

Boston Bar Journal

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Boston Bar Journal

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Statement of Editorial Policy

The *Boston Bar Journal* is the premier publication of the Boston Bar Association. We present timely information, analysis, and opinions to more than 10,000 lawyers in nearly every practice area. Our authors are attorneys, judges, and others interested in the development of the law. Our articles are practical. Our publication is a must-read for lawyers who value being informed on important matters of legal interest. The *Boston Bar Journal* is governed by a volunteer Board of Editors dedicated to publishing outstanding articles that reflect their authors' independent thought, and not necessarily the views of the Board or the Boston Bar Association.

N.B. Judges serving on the Board of Editors of the *Boston Bar Journal* do not participate in discussions about or otherwise contribute to articles regarding impending or pending cases.

President's Page

Justice Under Pressure

By Donald R. Frederico

Everywhere you look, the financial meltdown of 2008 has left its mark. European governments stagger under the weight of crushing debt. The United States deficit continues to soar while unemployment rates refuse to drop. The Massachusetts housing market recorded its lowest October sales in 20 years. Stock markets, although somewhat improved, remain well below their highs of just a few years ago.

The Massachusetts system of justice is not immune from financial distress, and is particularly vulnerable. We see this vulnerability play out on several fronts.

The leaders on both sides of our criminal justice system are now engaged in a heated debate over the allocation of state tax dollars distributed to district attorneys' offices and to the Committee for Public Counsel Services. The district attorneys argue that CPCS has been given more than its fair share of available funds, that CPCS diverts too much of its budget to private bar advocates, and that more should be given to DAs to level the playing field. CPCS argues that it manages its funding efficiently, that the DAs receive funding from other sources, and that defending the indigent is sufficiently different from prosecuting them that the budgets of the two groups cannot fairly be compared. While there no doubt is merit to arguments advanced by both sides, it seems unlikely that this debate would take on such significance in a healthier economic climate.

Our judiciary also is reeling from the fiscal shortfall. The Trial Court remains shackled by a hiring freeze that it self-imposed two years ago. Attrition during that time has reduced staffing levels in some courts to as low as fifty-five



percent. Virtually all of our already underpaid Trial Court judges have agreed to take unpaid furloughs in order to avoid layoffs of court staff. The court has undertaken other extraordinary measures to reduce costs, and is running out of options. Without additional funding in near-term budgets, the administration of justice will be sorely strained.

No group has been harder hit than the organizations that provide legal services to the poor. Massachusetts legal services organizations, such as Greater Boston Legal Services, depend on funding from three principal sources: IOLTA funds, state budgetary allocations, and private donations. IOLTA funding comes from interest earned on IOLTA accounts for the temporary deposit of client funds maintained by lawyers and law firms throughout the Commonwealth. As recently as 2007, Massachusetts IOLTA accounts generated approximately \$31 million in interest. This money was paid to the Massachusetts Legal Assistance Corporation, the Massachusetts Bar Foundation and the Boston Bar Foundation to support legal services for the poor. Because less money has been deposited into those accounts during the economic downturn, and because banks have lowered the interest rates paid on the deposited funds, income from Massachusetts IOLTA accounts has experienced a precipitous decline. In 2010, it dropped to approximately \$9 million, less than one-third of its peak just three years earlier. As a result of low interest rates and lower balances, total IOLTA revenue could dip as

low as \$7 million. Every dollar lost through IOLTA means less money to support legal services, fewer legal services attorneys to address the needs of the poor, and less access to justice for those who cannot afford to hire lawyers.

The Boston Bar Association is committed to supporting adequate funding for our prosecutors, our public defenders, our courts, and our legal services organizations. With respect to legal services, every one of us can play a role. Here are three examples of what you can do:

- Join us on February 2, 2011 for our annual Walk to the Hill. It is an opportunity to show Massachusetts legislators the strong support of the organized bar for state funding for legal services.
- If you are in private practice, do what you can to make sure that your firm is making appropriate use of its IOLTA account and is receiving a competitive interest rate from the bank that services the account.
- Donate to legal services organizations and to the Boston Bar Foundation. If you are not already a member of the BBF Society of Fellows, become one.

We cannot solve these problems overnight, but in many ways, large and small, we each can make a difference. ■

Case Focus

The Abolition of the “Natural” Accumulation Defense in Snow and Ice Cases: an Overview of *Papadopoulos v. Target*

By Matthew C. Welnicki

In *Papadopoulos v. Target*, 457 Mass. 368 (July 26, 2010), the Massachusetts Supreme Judicial Court (SJC) abolished the long-standing distinction between “natural” and “unnatural” accumulations of snow and ice in slip-and-fall cases. Prior to the *Papadopoulos* decision, Massachusetts law held that a property owner was not liable for injuries caused by “natural” accumulations of snow or ice on the owner’s property. In *Papadopoulos*, the SJC ruled that all property owners are now held to the same duty of care — to “act as a *reasonable* person under all of the circumstances” — regardless of whether a property defect arises out of a “natural” or “unnatural” hazard or accumulation of snow or ice. The SJC also ruled that it will apply this standard retroactively.

In *Papadopoulos*, the plaintiff slipped and fell on a patch of ice while walking in Target’s parking lot. There, after a snow storm, a plow had cleared the parking lot and piled the snow on a median. The ice in question had either fallen from the snow pile or formed from snow that melted and ran off the pile.

The trial court ruled that the ice was a “natural” accumulation. Under then-existing Massachusetts case law, property owners had no obligation to remove or warn of “natural” accumulations of snow and ice. Therefore, the trial court concluded that the plaintiff could not prevail on his negligence claims and allowed Target’s motion for summary judgment. The plaintiff appealed and the



Matthew C. Welnicki is an associate at Sugarman, Rogers, Barshak & Cohen, P.C. where he focuses his practice on business litigation and tort defense.

Appeals Court affirmed the trial court's decision in favor of Target.

On further appellate review, the SJC rejected the long-standing distinction between "natural" and "unnatural" accumulations of snow and ice and vacated the trial court's allowance of summary judgment for Target. The SJC concluded that the standard of care in snow and ice cases should be no different than the standard of care owed by a landowner in any other premises liability action. Specifically, it held that a landowner owes a duty to maintain its premises in a *reasonably* safe condition given the circumstances.

The SJC examined the history of premises liability law and explained that the "natural" accumulation rule was a "relic" of abandoned landlord-tenant law. Accordingly, the court held that all property owners now owe a duty to keep their property reasonably safe for lawful visitors regardless of the source of the danger, whether "an act of nature [or] an act of another person." Further, it was important to the SJC's analysis that the question of whether an accumulation of snow or ice was "natural" or "unnatural" was sometimes difficult to answer and could be a distraction from the ultimate issue of the property owner's negligence.

The SJC rejected the argument that all "natural" accumulations of snow or ice are "open and obvious" dangers. The court explained that property owners should realize that while visitors should look out for themselves, a "hardy New England visitor would choose to risk crossing the snow or ice rather than turn back or attempt an equally

or more perilous walk around it." Therefore, even though accumulations of snow and ice may be recognizable dangers, a property owner still has a duty to be reasonably careful in making its property safe. The SJC also rejected the argument that requiring property owners to remove "natural" accumulations of snow and ice would be impractical. It specifically noted that the highest courts of all other New England states had rejected Massachusetts' rule for "natural" accumulations.

The SJC cautioned that its decision is not intended to make owners insurers of their property. The new standard introduces no special burden on property owners. "If a property owner knows or reasonably should know of a dangerous condition on its property, whether arising from an accumulation of snow or ice, or rust on a railing, or a discarded banana peel, the property owner owes a duty to lawful visitors to make reasonable efforts to protect lawful visitors against the danger."

The SJC explained that courts will now balance the expense of removing the snow and ice with the likelihood and seriousness of foreseeable harm to visitors. It also listed factors that the courts will now consider:

The snow removal reasonably expected of a property owner will depend on the amount of foot traffic to be anticipated on the property, the magnitude of the risk reasonably feared and the burden and expense of snow and ice removal. Therefore, while an owner of a single

family home, an apartment house owner, a store owner, and a nursing home operator each owe lawful visitors to their property a duty of reasonable care, what constitutes reasonable snow removal may vary among them.

The SJC noted that it was not yet deciding whether property owners must remove snow or ice *during* a snow storm.

The SJC also concluded that the standard should apply retroactively to all cases that have not yet been resolved by judgment, settlement or the running of the three-year statute of limitations. It reasoned that retroactively applying the new standard was fair because property owners did not make decisions about snow or ice removal based on a distinction between “natural” or “unnatural” accumulations and that distinction’s impact on their potential tort liability. The SJC noted that most property owners have long been required to keep access to their property free of snow and ice under more demanding state and local regulatory requirements.

The *Papadopoulos* decision will likely increase the overall number of snow and ice slip-and-fall claims brought in Massachusetts. This increase may be especially noticeable in the short term as injured persons rush to assert claims that were previously precluded by the “natural”

accumulation defense. But it will remain to be seen whether the *Papadopoulos* decision has any dramatic impact on the risk of exposure that property owners, or their liability insurers, will face. The decision does not create a “new” standard of care, rather, it provides for a more uniform application of the familiar “reasonable person” standard. Plaintiffs in snow and ice cases will still need to prove all of the elements of negligence before recovering and the owners will still have defenses such as comparative negligence. Snow and ice cases will no longer be decided by a legal characterization of the nature of the accumulation. Rather, the ultimate determination of liability will be made by jurors who can rely on their own experiences with clearing snow and crossing uncleared paths. ■

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Voice of the Judiciary

Probate and Family Court: A Vocation, Not a Job

By Judge Paula Carey

Massachusetts first established a statewide Probate Court in 1780, although many individual counties boast an earlier date. The Probate and Family Court's assumption of concurrent family law jurisdiction began in 1922. The nature of the Court's caseload has changed dramatically over the past two decades, from primarily probate cases (which are paper driven with a defined track and minimal court appearances) to primarily domestic cases (which are people driven, have an uncertain track, and involve multiple court appearances).

In FY10 the Probate and Family Court had 26,177 divorce complaints; 19,589 paternity complaints; 29,627 modification complaints; 21,081 contempt complaints, 52,774 probate petitions (including guardianship), and 7,008 matters of other types (including abuse prevention and child welfare), for total filings of 156,256.

Over the last three years, we have seen a major change in the area of guardianship and conservatorship of the elderly, incapacitated persons and minors with the passage of the Massachusetts Uniform Probate Code, specifically Article V. As a result of these reforms, the most vulnerable persons who appear before our Court now have the protection they need.

The rollout of Article V was a monumental task in light of the six-month implementation window. We promised a review of our policies, forms and procedures at the time of implementation so that we could address any unintended consequences that followed. With review now complete, legislation has been filed; a



Hon. Paula M. Carey is the Chief Justice of the Probate and Family Court as of October 2, 2007. Prior to her appointment as Chief Justice, she was an Associate Justice of the Norfolk Probate and Family Court. Chief Justice Carey was appointed to the bench in January, 2001.

new standing order and uniform practice have been enacted; and many Article V forms have been revised.

A new Standing Order has been enacted that provides for a simplified medical affidavit during a temporary guardianship if a respondent is in stable condition, their prognosis is clear and they are being treated by the same physician. A Uniform Practice allowing clinical nurse practitioners to sign medical certificates has been created. Both help to streamline the process and decrease the cost to parties.

A total of 53 forms were promulgated in July of 2009. Twenty-five of those forms have been revised and 17 new forms have been developed. The suggested legislative changes and all of the other changes were discussed collaboratively by a working group of judges, court employees and lawyers representing all constituent groups.

Simultaneously with our review of the Article V implementation, the UPC Estate Working group, consisting of judges, court staff and lawyers, is working hard to develop the numerous rules, procedures, protocols and forms required to implement what will be a wholesale systemic change in probate practice in our Court. The UPC Education Committee is developing a curriculum for staff and bar training that is slated to begin in the spring of 2011.

The last three years have also seen the first major overhaul of the Child Support Guidelines since their inception in the 1980s; the changes move Massachusetts to an income shares approach to child support.

We have seen a significant increase in individuals who choose to represent themselves. In an effort to address the issues this phenomenon creates, our Court has a firmly entrenched Lawyer for the Day program in each division, Family Law Centers and Family Law Facilitators in multiple divisions, simplified forms and instructional videos, and community outreach programs.

Limited Assistance Representation (LAR) is a unique opportunity for an individual who may not be able to afford full representation to obtain at least some representation in a case. LAR began as a pilot project in Suffolk, Hampden and Norfolk Counties and has now expanded statewide. The pilot counties experienced great success, enabling many individuals who might otherwise have no legal assistance to obtain assistance on a discrete aspect of their case. As a result of this success, the pilot was rolled out statewide. More than 500 lawyers statewide have taken the training and are participating in LAR.

I am continually amazed at the level of commitment by Massachusetts attorneys to the delivery of justice. I have traveled to national conferences and the experience in other states is not the same. Massachusetts attorneys, especially family

and probate practitioners, are incredibly generous with their time by serving on committees, volunteering in our courts, assisting litigants in need through LAR, and helping to train our staff through the many changes our Court has seen. This collaboration and voluntarism illustrates my theory that working and practicing in the Probate and Family Court is a vocation – not a job.

Lawyers, through Senior Partners for Justice, take on pro bono cases from start to finish or, through LAR, take on a discrete aspect of a case. They also volunteer to review guardianship care plan reports. Senior Partner lawyers have reviewed 1,800 care plans throughout the Commonwealth since the project began in early 2010. This commitment to ensuring that elderly and incapacitated persons are receiving proper care is amazing. The bar has helped put Massachusetts in the national spotlight for guardianship monitoring.

The Probate and Family Court is proud of our revamped website. The site is simple and easy to follow. Many of our forms are on the site and easy to retrieve, and we are in the process of creating a version of our forms that can be saved. In the area of technology, we now have Public Access terminals in all of our Registries. Court users are now able to search Land Court dockets from the Registry offices. I hope that someday soon we will have electronic filing and view of images on the Public Access terminals.

Our Parent Education programs for never-married parents continue in Hampshire, Suffolk and Essex Counties. These pilot projects operate through a federal access and visitation grant. We view never-married parents as particularly vulnerable: if we can provide some educational tools to help with cooperative parenting and communication, we can help children maneuver through the conflict of their parents.

We continue our outreach efforts in Hampshire and Norfolk Counties, as well as in collaboration with Roxbury Community College. Many of our judges participate in Law Day events at local schools and address Community Courts classes at local law schools.

The Probate and Family Court is an exciting and challenging Court. On a daily basis, judges of the Probate and Family Court are confronted with decisions that will leave an enduring impact upon people's lives: how often parents spend time with their children; the resources parents will allocate to support their children; and the propriety of life-sustaining medical treatment for people who are unable to express their wishes. The list goes on. No two days are the same and our Court has the continuing responsibility to deal with the ever changing nature of how we define family issues, generally, along with the opportunity to help individual families maneuver through a change in their status. ■

The Profession

Reflections on the Legacy of Chief Justice Margaret Marshall

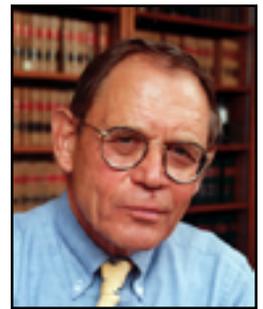
By Rudolph Kass and Mark V. Green

Around the time this edition of the Boston Bar Journal is released, Margaret Marshall will have concluded her tenure as Chief Justice of what she is fond of describing as the oldest court of continuing existence in the western hemisphere. She leaves a remarkable legacy.

Marshall's appointment as Chief Justice on October 14, 1999, made her the first woman to hold that position in the history of the Court. That first was a culmination of the steady progress of women in the Commonwealth's judicial branch. Indeed, until the retirement of Justice Ruth Abrams, Chief Justice Marshall presided over a Court on which the majority of justices were women. That benchmark achieved, Marshall was able to observe that in making a nomination to the SJC, a governor need not consider whether it would maintain or increase the number of women on the Court. "The important point is that you appoint the very, very best."

Chief Justice Marshall often refers to her experience growing up in South Africa under apartheid as the source of her appreciation of the importance of civil rights, and of an independent judiciary to protect them. An examination of her judicial writing reflects that sensibility.

She wrote frequently on the subject of discrimination and civil rights. For example, in *Dahill v. Police Dept. of Boston*, 434 Mass. 233 (2001), the Court



Rudolph Kass is a retired justice of the Massachusetts Appeals Court and currently arbitrates and mediates.



Mark Green is an Associate Justice of the Massachusetts Appeals Court, where he has served since 2001. Prior to his appointment to the Appeals Court, Justice Green served as a judge of the Land Court from 1997 to 2001.

adopted a broader definition of the term “handicap” under G. L. c. 151B, the Massachusetts anti-discrimination statute, than the United States Supreme Court had held protected under the Americans with Disabilities Act. *In re Ruby McDonough*, 457 Mass. 512 (2010), protects the right of disabled witnesses to testify if they may do so competently with the assistance of reasonable accommodations. In *Buster v. George W. Moore, Inc.*, 438 Mass. 635 (2003), Marshall wrote that economic coercion alone can constitute “threats, intimidation or coercion” under the Massachusetts Civil Rights Act. In *Gasiol v. Massachusetts General Hospital*, 446 Mass. 645 (2006), the Court concluded that an employee’s claim under the Massachusetts anti-discrimination statute for wrongful dismissal or failure to reinstate survives the employee’s death. In *Commonwealth v. Bernardo B.*, 453 Mass. 645 (2006), the Court allowed a juvenile to pursue discovery to substantiate his claim that the Commonwealth had engaged in gender discrimination by selective prosecution of statutory rape. Much of Chief Justice Marshall’s attention has been directed to changes in societal conditions affecting family law and the protection of children. So, for example, in *Youmans v. Ramos*, 429 Mass. 774 (1999), the Court for the first time recognized the status of a “de facto parent” in affirming a visitation order between a child and a maternal aunt who had been the child’s sole

caretaker. In *Adoption of Vito*, 431 Mass. 550 (2000), the Court confirmed the authority of a court to order visitation of a child after termination of a parent’s rights for abuse or neglect, if visitation is in the best interests of the child. In *Doe v. Senechal*, 431 Mass. 78 (2000), the Court resolved a tension between the support interests of a child and the privacy interests of a putative parent by affirming an order requiring the putative father to submit to a paternity test. And in *L.W.K. v. E.R.C.*, 432 Mass. 438 (2000), Marshall, writing for a divided Court, held that a parent’s obligation to pay child support survives the parent’s death.

Much as a parent is unwilling to designate a favorite child, Chief Justice Marshall steadfastly has deflected attempts to designate a favorite opinion. But whatever thoughts she may hold privately, there is little question that the opinion with which she is most widely identified is *Goodridge v. Department of Pub. Health*, 440 Mass. 309 (2003). The opinion in fact reflects an almost perfect union of the two themes we have just discussed: civil rights and discrimination and changing conditions of families and protection of children. First, she recognized the pernicious effects of discrimination:

“The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. ‘The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.’ Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.” (footnotes and internal citations omitted)

Then, in rejecting the claims of those who argued that sanctioning same sex marriage would threaten children, she responded:

“No one disputes that the plaintiff couples are families, that many are parents, and that the children they are raising, like all children, need and should have the fullest opportunity to grow up in a secure, protected family unit. Similarly,

no one disputes that, under the rubric of marriage, the State provides a cornucopia of substantial benefits to married parents and their children ... In this case, we are confronted with an entire, sizeable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license. It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.”

All chief justices write significant opinions. Beyond leading the appellate business of the court and leaving her own distinguished decisional legacy, Chief Justice Marshall, in her role as the presiding officer of the judicial branch, has distinguished herself in four areas: court management, access to justice, public education, and serving as a national leader and advocate for the role of state courts.

In the field of court management, Chief Justice Marshall’s establishment of the Visiting Committee on the Management of the Courts — the “Monan Committee” — spawned a revolution in the management culture of the Massachusetts State courts. As a result of the Visiting Committee’s report, the Massachusetts

courts have implemented radical changes in management practices, including greater accountability, the adoption of objective measurements of performance, the development and monitoring of time standards, the development of a staffing model for the courts, and the development of oversight mechanisms (including external surveys and the Court Management Advisory Board) to ensure continuing progress.

In the arena of access to justice, Chief Justice Marshall established the Steering Committee on Self-Represented Litigants, chaired by Appeals Court Justice Cynthia Cohen. Among other initiatives that followed the Steering Committee's work, the Court promulgated an order permitting limited assistance representation in all trial courts statewide, which allows a lawyer and client to agree that the lawyer will assist the client with part of a legal matter while the client self-represents on other aspects of the case. The Court also promulgated guidelines for judges and court staff to assist them in their interactions with self-represented litigants. To ensure continuing progress on these initiatives and the continued development of more, the Court appointed Judge Dina Fein to the newly-created position of Special Advisor for Access to Justice Initiatives, and established the Access to Justice Commission, now co-chaired by Justice Ralph Gants and David Rosenberg, Esq.

In the area of public education, Chief Justice Marshall has thrown open the courthouse doors, literally and figuratively. Since 2005, in partnership with Suffolk Law School, all SJC oral arguments are available, live and archived, over the internet. In partnership with Discovering Justice, countless groups — in ages ranging from elementary school students to senior citizens — have toured the renovated John Adams Courthouse to learn about the judicial system and the rule of law. The Supreme Judicial Court website now offers a user-friendly portal for information about the courts to attorneys, self-represented litigants, students, and the general public.

Marshall stumped the Commonwealth and — as President of the National Conference of Chief Justices — the country, describing to audiences in countless venues how the state courts pull the laboring oar in administering justice in civil and criminal cases.

Finally, Chief Justice Marshall passed up no opportunity to remind the entire Massachusetts judiciary and the public that a democratic society cannot thrive without justice — equal, fair, accessible, and prompt — and that an independent judiciary is indispensable to providing justice of that quality. She led the courts into the 21st century, she challenged the judiciary to do better, and she led by example. Her energy and electric persona made us believe in ourselves. ■

Editor's Inbox

Advance Conflict Consents: Another View

By J. Charles Mokriski

Editor's Note:

The [article](#) on advance conflict waivers by Mary Strother and Dyane O'Leary in the summer issue of the *Boston Bar Journal* has inspired a spirited discussion. The *Journal* published a [response](#) in the Fall issue, in which Peter Katz argued that advance waivers are generally contrary to clients' interests and should be understood as a waiver of otherwise generally understood ethical obligations. In the article below, J. Charles Mokriski asserts that there are circumstances, particularly with sophisticated clients, where advance waivers strike a proper balance between the needs of clients and firms.

The *Boston Bar Journal* encourages readers to challenge the positions taken in published articles, and will publish responses where we believe that the response furthers the discussion of an issue. As with all submissions, the Board of Editors reserves the right to edit submissions prior to publication. Proposals should be sent to bsashin@bostonbar.org.

Peter Katz's comment on an earlier *Boston Bar Journal* piece concerning advance conflict waivers captures one half of an ongoing debate in legal ethics circles. Such waivers are one-sided affairs, Katz argues, with the benefits going to law firms at the expense of clients. This case seems easy to make in theory, since the whole notion that a client can give "informed consent"—which is what is required under Rule 1.7 of the Rules of Professional Conduct to enable a lawyer to proceed with a representation adverse to another of her clients—to a conflict of interest that might arise in the future seems a non-starter. How can such a consent be "informed" if the facts are unknown at the time it is given?

In fact, this paradox is well appreciated by the thoughtful rule-makers who have massaged Model Rule 1.7 and its official Comment 22 that addresses advance consents through the ABA rule-making process. Comment 22, and ABA Formal Opinion 05-436 that followed its adoption, confront this paradox head-on. Salient portions of Comment 22, incorporated into Opinion 05-436, state as follows:

...The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. ...

...[I]f the client is an experienced user of the legal services involved and reasonably informed regarding the risk that a conflict may arise, such



consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

The Comment's last clause suggests that a general and open-ended consent can be effective if it is given by an experienced user of the legal services who is independently counseled in giving the consent, and if the future matters consented to are unrelated to the subject of the representation in connection with which consent is given. Mr. Katz contends that the issue of deciding whether a matter is "substantially related" is "put into the hands of the lawyer." Not so. There is much guidance in the Rules for determining whether one matter is substantially related to another (see particularly, Comment 3 to Rule 1.9).

The unfairness of a wholesale condemnation of advance consents can be illustrated by a common example of when an advance consent makes consummate good sense for the client giving it.

Consider Law Firm A, a large diversified practice law firm. It has close relationships with several major clients of longstanding, which depend on the firm's availability to represent them in all manner of important matters. Law Firm A has a very highly regarded appellate practice, which includes the go-to appellate team in the community. Company X, which has never used Law Firm A, has a critical, bet-the-company appeal, and it needs the best representation available. Company X's in-house lawyers conclude that it wants Law Firm A's appellate team. The team is enthusiastic about the case, and urges the management of Law Firm A to let them take it on, even though it is a one-shot case, with little prospect of future business from Company X.

Law Firm A management is concerned that the appeal will drag on for a couple of years, and that the pendency of that appeal may conflict it out of any number of possible matters that might come

along in which one of its major institutional clients needs its help. Any of these major clients would be shocked and dismayed if an isolated representation of Company X stands in the way of its being represented by its regular firm, on which it depends and in whom it reposes great confidence. No problem, Mr. Katz might say. When the feared conflict situation arises, Law Firm A need merely ask Company X to consent to the conflict, and Company X might do so...or not. Even though consenting may not disadvantage Company X in the least, it might refuse as a tactical gambit or out of sheer cussedness. Aware of that risk, Firm A's management tells its appellate lawyers that they can take on Company X's appeal only if Company X will consent to future conflicts in unrelated matters in which Company X might be an adverse party. Company X, advised by its in-house counsel, and desperate to have Law Firm A's appellate team in its corner, thinks this is a small price to pay to get that team working on its appeal. Should Company X and its in-house lawyers be unable to make this rational calculation and sign on to the consent? Does it afford no benefit to Company X?

In other words, the situation is *not* a zero-sum game between client and lawyer. Law firm A gets a challenging appellate matter, and Company X gets competent, first rate representation in its appeal. In the real world, consenting to future conflicts is not merely a concession that a powerful firm extracts from clients for its own benefit. It is a precaution it takes to protect other regular clients and potential clients who have or may have need for its services. So long as law firms do not routinely request advance conflict consents as a standard provision in all engagement letters, and so long as protections are built into advance consents by providing for mandatory ethical screens to protect confidential information, consents to future conflicts make sense in appropriate circumstances. ■

Heads Up

Employers “Google” at Their Own Risk: It’s Important to Know What You Know

By Josh Davis and Katherine Rigby

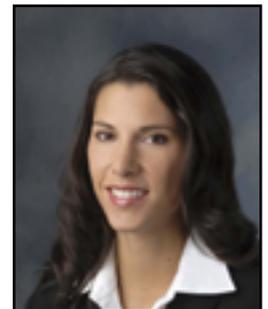
Most of us grew up using the telephone to talk with people. We all now live in a world where “talking” with someone takes place on the computer. Increasingly, people use email rather than the phone and share information virtually rather than in person. They also “talk” on Facebook, MySpace, Twitter and through LinkedIn. Courts and lawyers are still working to make sense of a world in which so much of communication is recorded by computer.

Online communication is multi-faceted and involves images, words, declarations of likes and dislikes and other statements or manifestations of affiliation or belief. Facebook, MySpace, Twitter and LinkedIn are virtual individual web pages full of information concerning their subscribers. People post pictures, declare their political and social affiliations, romantic aspirations, and other personal preferences. That information, however appealing to potential or current employers, is not always reliable. Moreover, the information available online may include much that is not apparent in an in-person interview — clues about sexual orientation, religious affiliation, psychological disability or a penchant for inappropriate humor or conduct. Employers who seek and find such information need to understand that risks accompany discovery and that they need to act carefully, if at all.

One risk is a charge of discrimination following an adverse employment decision. An employer who is unaware of an employee or applicant’s membership in a protected class cannot discriminate. An employer who has “googled” the



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applicant or employee and in so doing learned of the individual's protected status takes adverse action with some measure of risk. Said differently, in such circumstances an employer needs to take care to ensure that it has a legitimate non-discriminatory reason for its decision. Employers who gather information online and then act on it should expect to be accountable for what they find.

In addition to claims of discrimination, employees may assert claims based on privacy or collective interests. Some cases in this area rest on a familiar touchstone – whether the employee or applicant has a legitimate expectation of privacy. Accordingly, employers need not worry about publicly available information or about information to which they have been granted access without pretense (for example by being “Facebook friends”) — but employers may not use guile to gain access where it is not offered or granted. Information protected by limitations on access (members of an invitation-only group or chat room) is likely private and an employer who takes steps to bypass those limitations does so at its own peril. In one case, an employer learned of a group of pilots who were using an online forum to discuss their concerns with their jobs. A management employee falsely represented himself as a pilot in order to gain access to the pilots' discussion group. The Ninth Circuit determined that the conduct (falsely accessing the online forum to review critical comments posted by an employee) violated the Railway Labor Act and

raised a triable issue under the federal wiretap law. See *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 883 - 884 (9th Cir. 2002). In so doing, the Court embraced the notion that the federal labor laws protect concerted activity by employees even when it takes place online.

The National Labor Relations Board (“NLRB”) recently issued a complaint that seeks to broaden the scope of potentially protected online activity. On October 27, 2010, the NLRB's Hartford regional office issued a complaint alleging that an employer illegally terminated an employee who posted a negative comment about her supervisor on her personal Facebook page leading co-workers to post similar negative comments on that page. The company suspended and eventually terminated the employee because the postings violated the company's internet policies (that prohibited negative online commentary about the employer). The NLRB complaint extended to the policy itself, which the NLRB contends interferes with the protected rights of the employees. A hearing is scheduled for January 25, 2011 before an administrative law judge.

In addition to claims based on labor law, or state or federal laws that protect privacy, employers in Massachusetts may see such claims brought under the provisions of the Massachusetts Civil Rights Act. Barry Nolan, former host of Evening Magazine, sued his former employer after it allegedly terminated him because of his public expression of outrage at the decision to award a journalism award to Bill O'Reilly of Fox

Television. At least some of his protest took place online. Although Nolan lost in the District Court, *Nolan v. CN8*, No. 08-12154-RWZ, 2010 WL 3749466 (D. Mass. Sept. 21, 2010), other employees may bring claims alleging Civil Rights Act protection for their online activism or musing.

Employers may nevertheless choose to gather publicly available information because of its potential value. An employee's or applicant's online conduct may offer meaningful indicia of his or her attitude toward work or toward a particular career. In some instances, online information may suggest poor judgment or an interest in moving to another part of the country. This kind of information, if valid, might properly influence a choice among applicants. Whether it is valid or not is an open question; there are very few checks on the reliability of much of the information floating across the web.

Employers looking at unverified content have no online way of determining whether the information is trustworthy. Nevertheless, that content may seem to an employer to warrant a particular decision about a particular applicant or employee. For example, an employer might think twice about hiring an applicant for a job that requires months of training whose Facebook page announces his plan to move to the West Coast with his boyfriend when he graduates from Boston College in three months. If the employer failed to hire the applicant without verifying his intent to move, it could well face a claim

of sexual orientation discrimination. In contrast, if the employer gave the employee the opportunity to address the online content prior to acting, its decision to question the employee about the intent to move would rebut the suggestion of discrimination. It would also allow the employee the opportunity to address the accuracy of the information itself.

As this discussion suggests, employers who decide that the benefits of online searching outweigh the risks need to adopt clear protocols for such review. These protocols must require that each applicant be treated the same way — for example a decision could be made to “google” each applicant (an employee with hiring authority who “googles” only women applicants is a time bomb). Employers should always give an applicant or employee the opportunity to address information uncovered online so as to avoid acting on the basis of false information. And employers should not create false identities or use other artifice to learn more. Information must be publicly available and must be gathered and reviewed in a manner designed to yield reliable decisions and to avoid bias.

There is a lot out there — and the parameters of risk attendant to action based on such information are only starting to appear. Lawyers should counsel care, consistency and forethought and we should all be ready for the next wave of claims based on tweets, status updates and the like. ■

Practice Tips

CORI Reform — Providing Ex-Offenders with Increased Opportunities without Compromising Employers' Needs

By Gregory I. Massing

Criminal offender record information (CORI) reform legislation enacted on August 6, 2010, represents the culmination of a change in philosophy initiated by the Patrick Administration and a conciliation of the interests of law enforcement agencies, crime victim advocacy groups, and businesses. For years prior to the bill's introduction in May 2009, employers and advocates for ex-offenders alike recognized that the CORI system was badly in need of reform. The rules governing the availability of criminal records simply were not working, to the detriment of public safety. As Governor Patrick stated when he introduced his CORI reform bill (House Bill No. 4701: An Act to Enhance Public Safety and Reduce Recidivism by Increasing Employment Opportunities), "A good job is the best tool to prevent repeat offending." The Governor underscored the need for reform by remarking that the old system often turned "even a minor offense into a life sentence by permanently keeping [ex-offenders] out of a job."

Prior to May 2009, the numerous attempts to reform the CORI system had focused on *restricting* access to CORI. Proposals to permit expunging criminal records and to shorten the waiting periods for sealing records (to three years, instead of ten, for misdemeanors, and to seven years, instead of fifteen, for felonies) predominated. Such proposals, which had lingered in the legislature for years, were self-defeating. The business and law enforcement communities, two groups that are very influential with lawmakers, naturally resisted the idea of restricting access to information that is critical to them. Employers have a legitimate business reason to want to know if a prospective employee recently was convicted of a crime or is currently facing criminal charges, while law



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enforcement officials have numerous reasons to inquire into individuals' entire criminal record, including charges that resulted in dismissal.

Worse, proposals to restrict access were doomed to irrelevance for a more fundamental reason: in the information age, rapid increases in the availability, dissemination, and storage of information makes criminal records readily available in various forms. On the other hand, true CORI — complete records of individuals' criminal docket activity maintained by the state's Criminal History Systems Board (CHSB) — is available to only a relatively small segment of employers, generally those who provide services to vulnerable populations. Only about 5,000 private employers, just 3% of private businesses in the Commonwealth, are "CORI certified," having convinced a two-thirds majority of the CHSB that the public interest in providing them with CORI "clearly outweighs the interest in security and privacy" of job applicants. G.L. c. 6, § 172. Most private employers, such as retail stores and the food service industry, do not have access to CORI, and if they do obtain criminal history of prospective employees, they get it from other sources, such as credit reporting agencies, the Internet, or job application forms completed by applicants.

A Shift in Emphasis

Faced with this reality, the Governor's bill turned the debate on its head by proposing to *expand* the availability of official CORI — in exchange for reasonable restrictions on the type of information available and procedural protections for job seekers. Under the Governor's proposal, official CORI would be available on-line, for a modest fee, to any employer, landlord, or

volunteer organization that needs it to screen potential or current employees, tenants, or volunteers. Rather than applying for CORI access from the CHSB, users will be able to obtain CORI instantly, on line, by self-certifying that they want CORI for a legitimate purpose and that they have obtained the subject's permission. Furthermore, employers that rely on official CORI reports to make hiring decisions within 90 days of receiving the report would receive legal protections: they cannot be held liable for negligent hiring solely for failing to check other sources of criminal history, and if they make an adverse employment decision based on an erroneous CORI report, they cannot be held liable for employment discrimination to any greater extent than if the report had been accurate. The bill that the legislature ultimately passed — chapter 256 of the Acts of 2010, which goes into effect in two phases, in part as of November 4, 2010, and most 18 months later, on May 4, 2012 — included this expanded access and accompanying protections.

Reasonable Restrictions on the Content of CORI

At the same time, the CORI reform legislation offers increased protection for ex-offenders whose official records will become more widely available. The waiting periods for sealing criminal records under G.L. c. 276, § 100A, will be decreased to five years for misdemeanors and ten years for felonies, to be counted from the date of conviction or release from any period of incarceration, so long as the individual is not convicted of a crime during that period. Time successfully served on probation or parole will count toward the waiting period, thus rewarding successful re-entry efforts.

Moreover, the CORI report that most users receive on-line will not include any convictions that are eligible for sealing under the new five- and ten-year time frames (except for murder, manslaughter, and felony sex offense convictions, which will be reported) or any closed cases that ended in dismissals. However, if an offender is convicted of a new crime at any time, all prior convictions will appear on the CORI report that employers receive, unless the individual has had the record officially sealed by the department of probation under G.L. c. 276, § 100A. These time periods, which match the time periods for using criminal records to impeach witnesses in court under G.L. c. 233, § 21, reflect the fact that past convictions followed by a lengthy period of law-abiding conduct simply are not relevant in predicting future criminal activity or assessing credibility.

The legislation also recognizes that some employers and organizations require additional access to CORI because of a statutory, regulatory, or accreditation requirement. For example, schools, camps for children, banks, security guard companies, hospitals, day care centers, nursing homes, and assisted living facilities are all either permitted or required by law to obtain all available, unsealed records of conviction and non-conviction records of their employees. These entities will still be able to obtain this additional information.

“Ban the Box” and Other Procedural Protections for Ex-Offenders

In addition to these content restrictions, the subjects of CORI checks will receive new procedural protections. Effective November 4, 2010 — the only major aspect of CORI reform discussed

in this article with a 2010 effective date — employers are no longer permitted to ask job applicants about criminal history on an initial written application form. This so-called “ban the box” provision amends G.L. c. 151B, § 4, by adding a new subsection 9½ making it an unfair employment practice to ask about CORI on an “initial written application form” unless the applicant “is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses” or unless the employer is subject to a federal or state law that prohibits it from employing persons in certain positions because of certain types of criminal convictions. (Banks and credit unions, for example, may not employ individuals convicted of a crime involving dishonesty or breach of trust.) The Massachusetts Commission Against Discrimination (MCAD) is responsible for enforcing c. 151B. The “ban the box” provision effectively forces employers to consider ex-offenders’ job qualifications on the merits, rather than automatically reject applicants who honestly answer the question in the affirmative. Later on in the hiring process employers may inquire about criminal history, but such inquiries will continue to be restricted, as has long been the case, to felony convictions and misdemeanor convictions in the last five years. See G.L. c. 151B, § 4(9), which was not affected by the addition of § 4(9½).

Nothing in the legislation prohibits employers from making adverse decisions based on criminal records; however, the Equal Employment Opportunity Commission and the MCAD have long cautioned that reliance on criminal records may be discriminatory to the extent such reliance has a disparate impact on protected populations.

Also, effective May 4, 2012, if the employer does obtain criminal background information about the applicant later in the hiring process, no matter what the source, the employer must share the information with the applicant before questioning the applicant about it — giving otherwise qualified ex-offenders the opportunity to explain their past and how they have overcome it, as well as giving applicants with no criminal past the chance to question the accuracy of the record. The employer will also be required to give the applicant a copy of the record “if the [employer] makes a decision adverse to the applicant on the basis of his criminal history.” (The same disclosure rules apply to housing, volunteer opportunity, and licensing decisions.) To make sure CORI users are following the rules, subjects of CORI checks will have the ability to obtain free of charge, every 90 days, a list of everyone who has obtained their criminal history except for criminal justice agencies. Complaints about misuse of CORI can be filed with the Criminal Records Review Board, created by the legislation, which will have subpoena power, the authority to issue civil sanctions up to \$5,000, and the ability to refer complaints for criminal prosecution.

Two-Phase Implementation

The two-phase implementation of the CORI reform legislation is a direct result of the exchange of increased access for content restrictions and procedural protections. Because increased access for employers depends

primarily on technological advances, the legislature gave the Commonwealth 18 months to accomplish the necessary upgrades to the ancient mainframe computers that currently house CORI, to interface with the trial courts’ new MassCourts data systems, and create the web-based application for users. In turn, subjects of CORI reports will not receive the increased protections afforded by the legislation (except for the “ban the box” provision) until employers receive their increased access. The legislature required the operational arm of the CHSB, renamed the Massachusetts Department of Criminal Information Systems, to report regularly on its progress in rolling out the new CORI system.

In the 18-month interim period, the 20-member CHSB will continue to entertain employers’ applications for CORI certification and to hear complaints for improper access or dissemination of CORI. The legislation slightly changed the membership of the board, as well as its standard for evaluating applications for access, to place an increased emphasis on workforce development and “the importance and value of successful reintegration of ex-offenders.”

In short, the CORI reform legislation seeks to demystify criminal records and to give ex-offenders seeking employment opportunities great opportunities to advocate for themselves in the job market. ■

In-House Perspective

Ethics Rules Require Close Supervision of Offshore Legal Process Outsourcing

By Martha A. Mazzone

Giant information provider, Thomson Reuters, recently purchased a fast-growing Indian legal process outsourcing (“LPO”) company called Pangea3. Many in the business and legal communities see this multi-million dollar acquisition by Thomson as validation of a significant, possibly paradigmatic, shift in legal services delivery, from full-service law firms to unbundled, specialized services provided by a variety of vendors. The traditional in-house counsel/outside counsel model may be giving way to a disaggregated set of services and providers, in the interests of expertise as well as cost — but what are the ethical ramifications of the disaggregation? This article focuses on one of the more challenging ethical issues that in-house counsel and outside counsel must wrestle with when using an LPO provider: the accountability of the U.S. attorney to supervise that provider and ensure that the client receives the thorough, skillful legal representation required by Model Rules of Professional Conduct 1.1.

LPOs Are Here To Stay

The jargon that develops at the beginning of any new industry can be misleading. “LPO” is nondescript terminology. After all, an in-house counsel giving work to the outside counsel firm across the street is, technically, “legal process outsourcing.” Attorneys in traditional, full-service law firms may believe that their firms *are* LPOs. For purposes of this article, though, the LPO model is very different from a law firm.

LPOs are part of a distinctive trend in legal services today: the parsing out of what actually makes up “legal services” and hiring disparate people and companies to provide those services. It has been described as “taking the



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machine apart.” For example, instead of choosing a law firm for each particular matter and project, a company relies on an expert in-house team, a set of preferred law firms (frequently reduced to a small number through a competitive bidding/selection process often called “convergence”), a foreign LPO firm in India or elsewhere “offshore” that performs document review, IP work, legal research and the like, and domestic contract attorneys who may have the background of Big Law attorneys but have chosen a different lifestyle (or have had it chosen for them in 2008 -09 when law firms were in the grip of massive RIFs.)

Not all LPOs are offshore. But if clients really want to take advantage of the labor arbitrage that LPOs offer, offshore is, by a long-shot, where it’s at. An offshore LPO, which may be captive or not, provides legal services at costs lower than a junior associate could provide at the traditional law firm even five years ago. One provider, highly regarded though small, offers document review services to litigators at a rate of only \$20/hour. Private American lawyers can say whatever they want about quality of service from offshore providers — and it might even be true — but these grumbles are increasingly falling on deaf ears. 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.”

Which is to say, foreign LPO firms are here to stay. That means outside counsel and in-house counsel must address the ethical and practical questions involved in contracting with LPOs.

In-house counsel may be more motivated to hire foreign LPO services at first, given the opportunity to save money, but outside counsel can also benefit from proactively marketing these lower-cost services to their clients as an advantage in engaging their firms.

The ABA and State Bar Ethics Opinions

On August 5, 2008, the American Bar Association issued Formal Ethics Opinion 08-451, approving the use of foreign LPOs and commenting that “the outsourcing trend is a salutary one for our globalized economy.” The primary ethical challenge, as the ABA sees it, is accountability to the client. Rule 1.1 of the Model Rules of Professional Conduct imposes a duty on lawyers to be accountable to their clients for the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The *outsourcing* lawyer retains the Rule 1.1 obligations, and thus must seek to ensure that the *outsourced* lawyer (or non-lawyer) can and does provide competent representation with the requisite skill and diligence.

To ensure competent representation by an outsourced provider, whether you are an in-house counsel seeking to disaggregate legal services and use an LPO for some of your “commodity” legal work, or a private firm litigator who wishes to offer the client less expensive document review, you must also understand and fulfill your obligations under Model Rule 5.1 (and 5.3, with respect to non-lawyers). Rule 5.1 requires a lawyer “with direct supervisory authority” over another lawyer to make “reasonable efforts to ensure” that the

supervised lawyer is complying with the rules of professional conduct, i.e., delivering competent legal services to the client. In short, if you outsource legal work for your client, the buck stops with you when it comes to the adequacy of the outsourcer's work.

Some half dozen or more state bar association ethics committees have weighed in on LPOs specifically, and come to a similar conclusion as the ABA: an attorney *can* meet the ethical obligation to provide competent representation via foreign outsourcing, if the lawyer supervises the outsourced provider. See, e.g., Association of the Bar of the City of New York Commission on Professional & Judicial Ethics, Formal Opinion 2006-3 (2006); North Carolina State Bar, Formal Ethics Opinion 12 (2007); Supreme Court of Ohio, Opinion 2009-6 (August 14, 2009). For example, the North Carolina bar opinion (relying on the influential New York bar opinion) addresses the use of non-lawyers and foreign lawyers not admitted in the United States, refers to them both as "nonlawyers" or "foreign assistants," and states (emphasis added):

When contemplating the use of foreign assistants, the lawyer's initial ethical duty is to exercise due diligence in the selection of the foreign assistant. RPC 216 states that, before contracting with a nonlawyer assistant, a lawyer must take reasonable steps to determine that the nonlawyer assistant is competent. 2002 FEO 9 states that the lawyer must *evaluate the training and ability* of the nonlawyer in determining whether delegation of a task to the nonlawyer is appropriate

... In the *selection* of the foreign assistant, the lawyer should consider obtaining *background information about any intermediary employing the foreign assistants*; obtaining the foreign assistants' *resumés*; conducting reference checks; interviewing the foreign assistants to ascertain their suitability for the particular assignment; *obtaining a work product sample*; and confirming that *appropriate channels of communication are present* to ensure that supervision can be provided in a timely and ongoing manner. ... Another ethical concern is the lawyer's ability adequately to *supervise* the foreign assistants. ... The lawyer must also ensure that the assignment is within the foreign assistant's area of competency ... must review the foreign assistant's work on an ongoing basis to ensure its quality; have ongoing communication with the foreign assistant to ensure that the assignment is understood and that the foreign assistant is discharging the assignment in accordance with the lawyer's directions and expectations; and review thoroughly all work-product of foreign assistants to ensure that it is accurate, reliable, and in the client's interest. ... *If physical separation, language barriers, differences in time zones, or inadequate communication channels do not allow a reasonable and adequate level of supervision to be maintained over the foreign assistant's work, the lawyer should not retain the foreign assistant to provide services.*

Other state bars have not yet opined on foreign LPOs, but there are decades of opinions from

twenty-plus state bars on similar ethical issues posed by the use of temporary or contract lawyers and ultimate accountability for the competency of the representation. See, e.g., District of Columbia Bar Legal Ethics Opinion 16-05 (2005); State Bar of Georgia Formal Advisory Opinion 05-09; State Bar Of California Standing Committee On Professional Responsibility And Conduct Formal Opinion 1992-126 (1992). Massachusetts has not given its legal community formal guidance on the ethical challenges of outsourcing legal work offshore or to domestic temporary attorneys, so Massachusetts attorneys would be wise to act cautiously when evaluating, hiring and supervising LPO firms.

“Reasonable Efforts”

Hiring and supervising outsourcing vendors around the world is inherently trickier than hiring and supervising American contract lawyers who learned the American legal system, went to American law schools, passed American bars, and likely work on-site in your law firm or legal department where you can spend time with them. What constitutes “reasonable efforts to ensure” that an outsourcing vendor is providing competent legal representation? Here is a short list of the type of efforts that the bar opinions cited above and other commentators recommend as best practices when hiring and supervising LPO firms:

Conduct due diligence on the personnel and on the company hiring the personnel.

Any LPO firm worth its salt should be willing to show you the results of background checks of its

employees, give you written evidence of its hiring policies and criteria for employment, and provide you with resumes that are up to date. It is important that you understand, and correctly represent to your client, the educational backgrounds of the LPO employees, and relate those backgrounds to the kind of work the LPO firm will be doing for you. Your contract with an LPO company should state expressly that you must clear anyone who has access to your client’s information.

Conduct due diligence on the country where the LPO group is located. Find out about the legal system. Do attorneys have to pass a bar exam to practice law in the country, for example? Does bar admission require passing moral turpitude/character standards? Does it require a law degree? Also, find out what you can about the country’s data security and personal information security laws to make sure you want to do business in that country. Does the country recognize privilege over in-house counsel – client communications? A reputable LPO provider should be able to answer most of these questions immediately.

Make at least one site visit and have ongoing conference calls with team leaders and key personnel. You may be able to defend your diligence without making an expensive site visit, but it will not be easy. Without a site visit, you are relying on the brochures and websites of the vendors trying to sell you their products. In other words, you know they are “talking the talk,” but do they walk the walk? At the very least, you must conduct interviews with the key individuals who are running the LPO operations day-to-day, and

maintain regular contact with those individuals throughout the engagement.

Develop written procedures and protocols that the LPOs must follow. This is something that few lawyers take the time to do, but it will go far in showing your diligence and reasonable care in supervision of outsourced legal providers. For example, if an LPO is doing contract review for you, establish a written procedure for the review, including expectations for analysis, notation, and escalation of key contractual issues. If you use an LPO for document review, you should provide the document review protocol, and explain what documents will be relevant, significant, or in need of immediate escalation. Particularly if you expect an LPO to review privileged documents, you will need written checklists and review protocols to assure consistency among the vendor's employees, as concepts of privilege vary widely.

Consider security issues carefully. Maintaining the client's confidentiality is of paramount concern in competent legal representation. If you do not have the technical expertise yourself to assess the quality of the LPO's information technology, hire someone who does. Security companies abound that can test network security and make site visits to ensure physical security.

Informed consent. Finally, ask yourself if you can competently represent your client via outsourcing without getting the client's consent for it. Not likely. Make sure that your client understands and agrees specifically to the type of work that is

being outsourced, and the identity and quality of the LPO.

See, e.g., San Diego County Bar Association Formal Legal Ethics Op. 2007-1 (citing ABCNY Formal Op. 2006-3 and enumerating requirements for screening and supervising LPO firms by the principal attorney discharging his duty to act competently); Steven J. Mintz, Ethics Opinions Allow Foreign Legal Outsourcing, ABA Litig. News Online, July 2007, at: http://www.abanet.org/litigation/litigationnews/2007/july/0707_article_outsourcing.html.

This article attempts to frame, in a few hundred words, the complex concerns related to supervising LPO companies, particularly those offshore, in an effective and ethical manner. There are many other challenges to working with LPO firms including, among others, avoiding conflicts of interest, how to bill clients for LPO work, and avoiding aiding and abetting the unauthorized practice of law. The complicated rules of attorney-client privilege and work product, which differ greatly from country to country, also come into play when attorneys consider hiring LPO. If working with an LPO company is on your list of to-dos for 2011 (and it probably should be on your aspirational list), at least read the ABA opinion, and any state opinions applicable, and take the time to understand what your responsibilities are to your client in outsourcing legal work offshore. ■