comprehensive assessment of the extent to which law firms should be subject to civil liability for harm incidental to

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offices in Bangalore in the late 1980s to spark a technology outsourcing boom). In fact, outsourcing has become so ingrained in the United States that it is now a part of pop culture. See generally *Outsourced* (NBC television broadcast 2010), available at <http://www.nbc.com/outsourced> (regarding a television show featuring the antics of a call service company that has outsourced its work to India).

99. See Sasha Borsand & Amar Gupta, *Public and Private Sector Legal Process Outsourcing: Moving Toward a Global Model of Legal Expertise Deliverance*, 1 PACE INT'L L. REV. ONLINE COMPANION 1, 5 (2009) (noting that the recession may cause some companies who were initially reluctant to use legal process outsourcing to take a second look); Heather Timmons, *Legal Outsourcing Firms Creating Jobs for American Lawyers*, N.Y. TIMES, June 2, 2011, [http://www.nytimes.com/2011/06/03/business/03reverse.html?\\_r=1&pagewanted=1](http://www.nytimes.com/2011/06/03/business/03reverse.html?_r=1&pagewanted=1) (remarking that many legal outsourcing companies were able to grow during the current recession due to many law firms becoming more conscious of trimming costs).

100. See Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 125–27 (2011) (discussing a libel suit in California).

the foreign legal process outsourcing.

### A. Consumer Protection

The law governing lawyers is intended to protect consumers of legal services from unnecessary harm.<sup>101</sup> This is why lawyers are held to fiduciary standards under the law of agency and why they must exercise reasonable care under the law of negligence. Protecting consumers is also why disciplinary rules articulate particular obligations of lawyers to clients concerning such matters of recurring importance as competence,<sup>102</sup> diligence,<sup>103</sup> fees,<sup>104</sup> safekeeping of client property,<sup>105</sup> clients with diminished capacity,<sup>106</sup> law-related services,<sup>107</sup> deceptive advertising,<sup>108</sup> and other kinds of misleading statements.<sup>109</sup>

The need for client protection is often reduced in cases involving the representation of sophisticated clients and entities. This is why client sophistication is such an important factor in determining whether a lawyer's disclosure obligations to the client have been met.<sup>110</sup>

At a minimum, the rules governing civil liability for harm arising from legal process outsourcing should protect clients by offering them viable remedies. As in other areas of the law,<sup>111</sup> it would be against sound public

101. Cf. Vincent R. Johnson, *On Race, Gender, and Radical Tort Reform: A Review of Martha Chamallas & Jennifer B. Wiggins, The Measure of Injury: Race, Gender, and Tort Law*, 17 WM. & MARY J. WOMEN & L. 591, 599 (2011) ("Genuine concern for a victim's plight is dictated not only by good tort theory, but by basic principles of humanity and common decency. Of course, the interests of defendants must also be considered.").

102. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) ("Competence").

103. See *id.* R. 1.3 ("Diligence").

104. See *id.* R. 1.5 ("Fees").

105. See *id.* R. 1.15 ("Safekeeping Property").

106. See *id.* R. 1.14 ("Client with Diminished Capacity").

107. See *id.* R. 5.7 ("Responsibilities Regarding Law-Related Services").

108. See *id.* R. 7.1 ("Communications Concerning a Lawyer's Services").

109. See *id.* R. 8.4(c) ("Misconduct").

110. See VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 380 (2011) ("The more sophisticated the client, the easier it is for the law to conclude that consent was possible and that sufficient information about risks and alternatives was disclosed.").

111. Cf. *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982) (indicating that the court should defer to reasonable choice-of-law provisions, but that parties cannot agree their disputes will be governed by the Code of Hammurabi because that ancient code is nowhere in force); Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309, 325 (2006) ("Relegating a student to recovery under principles of law of a country which offers no realistic chance for adequate compensation would surely violate American public policy."); Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 565 (2009) ("The boundary line drawn by the economic loss rule should be between the real exercise of freedom of contract and relief under tort principles. Imaginary remedies have no place in the analysis.").



policy for legal rules to be crafted or interpreted in a way that would substitute imaginary remedies for real ones or that would undercut the law's interest in deterring deficient practices. In many situations, relegating injured clients to suing outsourcing providers in developing countries that have inadequate legal systems, while protecting American lawyers from liability in United States courts, would offend principles that call for safeguarding clients from harm.

### B. *Client Control of the Representation*

The law governing lawyers is intended, in part, to enable clients to exercise a broad degree of control over who provides their legal representation and how such representation is conducted.<sup>112</sup> This is why a lawyer cannot disclose client confidences to,<sup>113</sup> or share fees with,<sup>114</sup> outside counsel or nonlawyers, absent client consent. It is also why a client has a right to discharge a lawyer at any time, with or without cause,<sup>115</sup> subject only to liability for unpaid fees and court permission if the matter is in litigation.<sup>116</sup>

A myriad of disciplinary rules and legal principles require lawyers to disclose information to clients about material developments in their representation<sup>117</sup> and about conflicts of interest that threaten to impair the services that clients receive.<sup>118</sup> These rules are intended to ensure that the decisions of clients relating to representation are based on informed consent. In the law of lawyer discipline, as in the law of legal malpractice,<sup>119</sup> informed consent “denotes the agreement by a person to a

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112. See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2002) (discussing the allocation of authority between lawyer and client); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 21 (2000) (allocating authority between lawyer and client); *id.* § 22 (authority reserved to a client).

113. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003) (“Confidentiality of Information”).

114. See *id.* R. 1.5 (2002) (imposing limitations on fee splitting “between lawyers who are not in the same firm”); *id.* R. 5.4(a) (broadly prohibiting fee splitting with nonlawyers).

115. See *id.* R. 1.16(a)(3) (providing that a lawyer shall withdraw if discharged).

116. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32 cmt. d (2000) (discussing tribunal approval).

117. See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002) (“Communication”).

118. See, e.g., *id.* R. 1.7(b) (discussing informed consent to a concurrent-client conflict of interest).

119. See *Bowman v. Gruel Mills Nims & Pylman, LLP*, No. 5:06-CV-87, 2007 WL 1203580, at \*5–6 (W.D. Mich. Apr. 24, 2007) (holding, in a malpractice action, that a lawyer's decision not to press ERISA claims was a key strategic decision that needed to be discussed with the client); see also VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 97–101 (2011) (discussing the doctrine of informed consent in legal malpractice cases); Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 568–76 (2004)

proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”<sup>120</sup> A lawyer must abide by a client’s decisions concerning the “objectives of [the] representation”<sup>121</sup> and numerous important subsidiary matters, such as acceptance of settlements,<sup>122</sup> entry of pleas,<sup>123</sup> waiver of a jury trial,<sup>124</sup> and whether the client will testify.<sup>125</sup>

With respect to civil liability for harm associated with foreign legal-process outsourcing, it is particularly important to note that widely endorsed principles hold that a lawyer must consult with the client about the means that will be used to pursue the client’s objectives.<sup>126</sup> Thus, established norms strongly support the view that, in a wide range of cases, the client must receive sufficient information to be able make an informed decision about whether tasks related to the representation should be delegated to persons or entities in other countries. A client’s consent to outsourcing can only be informed if the client receives sufficient information about the risks of outsourcing (e.g., possible threats to the confidentiality of client information, difficulties of supervision, language barriers, and corrupt practices) and the available alternatives. If informed consent is necessary and has not been obtained, the outsourcing lawyers responsible for undermining the client’s control of the representation should be accountable under malpractice principles.<sup>127</sup>

### C. *Enterprise Responsibility*

The law of lawyering promotes responsible conduct in the practice of law by holding law firms accountable for losses that arise in the “ordinary course of business.”<sup>128</sup> This legal concept reflects traditional “principles

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(discussing informed consent in law and medicine).

120. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2009).

121. *Id.* R. 1.2(a) (2002).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Whether the outsourcing lawyer will be held accountable or not might depend on whether the decision to outsource is “material.” VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 99 (2011). Because the policy behind a “material” disclosure considers the ability of “clients to decide their own affairs,” if a decision to outsource is deemed material then this finding will be weighed heavily against an outsourcing attorney in a legal malpractice claim. *Id.*

128. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58(1) (2000).

of [respondeat superior] or enterprise liability.”<sup>129</sup> The term “ordinary course of business” has no fixed meaning, but it normally includes conduct intended to benefit a law firm (e.g., advising clients, conducting litigation, or even overbilling), and sometimes includes other forms of malpractice that are part of the normal risks of operating a law firm (e.g., drafting errors and late filings).<sup>130</sup>

Where the injury to a client results from conduct that is blameworthy and avoidable (e.g., from conduct that is negligent, fraudulent, or a breach of a fiduciary duty), the imposition of vicarious liability on the law firm provides a spur toward diligence that is calculated to deter and minimize bad practices. Where the assessment of civil responsibility is closer to strict liability—as is true where a law firm is held accountable for a partner’s unforeseeable theft of client funds<sup>131</sup>—the entity, rather than the unfortunate client, is forced to shoulder the burden of a loss that arose from the law firm’s manner of operation. In such instances, the law firm is required to internalize the client’s loss as a cost of doing business. The risk that led to the loss is treated as incidental to the law firm’s business methods. Essentially, the idea is that, in a wide range of situations, those who benefit from the operation of a law firm, rather than innocent clients, should be forced to internalize the costs of malpractice resulting from normal risks.<sup>132</sup> Imposing responsibility on the entity is thought to result in a more honest calculation of whether the benefits of the firm’s manner of operation outweigh the costs.<sup>133</sup>

In the context of legal process outsourcing, it is important to incentivize

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129. *Id.* § 58 cmt. b.

130. See generally VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 323–28 (2011) (discussing the significance of whether the risk was “normal” or whether the injurious conduct was intended to benefit the law firm).

131. See *Vanacore v. Kennedy*, 86 F. Supp. 2d 42, 50–51 (D. Conn. 1998) (concluding that a law firm was liable to a client for a partner’s theft of client funds because the partner, in the “ordinary course” of serving as the client’s lawyer, received trust funds from a third party in connection with the client’s sale of a business), *aff’d*, 208 F.3d 204 (2d Cir. 2000).

132. The idea that a wrongdoer must bear the cost of tortious conduct is a policy that is widely accepted. See *Querrey & Harrow, Ltd. v. Transcon. Ins. Co.*, 861 N.E.2d 719, 723 (Ind. Ct. App. 2007) (indicating that any interference with attorney–client relationships “is trumped by other policy considerations, primarily that of requiring the malpracticing attorney to bear the cost of his malpractice”), *aff’d*, 885 N.E.2d 1235 (Ind. 2008); cf. *Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655, 660 (6th Cir. 1979) (relying on the idea that wrongdoers should bear the cost of the injuries they inflict upon victims in the context of workers’ compensation).

133. See *McCarthy v. Olin Corp.*, 119 F.3d 148, 169 (2d Cir. 1997) (“Making an activity tortious forces the people who derive benefit from it to internalize the costs associated with it, thereby making sure that the activity will only be undertaken if it is desired by enough people to cover its costs.” (citing Note, *Absolute Liability for Ammunition Manufacturers*, 108 HARV. L. REV. 1679, 1690, 1691 (1995))).

law firms to accurately consider whether delegating tasks to persons in other countries is an economically sound proposition. In the *disciplinary* context, some authorities have endorsed a broad view of lawyer responsibility for outsourced tasks. For example, a North Carolina ethics committee opined that “[a] lawyer who utilizes foreign assistants will be held responsible for any of the foreign assistants’ [work product] used by the lawyer.”<sup>134</sup> Undoubtedly, the policy in favor of enterprise liability will also play an important role in shaping the principles that will govern malpractice claims arising from foreign outsourcing.

#### D. *Protecting Lawyers from Unfair Claims*

Certain principles of legal malpractice law—including the rules related to causation and defenses—insulate lawyers from damage awards when it would otherwise be fair to impose legal responsibility. Among that group of protective principles are the rules related to scope of representation.<sup>135</sup> A lawyer owes a client numerous demanding duties, such as competence, diligence, and loyalty.<sup>136</sup> However, those important obligations extend only as far as the scope of the representation. Thus, a lawyer who takes on a broad range of tasks has a greater range of duties to the client than a lawyer who agrees to handle only a limited matter.<sup>137</sup>

In lawyer–client relations, as in many other areas of law, legal principles defer to private ordering.<sup>138</sup> Lawyers and clients are accorded great latitude in defining the range of services that a lawyer will provide.<sup>139</sup> Reasonable limitations on the scope of representation will be respected by

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134. N.C. State Bar, 2007 Formal Ethics Op. 12 (2008), available at <http://www.ncbar.gov/ethics/ethics.asp?page=2&keywords=outsourcing> (citing MODEL RULES OF PROF'L CONDUCT R. 5.3 (2002)).

135. See generally VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 43–51 (2011) (discussing scope of representation and related issues).

136. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002) (discussing a lawyer's duty of competence); *id.* R. 1.7 (addressing a lawyer's duty of loyalty to the client).

137. See *Lerner v. Laufer*, 819 A.2d 471, 483 (N.J. Super. Ct. App. Div. 2003) (holding that where a client signed a detailed statement acknowledging that the lawyer was reviewing a property settlement agreement only to ensure that it reflected the terms of an earlier mediation, the lawyer did not breach the standard of care by performing no discovery or investigatory services related to the fairness of the agreement).

138. See Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 546–49 (2009) (discussing how the policy in favor of private ordering sometimes means that a plaintiff can seek a remedy for purely economic losses only in contract but not in tort).

139. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19(1) (2000) (“[A] client and lawyer may agree to limit a duty that a lawyer would otherwise owe to the client if: (a) the client is adequately informed and consents; and (b) the terms of the limitation are reasonable in the circumstances.”).

the law.<sup>140</sup> However, if there are doubts about the scope of representation, those doubts will often be resolved against the lawyer.<sup>141</sup>

Ethics opinions dealing with foreign legal process outsourcing sometimes speak in expansive terms that suggest that outsourcing lawyers have an immutable set of duties. Such expressions cannot easily be reconciled with the numerous different types of outsourcing arrangements<sup>142</sup> or with the well-established principles of legal malpractice law that allow lawyers and clients to decide what services will be provided. Nevertheless, it is essential that development in the law of civil liability related to foreign outsourcing reflects the fact that a lawyer and client may agree that the lawyer's assignment is limited in scope and obligations.

## V. THEORIES OF ACCOUNTABILITY

American lawyers who are involved with legal process outsourcing may be held liable for resulting legal malpractice under a variety of theories.<sup>143</sup> Those theories can be divided into two broad categories: personal liability and vicarious liability.

### A. *Personal Liability and Vicarious Liability*

Personal liability means that outsourcing lawyers are responsible for their own conduct that falls below the standard of care.<sup>144</sup> Thus, American lawyers may be sued for outsourcing-related acts and omissions

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140. See MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 7 (2002) ("Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.").

141. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 cmt. c (2000) (indicating that a contract limiting the scope of representation is construed from the standpoint of a reasonable client); see also *Grochocinski v. Mayer Brown Rowe & Maw LLP*, No. 06 C 5486, 2007 WL 1875995, at \*7 (N.D. Ill. June 28, 2007) (rejecting the defendants' argument that their duties were limited to nonlitigation matters because they provided legal advice related to the lawsuit and an e-mail from one lawyer instructed the client to feel "free to contact . . . me with any questions . . . you might have regarding the current situation").

142. See *supra* Part III.B (discussing the different types of outsourcing arrangements).

143. An earlier article suggested that the "captain of the ship" and "borrowed servant" doctrines might have some application to malpractice claims arising from legal process outsourcing. See Darya V. Pollak, Comment, "I'm Calling My Lawyer . . . in India!": *Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 151-52 (2006). Those doctrines have thus far played no significant role in legal malpractice litigation and will not be discussed in this Article. Cf. *Grubbs v. Knoll*, 870 A.2d 713, 724 (N.J. Super. Ct. App. Div. 2005) (rejecting a "captain of the ship" analogy as "inapt" when there was no claim for vicarious liability).

144. See generally VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 53-59 (2011) (analyzing the standard of care owed by an attorney in a negligence claim).

that negligently breach client confidences, ignore serious conflicts of interest, charge improper fees, or impair the quality of the legal representation.

Vicarious liability means that, in some instances, outsourcing lawyers who have exercised reasonable care in their representation of clients, and who therefore have not been negligent, may nevertheless be liable for the tortious conduct of outsourcing providers, such as negligently deficient legal research performed in another country.<sup>145</sup> Vicarious liability may be imposed under a variety of legal theories, including respondeat superior, actual or apparent agency, nondelegable duty, joint venture, common-law partnership, or concerted action.<sup>146</sup>

### 1. Importance of the Outsourcing Relationship Structure

While it will usually be impossible for outsourcing lawyers to escape liability for their own negligence,<sup>147</sup> the success of vicarious liability theories will often turn on the structure of the legal-process-outsourcing arrangement. These various theories of personal and vicarious liability will be discussed below.

For example, one legal commentator has argued that parties should move away from an outsourcing model that is based on “autonomously complet[ing] discrete legal tasks” and toward a collaborative model focused explicitly on cooperation.<sup>148</sup> This might make sense in terms of organizational theory, but it may also expand the range of malpractice liability.<sup>149</sup> Presumably, when only discrete tasks are outsourced, it is easier for an outsourcing lawyer to argue that the foreign provider was an independent contractor for whose conduct the outsourcing lawyer is not vicariously liable.<sup>150</sup> In contrast, if outsourcing involves close cooperation between the outsourcing lawyer and the foreign provider, it may be feasible

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145. *See id.* at 18–19 (stating that law firms and other principals may be held liable in a variety of situations in which they are not necessarily negligent, such as when their agents are acting with apparent authority).

146. *See generally id.* at 319–37 (outlining the various legal theories upon which a law firm may be held vicariously liable).

147. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(1) (2002) (“A lawyer shall not . . . make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.”).

148. Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 125 (2011).

149. *See id.* at 174 (noting that “a collaborative model may raise concerns about shared malpractice liability for negligent representation”).

150. *See infra* Part V.D (discussing vicarious liability for independent contractors).

to assert that vicarious liability should be imposed under joint venture,<sup>151</sup> common-law partnership,<sup>152</sup> or concerted-action principles.<sup>153</sup>

## 2. Limited Liability Entities

In recent years, many jurisdictions have enacted legislation that allows lawyers to practice law as part of limited liability corporations and partnerships.<sup>154</sup> The use of this type of business structure reduces a principal's exposure to vicarious liability, but does not protect the law firm itself from such responsibility.<sup>155</sup>

Undoubtedly, the precise terms of limited-liability-entity legislation—not to mention whether defendants have availed themselves of such arrangement—will play a role in malpractice suits related to foreign legal process outsourcing. However, even if lawyers practice in limited liability entities, they are liable for their own malpractice (including negligence and worse conduct) and for misleading clients about the limited liability of their law firm.<sup>156</sup> Moreover, in many jurisdictions, principals practicing in limited liability entities are subject to vicarious liability if the firm fails to comply with legislatively specified insurance requirements<sup>157</sup> or if the principals were responsible for supervising the persons who engaged in tortious conduct.<sup>158</sup> The latter exception to the protective cloak of

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151. See *infra* Part V.E.1 (investigating joint venture liability).

152. See *infra* Part V.C (exploring vicarious liability for business partners).

153. See *infra* Part V.E (analyzing possible liability under a concerted-action theory).

154. See generally Robert R. Keatinge, *Are Professional Partnerships Really Partnerships? LLPs, LLCs, and PCs—Vicarious Liability Protection and Limitations*, 60 CONSUMER FIN. L.Q. REP. 518 (2006) (discussing forms of limited liability entities “that may engage in the practice of law while limiting vicarious liability”).

155. See VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 346 (2011) (“Organization as a limited liability law firm does not affect the personal liability of lawyers who commit malpractice, nor the vicarious liability of any law firm in which those lawyers practice. The lawyer remains accountable to those harmed by the lawyer’s malpractice.”); see also Ethan S. Burger, *The Use of Limited Liability Entities for the Practice of Law: Have Lawyers Been Lulled into a False Sense of Security*, 40 TEX. J. BUS. L. 175, 176–77 (2004) (suggesting that statutory protections for legal malpractice “are not as extensive as they may first appear” due to the existence of entities that limit liability for its members).

156. See Susan Saab Fortney, *Professional Responsibility and Limited Liability Issues Related to Limited Liability Partnerships*, 39 S. TEX. L. REV. 399, 430–39 (1998) (indicating that lawyers who mislead clients are subject to liability under common-law and equitable principles).

157. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. c (2000) (noting that “rules in some states require lawyers in professional corporations or other entities . . . to maintain specified liability insurance”).

158. Cf. *Ross v. Ihrle*, No. 05-71420, 2006 WL 3446897, at \*6 (E.D. Mich. Nov. 28, 2006) (holding that because a legal malpractice plaintiff did not allege that the defendant lawyer, who practiced law via a limited liability professional corporation, had personally engaged in any negligent or wrongful acts, nor that he supervised or controlled another lawyer, he could not be liable for any

limited vicarious liability is likely to be significant in claims arising from foreign outsourcing because, as discussed below,<sup>159</sup> ethics opinions and commentators emphasize that lawyers involved in legal process outsourcing must supervise the provision of outsourced work. However, this path to liability is distinguishable from negligence:

[T]here are two paths to supervisory liability. A lawyer can always be held *personally* accountable for negligent supervision. . . . In addition, the exception in the statute governing limited liability entities means that a lawyer, based on his or her supervisory role, can be *vicariously* liable for the conduct of others, regardless of whether the lawyer was negligent.<sup>160</sup>

### B. *Negligence by the Outsourcing Law Firm*

The law of negligence is broad and can be used as a lens for examining almost any variety of injurious conduct. In the field of legal representation, this means that lawyers can commit negligence in countless ways. With respect to legal process outsourcing, for example, lawyers can be personally liable for negligent delegation of outsourced tasks to a foreseeably incompetent foreign provider, negligent supervision of the performance of the outsourced assignment or the quality of the work product, and negligent failure to communicate material information about outsourcing to affected clients.<sup>161</sup> These three theories of negligence liability are discussed below. However, there is an endless variety of other ways in which an outsourcing lawyer could be negligent. For instance, if information is communicated to foreign providers in a manner that carelessly exposes client confidences to unauthorized access, the outsourcing lawyer will be responsible under negligence principles for resulting harm.

#### 1. Negligent Delegation

Ethics committees and commentators agree that lawyers must exercise

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malpractice committed by the other lawyer). See generally VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 353–54 (2011) (discussing the supervisory liability exception to limited vicarious liability).

159. See *infra* Part V.B (discussing how law firms can be held negligent for work delegated to outsourced law firms).

160. VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 351 (2011) (citation omitted).

161. See, e.g., N.Y.C. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006), available at [http://www.nycbar.org/pdf/report/Formal\\_Opinion\\_2006-3\\_1392806.pdf](http://www.nycbar.org/pdf/report/Formal_Opinion_2006-3_1392806.pdf) (outlining the lawyer's duty to properly delegate and supervise when outsourcing, as well as the duty to properly notify the client of relevant outsourcing).



care in outsourcing work to foreign providers. This is not surprising because negligent delegation of work is an established theory of tort liability.<sup>162</sup> Thus, “[a]n attorney who decides to associate other counsel can incur liability concerning the matter in which counsel is selected or recommended.”<sup>163</sup>

Commentators advise that, in accordance with “best practices,” outsourcing lawyers should conduct due diligence on the foreign provider, the provider’s personnel, and the country where the work will be performed; make an on-site visit to the provider and hold conference calls with persons doing work in the other country; reduce important procedures to writing to clarify expectations and minimize misunderstandings; and anticipate threats to the security of confidential client information.<sup>164</sup> However, it is important to remember that the legal standard in a negligence action is not “best practices,” but reasonable care—the type of care that would ordinarily be exercised by a reasonably prudent lawyer.

Legal process outsourcing takes many forms and those variations create choices for outsourcing lawyers about how to structure the outsourcing relationship. So long as a lawyer acts reasonably in choosing among available options, there is no basis for negligence liability.<sup>165</sup>

Customary practices among outsourcing law firms are important in determining whether reasonable care has been exercised.<sup>166</sup> A lawyer who falls behind the “state of the art” in legal process outsourcing is at risk of being found negligent. Whether, in delegating tasks to a foreign provider, an outsourcing lawyer did what other reasonably prudent outsourcing lawyers do is an important question of fact that bears on the negligence analysis.<sup>167</sup>

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162. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. e (2000) (recognizing that a “firm is liable for its own negligence in selecting or supervising” independent contractors).

163. *Duggins v. Guardianship of Washington*, 632 So. 2d 420, 429 (Miss. 1993).

164. See Martha A. Mazzone, *Ethics Rules Require Close Supervision of Offshore Legal Process Outsourcing*, 55 BOS. B.J. 25, 28–29 (2011) (listing recommended actions that an outsourcing lawyer should take before engaging in legal process outsourcing).

165. See VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 61 (2011) (“A lawyer is negligent only if the lawyer does what no reasonably prudent lawyer could do, or fails to do what every reasonably prudent lawyer must do. Between those broad extremes, there is a wide field of discretion.”).

166. See *id.* at 56 (“The relevant inquiry in evaluating whether a lawyer acted appropriately is virtually always framed in terms of custom. That is, the question is whether the defendant exhibited the level of care that is customary among lawyers in the relevant geographic area.”).

167. The Third Restatement of Torts provides some basic rules on compliance with custom:

## 2. Negligent Supervision

Various ethics opinions have broadly stated that an outsourcing lawyer must carefully supervise the performance and quality of work outsourced to *foreign* providers,<sup>168</sup> even where the provider is a foreign lawyer.<sup>169</sup> This is not surprising, for careful supervision is often required even in cases of *domestic* outsourcing. For example, in *Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey*,<sup>170</sup> a New York law firm hired a Florida lawyer and his law firm to collect a judgment from an estate.<sup>171</sup> Because the claim was not timely filed, the estate, which was substantial in size, withdrew all settlement offers.<sup>172</sup> Ultimately, the client was unable to satisfy any part of the judgment.<sup>173</sup> In holding the New York law firm liable for the malpractice of the Florida lawyer, the New York Appellate Division concluded that the firm had breached its duty to supervise the actions of the Florida lawyer, whom it found was acting as a sub-agent.<sup>174</sup>

Supervision includes ensuring that the delegated work is done in a way that complies with the outsourcing lawyer's own ethical obligations, such as those related to confidentiality of client information, fee splitting, and conflicts of interest.<sup>175</sup> In some circumstances, there may need to be

(a) An actor's compliance with the custom of the community, or of others in like circumstances, is evidence that the actor's conduct is not negligent but does not preclude a finding of negligence.

(b) An actor's departure from the custom of the community, or of others in like circumstances, in a way that increases risk is evidence of the actor's negligence but does not require a finding of negligence.

RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL & EMOTIONAL HARM § 13 (2010).

168. *See, e.g.*, Va. State Bar Ethics Counsel, Op. 1850 (2010), available at <http://www.vacle.org/opinions/1850.htm> (recommending that the outsourcing lawyer constantly communicate with the foreign assistant and review the work to ensure its quality and that it is in the best interest of the client).

169. *See* Mark L. Tuft, *Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-Examining Current Ethical Standards*, 43 AKRON L. REV. 825, 841 (2010) ("A consensus appears to have emerged that . . . the outsourcing lawyer must take responsibility for all of the outsourced work, adopting the services provided by the foreign lawyer as the U.S. lawyer's own work.").

170. *Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey*, 863 N.Y.S.2d 100 (N.Y. App. Div. 2008).

171. *Id.* at 101.

172. *Id.*

173. *Id.*

174. *Id.* at 102.

175. *See* N.C. State Bar, 2007 Formal Ethics Op. 12 (2008), available at <http://www.ncbar.gov/ethics/ethics.asp?page=2&keywords=outsourcing> ("The lawyer must make certain that the outsourcing firm and the foreign assistants working on the particular client matter are aware that the lawyer's professional obligations require that there be no breach of confidentiality in regard to client information.").

written procedures.<sup>176</sup> For instance, with respect to confidentiality, it may be important for an engagement agreement to advise clients that electronic communications with a foreign provider may not be secure.<sup>177</sup> Written protocols with the foreign provider may need to address whether printed or digital client information will be returned and, if not, the procedures for destruction or disposal of that data.<sup>178</sup>

Electronic communication, such as e-mail and free video conferencing via the Internet, undoubtedly makes supervision of foreign outsourcing providers easier.<sup>179</sup> However, these common modes of communication<sup>180</sup> are not a panacea. The security of electronic communication can be breached,<sup>181</sup> and the time differences between

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176. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) (suggesting that lawyers independently safeguard information from disclosure by recognizing risks and, to minimize these risks, utilize written confidentiality agreements); Fla. Comm. on Prof'l Ethics, Op. 07-2 (2008), available at <http://www.floridabar.org/TFB/TFBETOpin.nsf/SMTGT/ETHICS,%20OPINION%2007-2> (suggesting that lawyers make written agreements regarding confidentiality and the remedies available if there is a breach (citing N.Y.C. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006), available at [http://www.nycbar.org/pdf/report/Formal\\_Opinion\\_2006-3\\_1392806.pdf](http://www.nycbar.org/pdf/report/Formal_Opinion_2006-3_1392806.pdf))); N.Y.C. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006) (recognizing that one of the measures that lawyers may take to preserve client secrets is to develop "contractual provisions addressing confidentiality and remedies in the event of breach"); Va. State Bar Ethics Counsel, Op. 1850 (2010), available at <http://www.vacle.org/opinions/1850.htm> (recommending, especially with overseas outsourcing, that there be a written agreement on confidentiality to protect the domestic law firm).

177. Cf. Daniel J. Siegel, *Data Security: Honored in the Breach*, TRIAL, Jan. 2012, at 19, 20 (recommending similar steps related to communication with clients).

178. See Fla. Comm. on Prof'l Ethics, Op. 07-2 (2008) ("[A]n attorney should require sufficient and specific assurances (together with an outline of relevant policies and processes) that the data, once used for the service requested, will be irretrievably destroyed, and not sold, used, or otherwise be capable of access after the provision of the contracted-for service.").

179. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) ("Electronic communication can close this [time and place] gap somewhat, but may not be sufficient to allow the lawyer to monitor the work of the lawyers and nonlawyers working for her in an effective manner.").

180. Cf. Fla. Comm. on Prof'l Ethics, Op. 07-2 (2008) ("It is assumed that most information outsourced will be transmitted electronically to the legal service provider.").

181. E-mail and other documents normally contain metadata, or "embedded information," which reveals facts about the production of the document. Mark T. Sadaka, *What You Should Know About Metadata*, TRIAL, Jan. 2012, at 44, 45, available at <http://www.marksadaka.com/what-you-should-know-about-metadata/>. "Metadata may include deleted text, information about the person who made the changes to the document, the data and time of the changes, and other information that could provide an opposing party with valuable confidential information." RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT'S GUIDE 223 (2007). The New York State Bar requires its members, in exercising reasonable care to prevent disclosure of confidential information, to refrain from sending e-mails in certain heightened, sensitive situations. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 749 (2001), available at [http://www.nysba.org/AM/Template.cfm?Section=Ethics\\_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&](http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&)

outsourcing law firms in the United States and foreign providers, in places like India and China, are substantial. In such situations, calls via Skype and similar services<sup>182</sup> are realistic only during a fraction of the hours in a day.<sup>183</sup>

### 3. Negligent Nondisclosure of Material Information

Under the law of negligence and the law of fiduciary duty, lawyers have an obligation to apprise clients of material information related to their representation.<sup>184</sup> These principles mean that, in a wide range of cases, information about foreign legal process outsourcing must be disclosed to clients. This includes not only the fact that work is being outsourced, but also the material risks resulting from that practice and the available alternatives.<sup>185</sup> A lawyer must obtain informed consent from a client before embarking upon a course of action that entails significant risks.<sup>186</sup>

CONTENTID=6533; see Va. State Bar Ethics Counsel, Op. 1850 (2010) (recognizing that electronic communication has the advantage of closing the gap caused by great physical distances but also poses many disadvantages in security and monitoring issues); Zoe Tillman, *Bank of America Sued for Outsourcing Customer Calls Overseas*, NAT'L L.J., Aug. 4, 2011, available at [http://bghllp.com/yahoo\\_site\\_admin/assets/docs/2011BoASuitPrint1PagebyPage.263175511.pdf](http://bghllp.com/yahoo_site_admin/assets/docs/2011BoASuitPrint1PagebyPage.263175511.pdf) (discussing litigation arising from outsourcing that placed customers' financial data at risk).

182. Skype is a leading software application that allows for video and voice chat via the Internet. SKYPE, <http://www.skype.com/intl/en-us/home:intcmp=alogo> (last visited March 17, 2012). The millions of people utilizing this free service are a testament to Skype's popularity. See *Skype: Creating A Phenomenon*, SPARKPR, <http://www.sparkpr.com/case-study/skype/> (last visited March 17, 2012) (remarking that "every minute of every day, millions of people around the world use Skype to keep in touch—for free"). Skype is not the only provider of free Internet voice chat. Other companies, such as Google, also provide the same service. See GOOGLE, <http://www.google.com/chat/video> (last visited March 17, 2012) (allowing users to chat for free via "Gmail, iGoogle, and orkur").

183. For example, depending on the time of year, there is an eleven-and-a-half-hour time difference between San Antonio and Bangalore, and a twelve or thirteen hour time difference between Chicago and Beijing. *The World Clock—Time Zones*, TIME & DATE, <http://www.timeanddate.com/worldclock/> (last visited March 17, 2012) (follow hyperlinks for desired cities to obtain time difference).

184. See MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002) (discussing communication between attorneys and their clients); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 (2000) (addressing a lawyer's duty to inform and consult with a client).

185. Cf. N.Y.C. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006), available at [http://www.nycbar.org/pdf/report/Formal\\_Opinion\\_2006-3\\_1392806.pdf](http://www.nycbar.org/pdf/report/Formal_Opinion_2006-3_1392806.pdf) (noting that outsourcing requires heightened attention on the part of the outsourcing lawyer because of the sensitive materials and secrets transmitted that could lead to a breach of confidentiality, and recommending that the client deserves full disclosure of the outsourcing if important documents, client confidences, or secrets will be shared).

186. See VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 97–101 (2011) (discussing informed consent); Vincent R. Johnson & Shawn M. Lovorn, *Misrepresentation by Lawyers About Credentials or Experience*, 57 OKLA. L. REV. 529, 568–76 (2004) (addressing informed

According to a Virginia ethics opinion, “[c]lient communication may be the foremost issue the [outsourcing] lawyer needs to address.”<sup>187</sup>

Outsourcing important tasks related to a client’s representation to persons in other countries almost inevitably requires disclosure of that fact to the client and client consent to the arrangement. This is true in any case where the client’s confidential information will be provided to persons outside the law firm.<sup>188</sup> It is also true whenever the contribution of the foreign provider will play a significant role in the representation of the client,<sup>189</sup> such as where the provider participates in strategic decisions that a client would expect the outsourcing law firm’s own lawyers to make.<sup>190</sup> According to a Colorado ethics opinion, outsourcing work to a foreign lawyer who is not affiliated with the law firm will almost always require disclosure.<sup>191</sup>

Ethics opinions suggest that it is useful to think about disclosure obligations related to outsourcing in terms of client expectations.<sup>192</sup>

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consent).

187. Va. State Bar Ethics Counsel, Op. 1850 (2010), *available at* <http://www.vacle.org/opinions/1850.htm>.

188. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451 (2008) (“Thus, where the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client’s informed consent.”); N.Y.C. Comm. on Prof’l & Judicial Ethics, Formal Op. 2006-3 (2006) (opining that a lawyer should obtain the client’s informed consent before sending the confidential information to a foreign provider); Va. State Bar Ethics Counsel, Op. 1850 (2010) (performing substantive work for a client in another country requires client consent).

189. *See* Cal. Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. 2004-165 (2004), at 3, *available at* <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=cN-OO0Bo11s%3D&tabid=838> (requiring a disclosure “if the use of the outside lawyer or firm is a significant development”); Colo. Bar Ass’n Ethics Comm., Formal Op. 121 (2008), *available at* <http://www.cobar.org/index.cfm/ID/386/subID/25320/CETH/> (necessitating disclosure if the outsourcing is a significant development); L.A. Cnty. Bar Ass’n Prof’l Responsibility & Ethics Comm., Op. 518, at 76 (2006), *available at* <http://www.lacba.org/Files/LAL/Vol29No9/2317.pdf> (noting that what constitutes a significant development is determined based on “the circumstances of each case”).

190. *See* N.Y.C. Comm. on Prof’l & Judicial Ethics, Formal Op. 2006-3 (2006) (explaining that, although lawyers do not have to disclose outsourcing in all circumstances, a lawyer should obtain informed consent if the foreign assistant will do work that the client believes will be handled by the firm).

191. Colo. Bar Ass’n Ethics Comm., Formal Op. 121 (2008).

192. *See* Fla. Comm. on Prof’l Ethics, Op. 07-2 (2008), *available at* <http://www.floridabar.org/TFB/TFBETOpin.nsf/SMTGT/ETHICS,%20OPINION%2007-2> (stating that some “factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the [nonlawyers] will have more than a limited role in the provision of the services” should be used to determine whether an attorney should inform a client about the overseas provider); N.C. State Bar, 2007 Formal Ethics Op. 12 (2008), *available at* <http://www.ncbar.gov/ethics/ethics.asp?page=2&keywords=outsourcing> (opining that “the reasonable expectation of the client is

Disclosure of foreign outsourcing may be required because “most clients . . . do not expect their legal work to be outsourced, particularly to a foreign country.”<sup>193</sup> Presumably, if foreign outsourcing becomes more common, client expectations will change, and the disclosure obligations of lawyers will be altered. However, until that day arrives, disclosure of outsourcing will often be deemed essential.

A Virginia ethics opinion charted an uncommon course, stating that “[t]here is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed.”<sup>194</sup> However, ethics committees and commentators more typically recommend more disclosure to clients, not less. When potentially significant information is kept from clients, clients may feel betrayed. If undisclosed outsourcing results in disappointed client expectations—such as an adverse judgment, a costly settlement, or a lost deal—the client may sue for malpractice, arguing in part that but for the nondisclosure the client would never have consented to the outsourcing. Full disclosure of material information minimizes the chances of this type of lack-of-informed consent claim. Moreover, disclosure of relevant facts treats clients fairly.

### C. *Vicarious Liability for the Conduct of Principals and Employees*

For purposes of legal malpractice liability, it is generally agreed that:

A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority.<sup>195</sup>

Because these principles embrace three distinct theories of liability for

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that the lawyer retained by the client, using the resources within the lawyer's firm, will perform the requested legal services”).

193. Colo. Bar Ass'n Ethics Comm., Formal Op. 121 (2009).

194. Va. State Bar Ethics Counsel, Op. 1850 (2010); *accord* N.Y.C. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006) (recognizing that disclosure is not required in all situations where work is outsourced).

195. *Licette Music Corp. v. Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P.A.*, No. L-1469-99, 2009 WL 2045259, at \*7 (N.J. Super. App. Div. July 16, 2009) (*per curiam*) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58(1) (2000)) (internal quotation marks omitted). In the absence of legislation allowing lawyers to practice in limited-liability entities, the rights and liabilities of a partner are normally governed by the relevant state's version of the Uniform Partnership Act (1914) or Revised Uniform Partnership Act (1993).

the conduct of employees—ordinary course of business,<sup>196</sup> actual authority,<sup>197</sup> and apparent authority<sup>198</sup>—they define a very broad range of potential liability.

### 1. Ordinary Course of Business

As suggested earlier,<sup>199</sup> the phrase “ordinary course of business” encompasses both the normal risks of a law practice<sup>200</sup> and the extraordinary risks of conduct that is intended to benefit the firm. Thus, a law firm may be liable for run-of-the-mill negligence (e.g., loss of confidential information, misdrafting of documents, and untimely filings) because negligent errors are part of the risks of operating a law firm. A law firm may also be liable for some forms of intentionally tortious conduct (e.g., business transactions that deceive clients or usurp business opportunities) if such conduct is intended, at least in part, to benefit the firm. Harm arising from conduct that is not a normal risk of operating a law firm<sup>201</sup> and not intended to benefit the law firm, such as, perhaps, sexual abuse of a client,<sup>202</sup> is normally not within the ordinary course of business.<sup>203</sup>

These same principles, which routinely apply to malpractice claims arising from activities unrelated to foreign outsourcing, will apply to suits if the performance of outsourced tasks causes harm. In such suits, the key

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196. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. d (2000) (explaining that a firm is liable “if the act was in the ordinary course of the firm’s business”).

197. Actual authority arises from a communication between a principal and an agent whereby the principal empowers an agent to undertake a particular sphere of action. See RESTATEMENT (THIRD) OF AGENCY § 2.01 (2011) (defining actual authority).

198. The apparent authority of an agent arises from communications between the agent’s principal and a third party. See *id.* § 2.03 (discussing apparent authority).

199. See *supra* Part IV.C (discussing enterprise liability).

200. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. d (2000) (“The ordinary course of business of a law firm includes the practice of law and various activities normally related to it. Thus, liability is imposed for legal malpractice . . . and torts committed by a principal or employee while acting in the scope of employment . . .”).

201. See *id.* (noting that “nonfirm business or other acts, such as entry by a law-firm principal into an unrelated business partnership that is not part of the firm’s practice of law and its ancillary activities, are not within the ordinary course of a law firm’s business”).

202. See *id.* (stating that jurisdictions are conflicted about whether a principal is liable for an agent’s intentional torts that are not made with the purpose of benefiting the principal). “In the case of law firms, the grounds for such liability are stronger when the plaintiff is a client and a client-lawyer relationship facilitated the tort.” *Id.*

203. VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 19 (2011) (noting, however, that “many intentional torts giving rise to malpractice claims . . . lack any purpose on the part of the actor to benefit the firm, and to that extent are difficult or impossible to fit within even a generous definition of the ‘ordinary course of the firm’s business’”).

issue is likely to be whether the outsourcing provider qualifies as a "principal" or "employee" of the outsourcing law firm.<sup>204</sup> Accordingly, vicarious liability will be imposed on the outsourcing firm for the provider's tortious conduct if it is determined that the harm arose from the ordinary course of the outsourcing firm's business. "The scope of a firm's course of business is determined from its own activities; a particular firm may have an ordinary course of business broader or narrower than those of otherwise comparable firms."<sup>205</sup>

Whether a foreign provider is a principal of the outsourcing law firm is presumably a straightforward inquiry. The question is simply whether the provider holds an equity interest in the firm as a partner or shareholder in the outsourcing law firm. This will rarely be the case if the foreign provider is a nonlawyer because under the law of most American jurisdictions, lawyers may not enter into a partnership or similar arrangement with someone who is not licensed to practice law.<sup>206</sup> However, in a limited range of cases, the foreign provider will qualify as a principal. This would be true, for example, if the provider is a lawyer who works in the foreign office of the outsourcing law firm and holds an equity interest in the law firm.

More commonly, the question will be whether the foreign provider is an "employee" of the outsourcing law firm. Depending on the facts, this could be a difficult issue because volumes have been written on the meaning of the term "employee."<sup>207</sup> Some cases are clear because the person in question is on the payroll of a law firm and is treated as an employee for purposes of taxation. However, in the absence of such indicia, the pivotal inquiry will be whether the outsourcing law firm exercises, or has a right to exercise, control over the details of the provider's performance.<sup>208</sup> Thus, depending on the facts, it is possible that

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204. See, e.g., *Whalen v. DeGraff, Foy, Conway, Holt-Harris & Mealey*, 863 N.Y.S.2d 100, 102 (App. Div. 2008) (concluding a law firm to be a principal in its relationship with a negligent subagent, and holding that the firm was liable for damages).

205. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. d (2000).

206. See MODEL RULES OF PROF'L CONDUCT R. 5.4(d) (2002) (forbidding lawyers from engaging in the practice of law with nonlawyers who own an interest or have a management role in the firm).

207. See, e.g., Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP & LAB. L. 295, 296 (2001) (noting that the definition of employee is "baffling").

208. See RESTATEMENT (THIRD) OF AGENCY § 2.04 cmt. b (2006) ("Respondeat superior is inapplicable when a principal does not have the right to control the actions of the agent . . ."); *id.* § 7.07 (stating that "an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work, and . . . the fact that work is performed



individuals in other countries who might not be thought of as employees for purposes of taxation and for other reasons may be deemed employees of an outsourcing law firm for purposes of tort liability. An outsourcing law firm will presumably increase its scope of malpractice liability “when its U.S. lawyers follow existing bar committee guidance by rigorously controlling the manner in which the foreign lawyers execute tasks and then reviewing the substance of that work.”<sup>209</sup>

## 2. Ostensible or Apparent Agency

Even if an outsourcing provider is not a principal or employee of an outsourcing law firm, the firm may be liable for the torts of the provider under apparent-agency principles. This body of law is sometimes called “ostensible agency,” “apparent authority,” or “agency by estoppel”; for practical purposes, the terms are indistinguishable from “apparent agency.”<sup>210</sup>

A person who cloaks another with the appearance of being an agent is estopped from denying that the other occupies that position.<sup>211</sup> The

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gratuitously does not relieve a principal of liability”). Numerous decisions have emphasized the importance of the right to control in determining the status of the tortfeasor. *See Verrett v. Houma Newspapers, Inc.*, 305 So. 2d 547, 550–51 (La. Ct. App. 1974) (holding that a publisher was not liable for the tortious conduct of a carrier who delivered newspapers by bicycle because the publisher did not reserve or retain any right of control over the manner in which carrier made deliveries); *Glenmar Cinestate, Inc. v. Farrell*, 292 S.E.2d 366, 369 (Va. 1982) (holding a drive-in theater not liable for a death resulting from an off-duty police officer’s negligent direction of traffic because the officer chose his own methods and the theater did not reserve the power to direct his activities). The right to control is also relevant to whether one entity will be held vicariously liable for the acts of another. *See Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 290 (Tex. 1996) (holding that the Boy Scouts of America could not be held liable under a respondeat superior theory for the alleged negligence of a local council in referring to a potential troop sponsor a scoutmaster who subsequently allegedly molested a scout because the local council was a separate corporate entity and the BSA had no right to control its activities).

209. Joshua A. Bachrach, Current Development, *Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(h)*, 21 GEO. J. LEGAL ETHICS 631, 649 (2008).

210. *See Baptist Mem’l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 n.2 (Tex. 1998) (“Many courts use the terms ostensible agency, apparent agency, apparent authority, and agency by estoppel interchangeably. As a practical matter, there is no distinction among them.”); *see also Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 255 (Ky. 1985) (using the terms ostensible agency and apparent authority interchangeably in the same sentence). *But see* RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. b (2006) (noting that while apparent authority and apparent agency are interchangeable, ostensible authority “is not identical in meaning to ‘apparent authority’ when it requires elements requisite to estoppel”).

211. *See generally* RESTATEMENT (THIRD) OF AGENCY § 2.05 (2006) (providing that a person cannot deny the existence of an agency if that person intentionally or carelessly created the illusion of agency or did not attempt to dispel the illusion when he had notice that a third person believed that an agency existed).

threshold question is whether manifestations attributable to the defendant caused the plaintiff to reasonably believe that the third person was an agent of the defendant.<sup>212</sup>

Medical malpractice cases have often raised issues of apparent agency.<sup>213</sup> Thus, a hospital whose conduct causes a patient to believe that a physician is an employee may be liable for the physician's malpractice.<sup>214</sup> However, a hospital that clearly informs patients that the physicians working in an emergency room are independent contractors for whom it is not liable, and not employees of the hospital, will not be subject to liability under apparent-agency principles.<sup>215</sup>

If a law firm allows a lawyer to use its offices and does things that suggest that the lawyer is an agent of the firm, the law firm may be liable for the lawyer's legal malpractice on grounds of apparent agency.<sup>216</sup> Of

212. See *id.* § 2.05 cmt. c (“The operative question is whether a reasonable person in the position of the third party would believe such an agent, as the actor appears to be, to have authority to do a particular act.”).

213. See *Kashishian v. Port*, 481 N.W.2d 277, 283 (Wis. 1992) (recognizing that a great number of jurisdictions apply the ostensible agency doctrine in a medical malpractice context); see also *VanStelle v. Macaskill*, 662 N.W.2d 41, 45 (Mich. Ct. App. 2003) (explaining that ostensible agency in the medical malpractice context is agency by estoppel that occurs when “the patient looked to the hospital to provide medical treatment and the hospital made a representation that medical treatment would be afforded by physicians working at the hospital”); G. Keith Phoenix & Anne L. Schlueter, *Hospital Liability for the Acts of Independent Contractors: The Ostensible Agency Doctrine*, 30 ST. LOUIS U. L.J. 875, 885 (1986) (“It appears inevitable that the [ostensible agency] doctrine will be fully embraced by the courts in view of the steady expansion of hospital liability and the acceptance of the ostensible agency theory by a majority of the jurisdictions concerning the issue.”).

214. See *Baptist*, 969 S.W.2d at 946–47 (deciding whether to use the ostensible agency doctrine to attach liability to a hospital for the misconduct of independent contractor physicians). The Texas Supreme Court in *Baptist Memorial Hospital System v. Sampson* listed the elements to establish ostensible agency:

Thus, to establish a hospital's liability for an independent contractor's medical malpractice based on ostensible agency, a plaintiff must show that (1) he or she had a reasonable belief that the physician was the agent or employee of the hospital, (2) such belief was generated by the hospital affirmatively holding out the physician as its agent or employee or knowingly permitting the physician to hold herself out as the hospital's agent or employee, and (3) he or she justifiably relied on the representation of authority.

*Id.* at 949; accord *Mejia v. Cmty. Hosp. of San Bernardino*, 122 Cal. Rptr. 2d 233, 239 (Ct. App. 2002) (listing the same elements (quoting *Stanhope v. L.A. Coll. of Chiropractic*, 128 P.2d 705, 708 (Cal. Ct. App. 1942))).

215. *Baptist*, 969 S.W.2d at 950 (concluding that, because the defendant hospital had posted signs in the emergency room and included language in a consent form, indicating that physicians were independent contractors for whom it was not responsible, the hospital had committed “no affirmative act to make actual or prospective patients think the emergency room physicians were its agents or employees, and did not fail to take reasonable efforts to disabuse them of such a notion”).

216. See *Licette Music Corp. v. Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P.A.*, No. L-1469-99, 2009 WL 2045259, at \*7 (N.J. Super. Ct. App. Div. July 16, 2009)

course, an aggrieved client who seeks redress under this theory must have relied upon the words or conduct attributable to the firm that allegedly caused the misimpression.<sup>217</sup> Absent such reliance, there is no liability under this legal theory.<sup>218</sup> In one recent case, a New Jersey court held that a law firm was not liable for a lawyer's alleged malpractice under apparent-authority principles because although the lawyer used the defendant law firm's resources (offices, letterhead, and staff time) in representing certain companies, there was no evidence that the companies relied on the firm to ensure the success of the representation.<sup>219</sup>

The words and conduct of an outsourcing law firm might cloak a foreign provider with the appearance of being an agent of the firm. Firms often use expansive language in their public relations, for example, touting themselves as being "global" law firms or as offering clients the resources of an international "team" of professionals.<sup>220</sup> Such broad statements might then be coupled in the mind of the client with various actions of the law firm, such as its allowing or encouraging direct communications between the American client and the foreign provider. Unless the outsourcing law firm has made explicit in its retainer agreement or otherwise that the foreign provider is an independent contractor for whose tortious conduct it is not responsible, the law firm may have set the stage for a malpractice claim based on apparent agency.

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(per curiam) (stating "[a] law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority" (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 (2000) (internal quotation marks omitted))); *Baptist*, 969 S.W.2d at 949 (explaining that apparent authority "may arise either from a principal knowingly permitting an agent to hold herself out as having authority or by a principal's actions which lack such ordinary care as to . . . lead[] a reasonably prudent person to believe that the agent has the authority she purports to exercise" (quoting *Ames v. Great S. Bank*, 672 S.W.2d 447, 450 (Tex. 1984)) (internal quotation marks omitted)).

217. See *Baptist*, 969 S.W.2d at 949 (listing justifiable reliance as an element of ostensible agency).

218. See *Cooper v. Olivent*, 610 S.E.2d 106, 108 (Ga. Ct. App. 2005) (refusing to apply the ostensible agency doctrine where the plaintiff failed to prove justifiable reliance).

219. See *Licette Music*, 2009 WL 2045259, at \*2-4, \*6, \*8-10 (emphasizing the overriding fact that the companies desired the attorney's advice and representation even if the firm where he worked would not, or could not, represent them).

220. See *BAKER & MCKENZIE*, <http://www.bakermckenzie.com/> (last visited Jan. 17, 2012) (click on "Our People" link) (declaring that its team of 3,800 professionals "share insights and best practices across borders" and that they "speak more than 75 languages and represent more than 55 nationalities"); *FULBRIGHT & JAWORSKI, L.L.P.*, <http://www.fulbright.com/> (last visited Jan. 17, 2012) (proclaiming itself on as "a full-service international law firm serving the needs of businesses, governments, non-profit organizations[,] and individual clients around the world").

#### D. Vicarious Liability for the Conduct of Independent Contractors

As suggested above,<sup>221</sup> if an American lawyer has the right to exercise control over the performance of outsourcing tasks by foreign personnel, those persons will likely be treated as employees of the American lawyer.<sup>222</sup> In that case, the outsourcing lawyer will be subject to vicarious liability for the torts of the foreign personnel under "ordinary-course-of-business" respondeat superior principles.<sup>223</sup>

In contrast, if an outsourcing lawyer does not have the right to control the details of performance, the foreign provider will be treated as an independent contractor.<sup>224</sup> In that case, the scope of the outsourcing lawyer's vicarious liability will be considerably limited because employers are not ordinarily liable for the torts of independent contractors.

##### 1. Rules in Transition

The Restatement of Torts is a useful touchstone for thinking about the law governing vicarious liability for the torts of independent contractors. However, the present era is one of transition.

For more than twenty years, work has been underway on the Restatement (Third) of Torts. Important parts of the project are finished,<sup>225</sup> and those sections now supersede the Restatement (Second) of Torts as representing the views of the American Law Institute. However, other important areas still need to be addressed by the Restatement (Third) of Torts,<sup>226</sup> and on those topics the Restatement (Second) of Torts, which

221. See *supra* Part V.C.1 (discussing vicarious liability for the conduct of "employees" and what it means to be in the "ordinary course of business").

222. Darya V. Pollak, Comment, "I'm Calling My Lawyer . . . in India!": Ethical Issues in International Legal Outsourcing, 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 149-50 (2006).

223. See RESTATEMENT (SECOND) OF TORTS § 414 (1965) ("One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability . . ."). In such a situation, the foreign provider could be deemed an employee, not an independent contractor. See *Richardson v. APAC-Miss., Inc.*, 631 So. 2d 143, 148 (Miss. 1994) (quoting *Tex. Co. v. Mills*, 156 So. 866, 868-69 (Miss. 1934)) (distinguishing between an employee and independent contractor based upon the level of control asserted by the principal). As such, the lawyer would be susceptible to respondeat superior liability. See *Wright v. City of Danville*, 675 N.E.2d 110, 118 (Ill. 1996) (stating that an employer is "liable for the torts of his employee" acting under the scope of employment via respondeat superior).

224. Darya V. Pollak, Comment, "I'm Calling My Lawyer . . . in India!": Ethical Issues in International Legal Outsourcing, 11 UCLA J. INT'L L. & FOREIGN AFF. 99, 150 (2006).

225. See generally RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIAB. (1998) (providing updated rules on products liability).

226. See Vincent R. Johnson, *The Vast Domain of the Restatement (Third) of Torts*, 1 WAKE FOREST L. REV. ONLINE 29, 29-35 (2011), [http://lawreview.law.wfu.edu/files/2011/01/Johnson\\_Forum.pdf](http://lawreview.law.wfu.edu/files/2011/01/Johnson_Forum.pdf) ("From my perspective, some of the most important and interesting work on the

was largely a product of the 1960s and 1970s, remains authoritative.

The new provisions dealing with the liability of persons who hire independent contractors are now essentially finished.<sup>227</sup> However, the Restatement (Third) of Torts has adopted a new approach which, in many respects, is different from the one embraced by the Restatement (Second) of Torts. Moreover, the slow common-law process through which states will decide whether to follow the new the Restatement has yet to play out.<sup>228</sup> It remains to be seen whether and to what extent the new Restatement approach will be deemed an accurate reflection of governing legal principles. Thus, it is necessary to consider the liability of outsourcing law firms under both the Restatement (Second) of Torts and the significantly changed Restatement (Third) of Torts.

a. Restatement (Second) of Torts

The provisions in the Restatement (Second) of Torts dealing with vicarious liability for the torts of independent contractors centered on a basic rule of no liability.<sup>229</sup> According to the general provision, an employer is not vicariously liable for the torts of an independent contractor.<sup>230</sup> This rule, which has been applied in many cases involving legal representation of clients,<sup>231</sup> is qualified by an important exception which covers cases involving an independent contractor's misperformance of a nondelegable duty.<sup>232</sup> If a duty is nondelegable, the employer is vicariously liable for the independent contractor's deficient

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[Restatement (Third)] lies ahead.”). For example, the sections of the Restatement (Third) of Torts dealing with liability for purely economic losses remain incomplete. See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM (Council Draft No. 1, 2011) (attempting to provide guidance related to the mercurial economic loss rule).

227. See generally RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (Preliminary Draft No. 7, 2010) (providing advice on direct and vicarious liability for employing independent contractors).

228. See, e.g., *Haase v. Badger Mining Corp.*, 682 N.W.2d 389, 394–95 (Wis. 2004) (declining to adopt or reject provisions from the then six-year-old Restatement (Third) of Torts: Products Liability and applying provisions from 1965's Restatement (Second) of Torts).

229. RESTATEMENT (SECOND) OF TORTS § 409 (1965).

230. *Id.*

231. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Traver*, 980 S.W.2d 625, 627 (Tex. 1998) (holding that a defense attorney hired by an insurer to represent an insured was an independent contractor who had discretion over the day-to-day performance of legal work, and therefore the insurer was not vicariously liable for the attorney's legal malpractice).

232. See *Breeden v. Anesthesia W., P.C.*, 656 N.W.2d 913, 920 (Neb. 2003) (defining a nondelegable duty as one where “the responsibility or ultimate liability for proper performance” of the duty cannot be delegated to another (internal quotation marks omitted)); cf. *Gazo v. City of Stamford*, 765 A.2d 505, 511 (Conn. 2001) (stating in another context: “[A] party may contract out the performance of a nondelegable duty, but may not contract out his ultimate legal responsibility.”).

performance.<sup>233</sup>

Various provisions in the Restatement (Second) of Torts endeavor to spell out just what types of duties are nondelegable.<sup>234</sup> However, no clear unifying theory to the nondelegable duty concept exists:

The Second Restatement of Torts acknowledges that “[f]ew courts have made any attempt to state any general principles as to when the employer’s duty cannot be delegated, and it may as yet be impossible to reduce these exceptions to such principles.” However, the same authority . . . provides that a duty is non[]delegable and a principal therefore cannot shift responsibility for the proper conduct of work to an independent contractor if the work requires “special precautions,” is to be done in a public place, involves instrumentalities used in highly dangerous activities, is subject to safety requirements imposed by legislation or administrative regulation, is itself inherently dangerous, or involves an “abnormally dangerous” activity.<sup>235</sup>

Despite the plethora of rules that attempted to illuminate the nondelegable exception, the general rule holds great sway.<sup>236</sup> Only in unusual cases are employers responsible for the negligence of independent contractors.<sup>237</sup>

The rule that employers are not liable for the torts of independent contractors except in cases of nondelegable duty is deeply engrained in American law. Such language is so common in court opinions that it is seemingly the law in the vast majority of states.<sup>238</sup> This will make it difficult for the new approach offered by the Restatement (Third) of Torts to gain a steady foothold in American jurisprudence, no matter how well reasoned those provisions may be.

233. See RESTATEMENT (SECOND) OF TORTS ch. 15, topic 2, intro. note (1965) (“Such a ‘non[]delegable duty’ requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted.”).

234. *Id.* §§ 416–29.

235. Vincent R. Johnson, *Americans Abroad: International Educational Programs and Tort Liability*, 32 J.C. & U.L. 309, 335 (2006) (footnotes omitted).

236. See *Ruiz v. Herman Weissker, Inc.*, 29 Cal. Rptr. 3d 641, 646, 650 (Ct. App. 2005) (refusing to apply the nondelegable duty exception); *Eastlick v. Lueder Const. Co.*, 741 N.W.2d 628, 635 (Neb. 2007) (same); *Taucher v. Puget Sound Power & Light Co.*, 635 P.2d 426, 431 (Wash. 1981) (en banc) (same).

237. See *Medley v. N.C. Dep’t of Corr.*, 412 S.E.2d 654, 657 (N.C.1992) (holding that the state was liable under “a nondelegable duty to provide . . . medical care for persons it incarcerates”).

238. See *Ruiz*, 29 Cal. Rptr. 3d at 646, 648–49 (recognizing the general rule of no liability for independent contractors and the nondelegable duty exception); *Eastlick*, 741 N.W.2d at 634 (same); *Taucher*, 635 P.2d at 428 (same).

## b. Restatement (Third) of Torts

The major change wrought by the Restatement (Third) of Torts in the field of independent contractor liability is the elimination of the general rule against vicarious liability.<sup>239</sup> Rather, the Restatement (Third) simply details a number of theories under which vicarious liability may be imposed on persons who hire the independent contractors whose conduct proves to be tortious.<sup>240</sup> This change in the structure of the rules governing vicarious liability was intended to clarify and simplify the complex body of law that has emerged relating to the torts of independent contractors.<sup>241</sup> However, the change is significant. Under the Restatement (Third) of Torts, the general no-duty rule is gone.<sup>242</sup> Rather, there are simply many paths to liability. One of those paths is the law of nondelegable duty.

## 2. Nondelegable Duties in the Outsourcing Context

One commentator has suggested that applying the nondelegable duty doctrine to legal-process-outsourcing malpractice claims “would be a broad departure from its traditional application in areas involving a risk of bodily harm to others,” albeit “a helpful and simple solution to the otherwise thorny problem of establishing liability within the United States for the negligence of an outsourced lawyer.”<sup>243</sup> In fact, this extension of legal principles would not be surprising because nondelegable duty arguments have been raised,<sup>244</sup> and have sometimes succeeded,<sup>245</sup> in legal

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239. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 55 cmt. a (Preliminary Draft No. 1, 2010).

240. *See id.* §§ 57–64 (Preliminary Draft No. 1, 2010) (providing rules for vicarious liability for independent contractors).

241. *See* Memorandum from Ellen S. Pryor, Assoc. Reporter for Chapter 10, Am. Law Inst., to Advisors (Nov. 30, 2010) (on file with authors) (remarking that eliminating the general no-duty rule “allows clearer expression of the two different areas covered in this chapter (direct negligence; vicarious liability in some cases for reasons entirely distinct from direct negligence)”).

242. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 55 cmt. a (Preliminary Draft No. 1, 2010).

243. Darya V. Pollak, Comment, “*I’m Calling My Lawyer . . . in India!*”: *Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT’L L. & FOREIGN AFF. 99, 151 (2006).

244. *See, e.g., Whalen v. DeGraff, Foy, Conway, Holt–Harris & Mealey*, 863 N.Y.S.2d 100, 102 (App. Div. 2008) (declining to expressly rule on the plaintiff’s arguments that a law firm had a nondelegable duty to file a notice of claim with an estate, but holding for the plaintiff because the firm had a duty to supervise the actions of an outside lawyer and that it had taken no steps to fulfill that obligation).

245. *See Kleeman v. Rheingold*, 614 N.E.2d 712, 717–18 (N.Y. 1993) (accepting plaintiff’s argument that liability of defendant law firm “could be predicated on a nondelegable duty of attorneys to exercise care in assuring proper services of their clients’ legal process,” and finding a

malpractice cases having no connection to physical harm.

a. The “Privilege to Farm Out” Work Has Its Limits

The Restatement (Third) of the Law Governing Lawyers states as a simple matter of fact that “[a] firm and its principals are not liable to the client for the acts and omissions of independent contractors *except when a contractor is performing the firm’s own nondelegable duty to the client.*”<sup>246</sup> The corresponding Reporter’s Note cites a case from one of the nation’s most eminent tribunals,<sup>247</sup> the New York Court of Appeals.<sup>248</sup> In *Kleeman v. Rheingold*,<sup>249</sup> the highest court of New York ruled that a law firm had a nondelegable duty to its client to exercise care in assuring proper service of legal process and, therefore, was liable for an independent contractor’s negligent performance of that duty. It is worth quoting Judge Vito Titone’s analysis at some length for it is a rare example of judicial efforts to reconcile the language of the nondelegable duty with the law of legal malpractice. In terms that might easily be applied to malpractice claims involving foreign outsourcing, Judge Titone explained the court’s analysis:

The exception [for nondelegable duties] is often invoked where the particular duty in question is one that is imposed by regulation or statute . . . . However, . . . examples of nondelegable common-law duties abound . . . . [W]hether a particular duty is properly categorized as “nondelegable” necessarily entails a *sui generis* inquiry, since the conclusion ultimately rests on policy considerations . . . .

. . . [A] duty will be deemed nondelegable when “the responsibility is so important to the community that the employer should not be permitted to transfer it to another” . . . . This flexible formula recognizes that the “privilege to farm out [work] has its limits” and that those limits are best defined by reference to the gravity of the public policies that are implicated . . . .

. . . . Manifestly, when an individual retains an attorney to commence an action, timely and accurate service of process is an integral part of the task

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legally viable foundation to hold the firm “liable to the client for negligent service of process, even though the task may have been ‘farmed out’ to an independent contractor”).

246. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. e (2000) (emphasis added).

247. See generally Vincent R. Johnson, *Judge Bernard S. Meyer: The First Merit Appointee to the New York Court of Appeals*, 75 ALBANY L. REV. 963, 974–76 (2012) (discussing the reputation of New York’s highest court and collecting sources).

248. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 reporter’s note, cmt. c (2000) (citing *Kleeman*, 614 N.E.2d at 717).

249. *Kleeman v. Rheingold*, 614 N.E.2d 712 (N.Y. 1993).



that the attorney undertakes . . . . Given the central importance of this duty, our State's attorneys cannot be allowed to evade responsibility for its careful performance by the simple expedient of "farming out" the task to independent contractors.

The existence of an extensive and comprehensive Code of Professional Responsibility that governs the obligations of attorneys to their clients reinforces our conclusion. Under the Code, a lawyer may not "seek, by contract or other means, to limit prospectively the lawyer's individual liability to a client for malpractice" . . . . Moreover, the Code forbids lawyers from "[n]eglect[ing] legal matter[s] entrusted to [them]" . . . , enjoins them to assist in "secur[ing] and protect[ing] available legal rights" . . . and requires them to represent their clients as zealously as the "bounds of the law" permit . . . .

Our conclusion is also supported by the perceptions of the lay public and the average client, who may reasonably assume that *all* of the tasks associated with the commencement of an action, including its formal initiation through service of process, will be performed either by the attorney or someone acting under the attorney's direction. While it may be a common practice among attorneys to retain outside agencies . . . to assist them in effecting service, that custom is not necessarily one of which the general public is aware. Even where a client is expressly made aware that a process serving agency will be retained, it is unlikely that the client will understand or appreciate that the process serving agency's legal status as an "independent contractor" could render the retained attorney immune from liability for the agency's negligence. Under established principles, the client's reasonable expectations and beliefs about who will render a particular service are a significant factor in identifying duties that should be deemed to be "nondelegable" . . . .

. . . . The responsibility for achieving [the goal of timely commencement of legal actions]—and the liability for negligent failures to achieve it—must remain squarely on the shoulders of trained and licensed attorneys who, as members of a "learned profession," alone have the necessary knowledge and experience to protect their clients' rights.<sup>250</sup>

At least three important points can be gleaned from the reasoning in *Kleeman*. First, whether a duty is nondelegable depends on an assessment of the particular facts in light of public policy considerations. Several of the relevant policy factors—namely, the policies favoring consumer protection, client control of the representation, enterprise responsibility, and protecting lawyers from unfair claims—were discussed earlier in this Article.<sup>251</sup> "Presumably, 'nondelegable' duties includes those obligations

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250. *Id.* at 715–17.

251. *See supra* Part IV (discussing the aforementioned policy factors).

which, if not performed properly, threaten to cause great harm” to a client.<sup>252</sup>

Second, conduct that violates the obligations of a code of legal ethics may qualify as the breach of a nondelegable duty.<sup>253</sup> Thus, lawyers may not escape their ethical responsibilities by “farming out” tasks to independent contractors.<sup>254</sup> One treatise, in a discussion not focused on outsourcing, says that the tasks that cannot be delegated to nonlawyers include establishing a lawyer–client relationship, maintaining direct contact with a client, giving legal advice, and exercising legal judgment.<sup>255</sup>

Third, the expectations of the client play a pivotal role in determining whether a lawyer may delegate a task and escape liability for its improper performance. Unless the client understands that the lawyer will be immune from liability for the outsourcing provider’s negligence, public policy may require that the outsourcing lawyer be accountable for the provider’s misperformance of duties.

The application of nondelegable duty rules to harm arising from legal process outsourcing has yet to be charted by the courts. A broad view of what duties are not delegable would be consistent with language found in the American Bar Association’s (ABA) opinion on outsourcing. That advisory pronouncement states that “[a] lawyer may outsource legal or nonlegal support services *provided that the lawyer remains ultimately responsible* for rendering competent legal services to the client.”<sup>256</sup> Saying that a duty is nondelegable is just a different way of saying that the lawyer remains ultimately responsible.

#### b. Unconsented Outsourcing Is Nondelegable

Arguably, any use of legal process outsourcing that violates the rules of legal ethics might be a candidate for a conclusion of nondelegable duty. Lawyers are not free to act—and cannot delegate tasks—in ways that run afoul of professional conduct standards.

It is hornbook law that a lawyer may not disclose confidential client

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252. VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 364 (2011). “In the legal malpractice context, a lawyer’s duty to disclose to the client that the lawyer is withdrawing from representation may fall within this category.” *Id.* at 364–65 (citing *Staron v. Weinstein*, 701 A.2d 1325, 1328 (N.J. Super. Ct. App. Div. 1997)).

253. *Kleeman*, 614 N.E.2d at 716.

254. *Id.*

255. ABA/BNA LAWYER’S MANUAL ON PROFESSIONAL CONDUCT 91:208 (2011).

256. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451 (2008) (emphasis added).

information to persons outside the firm without client consent.<sup>257</sup> Focusing on this principle,<sup>258</sup> absent client approval, tasks involving such revelations, in a very real sense, might reasonably be argued as nondelegable. Logically, a lawyer might be held liable for harm resulting from such an improper delegation of duty. Under this line of reasoning, the tortious conduct of an outsourcing provider would be vicariously imputed to the outsourcing law firm. It would not be necessary to show that the firm negligently entrusted the client's information to a foreseeably irresponsible provider, but only that the provider failed to exercise care in handling the outsourced task (e.g., in conducting relevant research or drafting) or otherwise engaged in tortious conduct (e.g., by intentionally misappropriating business opportunities).

The requirement of client consent to revelation of confidential information is closely related to the disclosure obligations of lawyers, for in order for consent to be effective, it must be reasonably informed.<sup>259</sup> In

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257. See 1 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 9.2 (3d ed. Supp. 2004), at 9-6 (2011) (describing the duty as “to avoid disclosing confidential information about a client or using that information adversely to the client” and noting that confidentiality is a “core rule” of lawyering); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE* 294 (2007) (remarking that the duty to keep client information confidential is “[o]ne of the lawyer’s primary duties” and that “[t]his duty survives the client–lawyer relationship, and even applies to conversations with prospective clients”); JEFFREY M. SMITH & RONALD E. MALLEN, *PREVENTING LEGAL MALPRACTICE* 178 (2d ed. 1996) (discussing the duty “to prevent the unauthorized disclosure of confidential, secret and privileged information”); see also N.C. State Bar, 2007 Formal Ethics Op. 12 (2008), available at <http://www.ncbar.gov/ethics/ethics.asp?page=2&keywords=outsourcing> (“A lawyer has a professional obligation to protect and preserve the confidences of a client against disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”); Ohio Bd. of Comm’rs on Grievances & Discipline, Op. 2009-6 (2009), at 4, available at [http://www.sconet.state.oh.us/Boards/BOC/Advisory\\_Opinions/2009/Op\\_09-006.doc](http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/2009/Op_09-006.doc) (“Client confidentiality is a hallmark of the attorney[–]client relationship.”).

258. Cf. Colo. Bar Ass’n Ethics Comm., Formal Op. 121 (2009), available at <http://www.cobar.org/index.cfm/ID/386/subID/25320/CETH//> (suggesting that outsourcing lawyers should be especially careful about confidentiality when outsourcing to foreign jurisdictions); Fla. Comm. on Prof’l Ethics, Op. 07-2 (2008), available at <http://www.floridabar.org/TFB/TFBETOpin.nsf/SMTGT/ETHICS,%20OPINION%2007-2> (noting that “[o]f particular concern [to outsourcing legal work] is the ethical obligation of confidentiality”); Ohio Bd. of Comm’rs on Grievances & Discipline, Op. 2009-6 (2009), at 3 (“Exposure of information relating to a representation may be more likely when legal services, rather than support services, are outsourced; but, like the outsourcing of legal services, the outsourcing of support services, such as photocopying, poses a risk of revealing information relating to a client’s representation.”).

259. See ABA Comm. on Ethics & Prof’l Responsibility, Op. 88-356, at 44 (1988) (requiring consultation with clients on the means used to represent the client (citing MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2002))); accord MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2002) (requiring consultation with clients on the means used to represent the client). The Ohio Board of Commissioners on Grievances & Discipline addressed consultation by stating:

discussing the disclosure obligations of outsourcing lawyers, the ABA ethics opinion compared the use of temporary lawyers, which “is a form of outsourcing,” to other outsourcing arrangements.<sup>260</sup> The committee opined that there is an obligation to disclose the law firm’s use of a temporary lawyer if that person works independently and is not directly supervised by the firm.<sup>261</sup>

State ethics opinions appear to go even further. Those authorities generally have not embraced the ABA’s supervision-based analysis, but instead mandate that the use of temporary lawyers must always be disclosed to the client.<sup>262</sup> Likewise, state opinions addressing legal process outsourcing usually require that the client be informed that tasks are being outsourced.<sup>263</sup>

#### E. *Vicarious Liability for the Conduct of Business Partners*

When an outsourcing American law firm and a foreign provider cooperate for the purpose of serving clients, vicarious liability for the torts of the provider might be imposed on the outsourcing firm under a variety

[D]isclosure and consultation with a client and informed consent by a client is required before outsourcing legal and support services. . . . In consultation with a client regarding whether legal and support services will be outsourced to lawyers or nonlawyers, the lawyer or law firm must be clear to the client about the arrangement, including providing disclosure as to whether the outsourcing will be direct to a lawyer or nonlawyer or through an independent service provider.

Ohio Bd. of Comm’rs on Grievances & Discipline, Op. 2009-6, at 3 (2009); *cf.* L.A. Cnty. Bar Ass’n Prof’l Responsibility & Ethics Comm., Op. 518 (2006), *available at* <http://www.lacba.org/Files/LAL/Vol29No9/2317.pdf> (remarking that charging a client for outsourced services in addition to the normal attorney’s fee will constitute a significant development that will trigger a duty to disclose and receive informed consent).

260. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451, at 4 (2008) (“[I]t may be necessary for the lawyer to provide information concerning the outsourcing relationship to the client . . .”).

261. *Id.* Formal Op. 88-356, at 44 (1988).

262. *See* Alaska Bar Ass’n, Ethics Op. No. 96-1 (1996), *available at* [https://www.alaskabar.org/servlet/content/indexes\\_aeot\\_\\_96\\_1.html](https://www.alaskabar.org/servlet/content/indexes_aeot__96_1.html) (“[W]here the temporary lawyer is performing independent work for a client . . . , the client must be advised of the fact that the temporary lawyer will work on the client’s matter and the consent of the client must be obtained.” (quoting ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 88-356, at 10 (1988)) (internal quotation marks omitted)); Fla. State Bar Ass’n, Op. 88-12 (Aug. 1, 1988), *available at* <http://www.floridabar.org/TFB/TFBETOpin.nsf/ca2dcdaa853ef7b885256728004f87db/66ffdb37f768a65b85256b2f006ca97f?OpenDocument> (“Whether the temporary nature of the participating attorney-supervising lawyer relationship need be disclosed to the supervising lawyer’s client would depend on whether the client would likely consider the information material.”).

263. State Bar of Mich., Ethics. Op. RI-310 (1998), *available at* [http://www.michbar.org/opinions/ethics/numbered\\_opinions/ri310.htm?CFID=36643185&CFTOKEN=863d086cc5c644fc-275906D4-1A4B-3375-E4E20FE595B41CD3](http://www.michbar.org/opinions/ethics/numbered_opinions/ri310.htm?CFID=36643185&CFTOKEN=863d086cc5c644fc-275906D4-1A4B-3375-E4E20FE595B41CD3) (expressing the client’s reasonable expectation to know when tasks related to that client’s legal matter are outsourced).

of legal theories.<sup>264</sup> Among these theories are joint venture, partnership in fact or by estoppel,<sup>265</sup> and concerted action. These topics are discussed below. The closer and more intertwined the relationship between the outsourcing law firm and the foreign provider, the easier it will be for a court to conclude that some legal theory supports a finding of liability.<sup>266</sup>

### 1. Joint Venture

As typically defined, a joint venture “is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge.”<sup>267</sup> Thus, it has been said that “intent to share both the responsibility and the profits from . . . representation clearly demonstrate the presence of a joint venture.”<sup>268</sup> More limited in the scope of endeavor than an ongoing partnership,<sup>269</sup> “[a] joint venture has been found to exist

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264. *But see* 1 GEOFFREY C. HAZARD, JR. ET AL., *THE LAW OF LAWYERING* § 8.16 (3d ed. Supp. 2003), at 8-39, 8-40 (2011) (“[L]awyers joining forces from different firms are not personally liable for each other’s malpractice.”).

265. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. c (2000) (“Even though no traditional partnership exists, a person might be able to assert vicarious liability under the doctrine of partnership by estoppel, or purported partnership, against lawyers who represented themselves to be partners or consented to another’s so representing them when the person relied on that representation.”); *see also* VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 358–62 (2011) (discussing partnership by estoppel and partnership in fact).

266. *Cf. Estate of Spencer v. Gavin*, 946 A.2d 1051, 1069 (N.J. Super. Ct. App. Div. 2008) (holding that a lawyer “who has a close and interdependent business relationship with another lawyer, and who is performing legal work for a common client at that lawyer’s request, has a duty to report that lawyer if he or she develops actual knowledge that the lawyer has been stealing funds from their common client”).

267. *Croye v. GreenPoint Mortg. Funding, Inc.*, 740 F. Supp. 2d 788, 799 (S.D. W.Va. 2010) (quoting *Armor v. Lantz*, 535 S.E.2d 737, 742 (W. Va. 2000)); *see also Lapkin v. Garland Bloodworth, Inc.*, 23 P.3d 958, 963 (Okla. Civ. App. 2000) (stating that the criteria for establishing a joint venture are: “(1) joint interest in property, (2) and express or implied agreement to share profits and losses of the venture and (3) action or conduct showing cooperation in the project. . . . [T]here must be some contribution by each co-adventurer of something promotive of the enterprise.” (quoting *Martin v. Chapel, Wilkinson, Riggs, & Abney*, 637 P.2d 81, 85 (Okla. 1981)) (internal quotation marks omitted)).

268. *Duggins v. Guardianship of Washington*, 632 So. 2d 420, 428 (Miss. 1993).

269. As explained by the Supreme Court of Appeals of West Virginia, in *Armor v. Lantz*, a case arising from an Ohio lawyer’s association with a West Virginia lawyer as local counsel on a personal injury case:

A joint venture “is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge. It arises out of a contractual relationship between the parties. The contract may be oral or written, express or implied.” While this Court has frequently likened a joint venture to a partnership, . . . we have nevertheless distinguished the two: “[A] partnership relates to a general business . . . while [a] joint adventure relates to a single business transaction.” . . .

where attorneys have agreed to share fees.”<sup>270</sup> Some courts have at times insisted on a rough equivalence of responsibility, authority, and profit sharing,<sup>271</sup> although others do not.<sup>272</sup> Whether a joint venture exists is normally a question of fact for the jury.<sup>273</sup>

The traditional rule that an employer is not liable for the torts of an independent contractor can be circumvented by showing that the tortfeasor was not an independent contractor, but rather a joint venturer with the defendant. For example, in *Duggins v. Guardianship of Washington*,<sup>274</sup> a lawyer, Duggins, engaged the services of another lawyer, Barfield, to assist him in handling a personal injury case.<sup>275</sup> Barfield ultimately stole funds belonging to the clients.<sup>276</sup> In a subsequent malpractice action, Duggins argued that he was not responsible for the loss of the funds because Barfield was an independent contractor.<sup>277</sup> The Supreme Court of Mississippi rejected that contention, reasoning that:

When Duggins associated Barfield, it was not as an independent contractor, but an equal. Duggins was to handle the client contact and do all the necessary leg work such as compiling medical records. Barfield was to use his experience in the area of medical malpractice to draft and file the complaint and to negotiate with the insurance company in the hopes of settling the claim. Although a written agreement was never executed between Duggins and Barfield, it was mutually agreed upon that the fees be split 50/50

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Because of the basic similarities between these two forms of business association, joint ventures and partnerships are governed generally by the same basic legal principles. Thus, since all partners are jointly liable for all debts and obligations of a partnership, . . . members of a joint venture are likewise jointly and severally liable for all obligations pertaining to the venture, and the actions of the joint venture bind the individual co-venturers.

*Armor*, 535 S.E.2d at 742-43 (citations omitted).

270. *Lapkin*, 23 P.3d at 963 (citing *Floro v. Lawton*, 10 Cal. Rptr. 98 (Ct. App. 1960); *Duggins*, 632 So. 2d at 430; *Fitzgibbon v. Carey*, 688 P.2d 1367, 1370 (Or. Ct. App. 1984)).

271. *See id.* (determining that an attorney who only agreed to share fees in one case was not a joint venturer); *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 528 (Tex. 2002) (holding that a common business or pecuniary interest is not sufficient to establish a joint enterprise and that, to establish a “community of pecuniary interest,” there must be a monetary interest common among the members of the group that is “shared without special or distinguishing characteristics”).

272. *See Pittman v. Frazer*, 129 F.3d 983, 985-86 (8th Cir. 1997) (upholding a finding of contributory negligence based on joint enterprise by a couple where a car belonging to a woman’s parents was driven by her lover directly into the path of a train while the couple was returning from a secluded area on private property).

273. *Bowers v. Wurzburg*, 528 S.E.2d 475, 484 (W. Va. 1999).

274. *Duggins v. Guardianship of Washington*, 632 So. 2d 420 (Miss. 1993).

275. *Id.* at 422-23.

276. *Id.* at 424.

277. *Id.* at 426.

between them.<sup>278</sup>

Because the two attorneys were joint venturers, Duggins was vicariously liable for the misappropriated funds.<sup>279</sup>

An outsourcing American law firm would be subject to *discipline* for improperly splitting fees with a foreign provider,<sup>280</sup> or for allowing a nonlawyer provider to exercise control over the representation of a client.<sup>281</sup> However, the consequences of such ethical breaches would not stop there. The outsourcing law firm might also be subject to *vicarious liability* for the torts of the provider under joint venture principles.<sup>282</sup> Of course, the sharing of profits must be distinguished from the payment of a fair fee for outsourcing services rendered.<sup>283</sup> If there is no sharing of profits, joint venture principles are unlikely to apply.<sup>284</sup> The same is true if control of the client's representation is not shared.<sup>285</sup>

## 2. Partnership in Fact or By Estoppel

Another method of establishing vicarious liability for the torts of an outsourcing provider is to show that partnership principles apply. This may be true based on a partnership in fact or because the outsourcing lawyer is estopped from denying the existence of a partnership.<sup>286</sup>

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278. *Id.*

279. *Id.* at 428 (holding that even if principles of Mississippi partnership law were not applicable, "Duggins could be found accountable for Barfield's actions by applying the principles of vicarious liability").

280. See MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2002) (restricting fee splitting between lawyers); *id.* R. 5.4(a) (broadly prohibiting fee splitting with nonlawyers).

281. *Cf. id.* R. 5.4(c), (d)(3) (prohibiting nonlawyer interferences with a lawyer's exercise of professional judgment).

282. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. e (2000) ("[A] firm may be liable to the client for the acts and omissions of the outside lawyer if the firm assumes responsibility to a client for a matter, for example . . . by assigning work to a temporary lawyer who has no direct relationship with the client.").

283. *Armor v. Lantz*, 535 S.E.2d 737, 745 (W. Va. 2000) (holding joint-venture principles inapplicable where "there were no discussions between Lantz and Sipe concerning how Lantz would be paid" and "Sipe testified that in another case in which both he and Lantz were involved, Lantz had received a flat \$1,000 fee for acting as local counsel").

284. "While state law defines the elements of a joint venture relationship, the most important characteristic for the purposes of this article is an agreement to share fees between the referring and receiving lawyer." Mary C. Daly & Carole Silver, *Flattening the Word of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT'L L. 401, 442 (2007) (footnotes omitted).

285. See *Croye v. GreenPoint Mortg. Funding, Inc.*, 740 F. Supp. 2d 788, 800–01 (S.D. W. Va. 2010) (deciding that, in light of the requirements of shared profit and shared control, mortgagors could not impose joint-venture-based liability upon a mortgagee for the allegedly fraudulent acts of a loan servicer).

286. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. c (2000)

Partnership liability is similar to joint venture. As the Supreme Court of Mississippi explained:

There is no difference between a partnership and a joint venture except the latter has limited and circumscribed boundaries. Indeed, the only purpose in distinguishing a joint venture from a partnership is to define a business relationship which is limited to specified undertakings for profit, rather than a general and continuing business of a particular kind. The legal principles for determining the existence of each are identical.<sup>287</sup>

However, courts are more willing to apply partnership principles to the claims of injured clients than to rely upon less familiar common-law rules governing joint ventures.<sup>288</sup> Logically, if partnership principles apply, there should be less concern about how profits are divided because it is well established that lawyers practicing in law firms routinely agree on different equity allocations. However, an agreement or intention to divide profits in some fashion is essential to the existence of a partnership.<sup>289</sup>

To prevail on a claim of vicarious liability based on partnership by estoppel, a plaintiff generally must prove that the defendant held another out as being the defendant's partner and that the plaintiff detrimentally relied on the existence of the ostensible partnership.<sup>290</sup> "Evidence of 'holding out' may consist of 'words spoken or written[,] or . . . conduct.'"<sup>291</sup>

Numerous cases have applied partnership-by-estoppel principles to cases not involving outsourcing.<sup>292</sup> However, there is no reason why the same

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(stating that lawyers may be vicariously liable under a partnership by estoppel).

287. *Hults v. Tillman*, 480 So. 2d 1134, 1141-42 (Miss. 1985) (footnote omitted) (citations omitted).

288. See RESTATEMENT (SECOND) OF TORTS § 491 (1965) (discussing joint enterprise liability).

289. See *Cnty. Capital Bank v. Fischer & Yanowitz*, 850 N.Y.S.2d 508, 510 (App. Div. 2008) (holding that a lawyer was entitled to summary judgment in a malpractice suit because there was no evidence that he agreed to share profits with another lawyer and no basis for finding a partnership by estoppel).

290. See *Gosselin v. Webb*, 242 F.3d 412, 415 (1st Cir. 2001) ("To prevail under this doctrine, a plaintiff must prove four elements: (1) that the would-be partner has held himself out as a partner; (2) that such holding out was done by the defendant directly or with his consent; (3) that the plaintiff had knowledge of such holding out; and (4) that the plaintiff relied on the ostensible partnership to his prejudice." (quoting *Atlas Tack Corp. v. DiMasi*, 637 N.E.2d 230, 232 (Mass. App. Ct. 1994))).

291. *Id.* (quoting MASS. GEN. LAWS ch. 108A, § 16(1)).

292. See, e.g., *Ross v. Ihrie*, No. 05-71420, 2006 WL 3446897, at \*8 (E.D. Mich. Nov. 28, 2006) (holding that a malpractice plaintiff had raised a fact issue regarding partnership by estoppel where three lawyers had listed all of their names on common stationary and had used a joint name ("Ihrie, Scarfone & O'Brien") on business cards, in answering the phone, and in lawyer[client agreements]).



theory of liability could not apply when a foreign provider is held out to be a “partner” of an American law firm. The fact that applicable rules of ethics provide that “[l]awyers may state or imply that they practice in a partnership or other organization only when that is the fact”<sup>293</sup> is no barrier to this line of reasoning. It merely means that, on some evidence, an outsourcing lawyer who holds a foreign provider out as being a partner may be subject to both discipline and civil liability.

Suppose, for example, that an American law firm is handling a tort claim arising from injuries to an American citizen in China and that it consults a prestigious Chinese law firm—say, the Jun He Law Offices<sup>294</sup> in Shanghai or the King & Wood<sup>295</sup> law firm in Beijing—for advice related to provisions of the new Chinese tort law.<sup>296</sup> If the American firm incautiously tells its client that it will be incorporating the advice of its Chinese “partner” into its handling of the case, the American Firm might be estopped from denying that the Chinese law firm was a partner if the outsourced work product proves to be defective.

### 3. Vicarious Liability Based on Concerted Action

An outsourcing American law firm is subject to liability for negligence or other forms of tortious conduct based on concerted action with a foreign provider who commits a tort.<sup>297</sup> There are two basic forms of concerted-action liability: (1) civil conspiracy (concerted action by agreement); and (2) aiding and abetting (concerted action by substantial assistance).

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293. MODEL RULES OF PROF'L CONDUCT R. 7.5(d) (2002); see Wis. Sup. Ct. Rule 20:7.5(d) cmt. 2 (2012), available at <http://www.wicourts.gov/sc/scrule/DisplayDocument.pdf?content=pdf&seqNo=45324> (“Lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, ‘Smith and Jones,’ for that title suggests that they are practicing law together in a firm.”); D.C. Bar, Ethics Op. 303 (2001), available at [http://www.dcbar.org/for\\_lawyers/ethics/legal\\_ethics/opinions/opinion303.cfm](http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion303.cfm) (indicating that “if solo attorney A is renting space and services from law firm B, C & D and the only sign in the vicinity of the office identifies the facilities as ‘The Law Firm of B, C & D,’ then the public would quite naturally assume that attorney A is affiliated with the law firm of B, C & D [and] would be misled as to the true nature of the relationship among these attorneys.”).

294. JUN HE LAW OFFICES, <http://www.junhe.com/en/index.asp> (last visited Jan. 19, 2012).

295. KING & WOOD, <http://www.kingandwood.com/> (last visited Jan. 19, 2012).

296. Cf. Vincent R. Johnson, *Train Wreck Serves As a Test for Chinese Law*, HOUS. CHRON., Aug. 7, 2011, <http://www.chron.com/opinion/outlook/article/Train-wreck-serves-as-a-test-for-Chinese-law-2081496.php> (discussing the new Chinese tort law).

297. See RESTATEMENT (SECOND) OF TORTS § 876 (1979) (discussing concerted-action liability in tort law).

a. Civil Conspiracy

Civil conspiracy generally requires (1) an agreement between two or more persons, (2) to participate in an unlawful act, or to do a lawful act in an unlawful manner, and (3) an injury caused by an unlawful overt act performed by one of the parties to the agreement in furtherance of the common scheme.<sup>298</sup> One conspirator can be liable for harm caused by another's overt act, even if the one neither planned nor knew about that act, so long as the purpose of the act was to advance the overall object of the conspiracy.<sup>299</sup>

At first blush, it seems unlikely that a client would be able to prove that an outsourcing law firm conspired with a provider to commit an unlawful act or to perform a lawful act in an unlawful manner. Yet, plaintiffs often allege that their lawyers have engaged in civil conspiracy,<sup>300</sup> and history has shown that business entities sometimes engage in such nefarious conduct, even in global contexts. In these cases, liability has been imposed under civil conspiracy principles.<sup>301</sup> It remains to be seen whether the same rationale will find application in cases involving legal process outsourcing. Conceivably, the undisclosed and unconsented delegation of client work to providers in other countries might be regarded as an unlawful act because it violates provisions of legal ethics. Thus, civil conspiracy principles might be an alternative to a nondelegable duty analysis.<sup>302</sup>

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298. See, e.g., *Ca de Lupis v. Bonino*, No. 07-01372(RBW), 2010 WL 1328813, at \* 9–11 (D.D.C. Mar. 31, 2010) (providing the elements for civil conspiracy); see also *Craftwork, Inc. v. Robinson*, No. 10-cv-3629, 2011 WL 6097725, \*7 (N.D. Ill. Dec. 6, 2011) (“Under Illinois law, in order to allege a claim for civil conspiracy, a plaintiff must allege (1) an agreement; (2) by two or more persons; (3) to perform an overt act or acts; (4) in furtherance of the agreement/conspiracy; (5) to accomplish an unlawful purpose or a lawful purpose by unlawful means; (6) that causes injury to another” (citing *Bressner v. Ambroziak*, 379 F.3d 478, 483 (7th Cir. 2004))); cf. *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C.*, 331 F.3d 406, 414 (3d Cir. 2003) (“[W]hen a complaint alleges that an attorney has knowingly and intentionally participated in a client’s unlawful conduct to hinder, delay, and/or fraudulently obstruct the enforcement of a judgment of a court, the plaintiff has stated a claim . . . for creditor fraud against the attorney.”).

299. See *Halberstam v. Welch*, 705 F.2d 472, 487 (D.C. Cir. 1983) (“The use of violence to escape apprehension was certainly not outside the scope of a conspiracy to obtain stolen goods through regular nighttime forays and then to dispose of them.”).

300. See *Bolsa Res., Inc. v. AGC Res., Inc.*, No. 11-cv-01293-MSK-KMT, 2011 WL 6370409, \*1, \*15 (D. Colo. Dec. 20, 2011) (declining to dismiss claims for legal malpractice and civil conspiracy).

301. Cf. *Morrison v. YTB Int’l, Inc.*, Nos. 08-565-GPM, 08-579-GPM, 2010 WL 1558712, at \*1, \*10 (S.D. Ill. Apr. 19, 2010) (upholding a claim for civil conspiracy against an international business entity).

302. See *supra* Part V.D.2 (outlining the legal principles associated with nondelegable duties when outsourcing).

### b. Aiding and Abetting

In contrast to civil conspiracy, which requires proof of an express or tacit agreement, concerted action by substantial assistance simply requires proof that the defendant knowingly aided and abetted tortious conduct.<sup>303</sup> According to one court:

In practice, liability for aiding-abetting often turns on how much encouragement or assistance is substantial enough. The *Restatement* suggests five factors in making this determination: “the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other [tortfeasor,] and his state of mind.”<sup>304</sup>

In the legal malpractice context:

Presumably, the “substantial assistance” requirement is concerned with ensuring that a lawyer made a real contribution to the plaintiff’s harm. If what the lawyer did was minimal, irrelevant, duplicative, and of little efficacy, there may be good reason not to impose responsibility for aiding and abetting . . . . However, in other areas of the law, mere moral support that deliberately emboldens a tortfeasor in perpetrating wrongful conduct is sufficient to support a finding of aiding[-]and[-]abetting liability.<sup>305</sup>

“A general awareness of wrongdoing on the part of the one being aided or abetted is sufficient to show knowledge on the part of an aider and abettor. . . .”<sup>306</sup> If an outsourcing lawyer learns that a foreign provider is rendering negligently deficient services for clients, and nevertheless assists the provider in continuing to do so, the lawyer may be vicariously liable under aiding-and-abetting principles, as well as being subject to possible personal liability based on the law of negligence.<sup>307</sup>

303. See *Rakes v. United States*, 352 F. Supp. 2d 47, 60 (D. Mass. 2005) (“[F]or harm resulting to a third person from the tortious conduct of another a person is liable if he . . . (b) knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other.” (quoting *Nelson v. Nason*, 177 N.E.2d 887, 888 (Mass. 1961)) (internal quotation marks omitted)), *aff’d*, 442 F.3d 7 (1st Cir. 2006).

304. *Halberstam*, 705 F.2d at 478 (citing RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1979)).

305. VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 148 (2011).

306. *Nat’l R.R. Passenger Corp. v. Veolia Transp. Servs., Inc.*, 592 F. Supp. 2d 86, 96 (D. D.C. 2009) (holding that a transportation-services company stated a claim against competitors for aiding-and-abetting breaches of fiduciary duty by its key staff members).

307. See *supra* Part V.B (outlining the ways in which an outsourcing firm may be held negligent).

## VI. LIMITING MALPRACTICE LIABILITY

Outsourcing lawyers have at least two good options for limiting their exposure to vicarious liability for the conduct of outsourcing providers. The first is limiting the scope of their representation and the second is by obtaining a release from the client.

### A. *Scope of Representation*

As mentioned earlier, the principles that favor private ordering allow lawyers and clients to define the scope of legal representation and thereby limit the range of duties that lawyers owe to clients.<sup>308</sup> Particularly in the case of sophisticated clients, such agreements will be upheld by the law, provided that their terms are clear and not inconsistent with public policy.

Whether a limitation on the scope of representation is reasonable, and is therefore enforceable, depends on a careful review of the relevant facts. Suppose, for example, that a proposed business transaction raises issues under United States law and Russian law, that the lawyer and client agree that legal research of Russian law will be outsourced to a foreign provider, and that the outsourcing American lawyer will have no duty to review the quality of the Russian legal research. If the client is sophisticated, and if the American lawyer lacks knowledge and experience related to Russian law, a court might well find that this limitation on the scope of the lawyer's duties was reasonable.

In contrast, assume that a lawyer and client agree that the pleadings for a corporate dispute governed by United States law will be drafted by a foreign provider and filed by the American lawyer in an American court without substantive review by the American lawyer. This limitation on the scope of the lawyer's duties might well be found unreasonable because, among other things, lawyers in the United States must take responsibility for the documents they file with courts and are subject to a range of penalties for frivolous litigation.<sup>309</sup>

It is not possible to state a general rule that clearly defines what types of limitations on the scope of legal representation will be held reasonable and

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308. See *supra* Part IV.D (describing the policy interest that favor protecting lawyers). See generally Joshua A. Bachrach, Current Development, *Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(h)*, 21 GEO. J. LEGAL ETHICS 631, 647-48 (2008) (discussing scope of representation).

309. See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2002) (prohibiting frivolous litigation).

legally binding. The best that can be said is that the greater the sophistication of the client, the clearer the limitation, and the less likely the limitation is to cause harm to the client, courts, third persons, or the legal profession, then the greater the chance such limitation will pass ethical and legal muster.

These principles have been recognized by cases involving a division of duties between multiple attorneys representing a client. As the Supreme Court of Mississippi stated in *Duggins*:

An agreement, preferably in writing, with the client concerning the division of legal representation may prevent the liability of one attorney for any errors committed by the other. However, if the division of responsibility is not clearly spelled out, the client's consent to the association does not prevent vicarious liability between or among counsel when the attorneys share the representation and legal fees.<sup>310</sup>

If a client suggests that tasks related to legal representation be outsourced to another country, the lawyer should be careful to document, as part of the lawyer–client contract or otherwise, whether the client agrees that this is a limitation of the lawyer's scope of representation and the tasks the lawyer is expected to perform. Absent well-documented understanding to the contrary, there is room for the client to claim that the lawyer was expected to perform a wide ranging quality-control function related to the outsourced work.

### B. *Releases from Vicarious Liability*

One commentator on foreign legal process outsourcing has opined that “[b]ecause the corporate client benefits from greater collaboration among legal service providers,” the client may be willing to agree that the outsourcing lawyer will not be vicariously liable for the torts of foreign providers.<sup>311</sup> Another writer suggests that it might be possible for an outsourcing lawyer to contractually limit liability more broadly in a way that insulates the lawyer not only from vicarious liability, but also from personal liability too.<sup>312</sup>

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310. *Duggins v. Guardianship of Washington*, 632 So. 2d 420, 426 (Miss. 1993) (citations omitted).

311. Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 175 (2011).

312. See Joshua A. Bachrach, Current Development, *Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(h)*, 21 GEO. J. LEGAL ETHICS 631, 632 (2008) (arguing that “under certain circumstances, a U.S. law firm should be ethically permitted to prospectively limit its liability in an offshore legal outsourcing arrangement”).

In states that permit advance waivers of liability for malpractice,<sup>313</sup> the validity of any such agreement turns upon whether the client understands the extent of the limitation, and the client is normally required to have independent counsel to provide advice related to signing the release.<sup>314</sup> The independent counsel requirement might not be a serious obstacle in the case of corporate clients who have in-house counsel or other ready access to legal advice. However, clients who are misled about limited liability may assert claims under common-law and equitable principles,<sup>315</sup> and may allege that inadequate disclosure of the limitation was itself a breach of fiduciary duty.<sup>316</sup>

## VII. CONCLUSION

As various legal commentators have suggested, legal process outsourcing is part of a permanent shift in the way American lawyers provide services to clients.<sup>317</sup> It is essential to remember that such innovative practices carry with them the risks of malpractice liability, and that an adverse malpractice judgment can destroy a law firm. Outsourcing lawyers need to plan carefully to reduce those risks by structuring relationships with foreign providers and American clients in ways that treat clients fairly and minimize the risk of malpractice liability.

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313. *See id.* at 651 (discussing jurisdictions that “proscribe, under all circumstances, agreements that prospectively limit the lawyer’s liability”).

314. *See* MODEL RULES OF PROF’L CONDUCT R. 1.8(h)(1) (2002) (dealing with releases prospectively limiting liability).

315. *Cf.* Susan Saab Fortney, *Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships*, 39 S. TEX. L. REV. 399, 430–39 (1998) (summarizing claims that can be made on common-law and equitable theories in legal malpractice cases).

316. *See* VINCENT R. JOHNSON, *LEGAL MALPRACTICE LAW IN A NUTSHELL* 348–49 (2011) (discussing limited liability law firms).

317. *Cf.* Mark L. Tuft, *Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-Examining Current Ethical Standards*, 43 AKRON L. REV. 825, 826 (2010) (“The classic law firm business model is being challenged.”).