CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™
ADVANCING ETHICS, COOPERATION AND EDUCATION

2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 4: Friday, April 11, 2014 (10:25 am – 11:25 am)

Reduce Legal Spend, Attract Clients, and Avoid Bad Faith: You Can Have It All

As the dust starts to settle on the raging battle to reduce legal spend, experts representing all affected perspectives will share their experiences on the most successful and innovative solutions now emerging.

Attempted solutions to reduce legal spend raise many dilemmas and challenges. How do you protect your policyholder within a budget? And protect yourself from claims of bad faith should the case go sideways? When should you hire – and how do you manage – two defense counsel in a possible *Cumis* situation? Should you hire different coverage counsel for claims advice and coverage litigation? What privilege and waiver issues arise? How do you attract quality attorneys at reduced rates?

What technology secrets actually work to reduce costs? Which budget items and litigation tasks justify the costs, and which do not?

As outside counsel, how do you sell your rate to clients? Can defense counsel also give the policyholder coverage advice? Does that create a conflict and violate ethical rules?

These expert panelists maneuver these challenges every day and will show you how: yes, you can have it all.

Introduction

Law firms and clients have become fixated in the last decade on hourly rates in efforts to increase revenue and reduce legal spend, respectively. But is this the most productive focus? Attorneys and clients often have adverse interests on hourly rates. If each instead defines their "win" in reference to their bottom lines, as opposed to just this one component, clients and their lawyers can find creative ways to achieve mutual benefit.

We therefore challenge the growing attention given to rates, and address other more effective and productive mechanisms to reduce legal spend. In particular: (1) certain alternative fee structures can generate incentives that will prove much more effective in reducing legal spend for the client and increasing business for the firm -- the coveted "win-win" and (2) innovative new technology and business models within the industry can reduce legal spend as long as properly focused and accompanied by protective measures to meet ethical obligations.

Eye on the Bottom Line

Hourly rates are relevant to both the attorney and client's bottom line, but are not the most important factor for either. They should therefore refocus on other components of the bottom line.

From the client's perspective, hourly rates do not reduce legal spend nearly as much as the resolution strategy employed. An effective resolution strategy can cut total hours on a matter into fractions, whereas rate pressure at best can reduce rates in the range of 10-30% before seriously jeopardizing the quality of representation or relationship with counsel.

To illustrate, consider a scenario in which an insurance company needs advice whether to accept coverage. The insurance company has the choice of two lawyers: "Lawyer A" at $300/hour or "Lawyer B" at $400/hour. Focused on rates, the insurance company retains Lawyer A. Excited to make a good impression by delivering the best product possible, Lawyer A spends a week preparing a 15-page thorough, articulate, spellchecked memorandum detailing choice-of-law, the history of the exclusion, and a multi-state survey of how the provision might be interpreted. The bill comes in for $15,000.

Lawyer B, in contrast, approaches her assignments more strategically. With the same assignment, Lawyer B would have recognized the exclusion does not apply, and set a conference call to discuss whether there might be any unique reason why a full coverage memorandum would be required (e.g., a potential advice-of-counsel defense). Confirming not, Lawyer B would send a one-paragraph email summarizing the analysis and conclusion. The bill would have been $2,500.

Lawyer A's lower hourly rates did not reduce legal spend nearly as effectively as the strategic vision of Lawyer B.

While vigilant in house counsel can curb ineffective representation to some extant, clients truly depend on their lawyers to exercise strategic judgment. Clients frequently see this kind of ineffective representation in heavy litigation matters. If not resolved, such litigation will require extensive depositions, document productions, motions to compel, and other expensive tasks that do not actually benefit the client in proportion to the costs.

The key, therefore, is not just the *efficiency* of the lawyers (i.e., completing a particular task in a reasonable amount of time), but the *effectiveness* of the lawyers (i.e., deciding what tasks actually justify the cost, and more importantly resolving a matter before the tasks need to be performed).

Clients should be more willing to pay higher rates if it means hiring a law firm that has *demonstrated true effectiveness* by resolving matters consistently for a lower total cost.

From the law firm's perspective, forcing increases in minimum rates becomes counterproductive the moment it results in the loss of profitable business. A million dollar client provides a million dollars of revenue no matter how the revenue is calculated. Any attorney smart enough to win a million dollars in business is smart enough to make that million dollars profitable, especially because the cost side of this ledger is not a hard cost. Yet law firms regularly turn away this business on account of rates, even in this era where most firms are experiencing stagnant or negative growth.

Law firms can ensure profitability by simply compensating their attorneys in proportion to the matter's profitability (i.e., revenue less overhead), instead of guaranteed salaries or compensation based on hours billed. For example, assume a six-attorney/two-paralegal practice group averages $5 million in steady revenue with $1 million in hard overhead costs (non-billing staff, rent, technology, etc.). The $4 million leaves plenty to distribute income to the originators and billers, and ensure profit for all concerned. Yet many law firms would refuse to retain this practice if the rates are just $50/hour less than the firm's minimum. There is no logic to a firm's singular focus on rates ahead of the bottom line.

Moreover, if a law firm is smart about its overhead it can maintain healthy profitability at much lower rates. Law firms are tight about rates and yet often reckless in expenses such as office rent, bar associations, supplies, technology, and firm retreats. The profitability would be the same charging $400/hr. on a $250/hr. cost or $500/hr. on a $350/hr. cost. Yet how much business is lost by insisting on $500/hr.? Lawyers should better appreciate the connection between expenses and new business: lower expenses allow for lower rates, which generates new business.

Both clients and law firms can better serve their own and each other's interests by showing flexibility with each other on rates while fixing their eye instead on the bottom line.

Resolution Strategy: the Key to Lower Client Costs, Firm Growth

Resolution strategy is the key to protecting each other's bottom lines.

Resolving matters effectively both saves the client money and ensures the law firm will receive new business at preferred rates, as illustrated above with the $2,500 coverage opinion. In conventional models, the longer a lawyer keeps a case, the more expensive it will be for the client. But if an exit strategy is implemented as soon as possible, the client will save money regardless of rates. There is no good reason to litigate a case for two years only to settle at the same amount at which it could have been settled in the first 60 days. Strategies and exit paths must be identified and chartered from the outset.

Though repeat business should provide sufficient motivation for an attorney to implement this strategy, alternative fee arrangements can help align the attorney and client's interest in resolution, and thus free them from the attachment to hourly rates. Here, we explore three proposals: (1) fixed and capped fees, (2) contingency fees and success bonuses, and (3) tiered volume reductions, explaining how each structure can align the interests of attorney and client towards an efficient and effective resolution strategy, thus giving rise to the win-win.

Fixed and Capped Fee Arrangements Align Interests Towards Quick Resolution

Fixed and capped fees can ensure clients get their bottom-line win by ensuring that they achieve the efficiencies promised. In the example above, involving a coverage opinion costing $15,000, the client could have offered the assignment to its preferred law firms at a set fixed price, knowing in advance how much it was willing to spend but perhaps not how involved the question might be. Assume the project was accepted at $5,000. While the client pays more than it might, it also pays less than it might, and on the whole ensures that its bottom line legal spend is protected. This also gives the law firm a clear target about how much time to spend on a project, thus avoiding the well-meaning pitfall of overworking a project. Over time, the client will reign in its global costs by preventing extraordinary bills, while the winning firm will increase its revenue and learn to provide the most effective and efficient client service.

Bidding many individual projects at fixed-fees can become complicated and time-consuming. To resolve this, clients can expand this deal to cover a wider range of assignments. For example, a client might budget expected counsel fees for all environmental matters in California for the next year, based on prior experience, and market that entire book of business to law firms along with a discount off expected fees as consideration for the volume offered. Most firms will (or should) jump at this opportunity.

Some contend litigation does not lend itself to fixed fee proposals. We challenge this conventional wisdom. Year-to-year, most large corporate clients can accurately project annual litigation expenses, even within geographic and substantive sectors, within a reasonable range.

Moreover, if unusual situations arise, any fixed-fee deal should entitle both client and attorney to claw back unexpected variances at year's end. For example, assume they project $1 million in environmental litigation expenses in California, based on prior experience plus some increase for inflation. However, the client may face an unexpected increase in the subsequent year resulting in $1.5 million in environmental litigation expenses. The law firm can seek to recover additional funds if the client truly experienced a spike in litigation. Similarly, if the litigation volume dropped unexpectedly, clients can request a return of fees paid.

In reality, claw backs rarely come to pass, or are resolved simply, both because the variances are less frequent than skeptics think and because neither side wants to strain a productive business relationship.

To address the complication of predicting costs in litigation, some clients will mandate capped fees instead of fixed fees, based on the law firm's own budget for the case, with adjustments only for dramatic, unexpected developments. This at least keeps law firms to their budgets, a notorious problem for clients. Capped fee arrangements work best in longstanding attorney-client relationships wherein both handle the same kinds of cases frequently, such that each can be expected to anticipate litigation costs within a reasonable range. In addition, if the relationship is deep enough, the attorney and client are more likely to work collaboratively to smooth the rough edges of this arrangement.

The only problem we see with capped fee arrangements is that it removes the law firm's incentive to resolve cases early. It encourages law firms to serve *efficiently* but not *effectively*, i.e., this arrangement requires the law firm to handle each particular task leanly to keep within the budget, but each particular task and not one less. Since we think the key to reducing legal spend is in resolution, we do not think capped fee arrangements strike at the heart of the problem.

Fixed-fees structured on a per-task basis, such as a stipulated amount to spend on any particular motion, deposition, etc., present the same problem, as compared to per-matter or broader fixed fee arrangements. Some insurance companies spend substantial time and money trying to determine the appropriate cost of certain tasks, e.g., the "right" cost of motions to transfer venue, to dismiss, for summary judgment, etc. Practically, calculating the correct cost of such tasks is almost impossible. More fundamentally, it does not strike at the heart of the problem in rising legal costs. Defining the right cost for a particular task might ensure *efficient* client service; but it does not address the most important link, which is *effective* client service. Recalling the prior example, the $15,000 memorandum might have been the "correct" charge given the extent of the research. But the more dramatic savings arises out of the strategy implemented, i.e., cutting out unimportant tasks and resolving matters early.

For fixed fees to work, they must align the interests of attorney and client towards effective resolution. When done properly, fixed fee arrangements ensure that both attorney and client will make more money, without fixating on hourly rates.

Contingency Fees and Success Bonuses Allow Firms To Share the Risk and Reward

Clients, used to their role as defendant, sometimes neglect to consider the contingency fee option when they are forced to initiate litigation as plaintiff. For example, insurers often walk away from subrogation and contribution actions because they do not want to "throw good money after bad," neglecting to consider whether a contingency fee arrangement would ensure profitability. Clients should at least inquire with counsel whether they would accept the case on contingency. Whereas hourly charges can quickly erode the economics of such actions, contingency fee arrangements unite the client and attorney's desire to reach a quick and effective resolution.

Moreover, many law firms may be willing to pursue even a marginal contingent fee case as a more effective marketing tool than lavish trips, presentations, and dinners.

Lawyers: a marginal contingency fee case showcases your talents far better than a fancy dinner. Anyone can read Zagat; clients are much more likely to rehire someone who has recovered found money for them.

Clients: next time you are marketed by a new firm that interests you, offer them a marginal collection case on a contingency fee and see how they perform. Find out firsthand if the attorney is as good as advertised.

Success bonuses allow client and firm to apply the same concept to defense matters. Agree on (1) a benchmark result -- which should include the costs necessary to resolve, (2) reduced rates, and (3) a success bonus to catch the law firm up to its standard rates, with an extra kicker. This allows the client to receive the desired low rates, but gives the law firm the opportunity to earn its full rates and more if it succeeds in achieving an effective resolution. As with the contingency fee arrangements, this aligns the interests of the client and attorney in reaching a desired result effectively and efficiently, minimizes risk, and creates an opportunity for mutual upside.

Today, many claims professionals are working in new areas as the industry experiences a growth of smaller, specialty lines carriers over the large, multi-line companies. Claims professionals in new roles may therefore find themselves reliant on the recommendations of third parties. One of these fee incentive deals gives clients the comfort to give counsel an opportunity with minimal risk, from which experience the claims professionals can make their own judgment moving forward.

Tiered Volume Reductions Are Easy To Implement

For lawyers or clients nervous to jump into fixed fee arrangements, tiered volume reductions give an easy taste of alternative fee structures. Under this arrangement, law firms reduce their rates by an agreed percentage for all work performed after a set tier is reached; multiple tiers can be set offering further discounts. This incentivizes (without requiring) the client to expand the business with the law firm if the firm proves effective and efficient. The law firm should be very happy to expand the relationship even at lower rates. Consequently, both client and attorney are incentivized to benefit each other.

When implementing the program, the first tier would normally be based on the prior year's annual billings from that firm. This makes it easy to implement and apply. In contrast to fee structures that impose volume obligations on the client, clients can easily secure internal approval for tiered discounts. They get these discounts automatically after giving sufficient business. In-house attorneys do not have to spend time evaluating case-specific benchmarks or expected annual costs within a particular sector, nor endure the difficult process of seeking internal authority to negotiate fixed fees. The tiered volume reductions are easy to implement and apply, while still giving both client and attorney the bottom-line "wins" they most want.

Lawyers and clients alike should consider shifting focus from hourly rates to bottom lines. Alternative fee arrangements help align the interests of attorney and client to derive effective resolution strategies, and for mutual gain.

Challenges in Alternative Fee Arrangements (AFAs): An Adjuster's Perspective

While alternative fee arrangements hold promise for containing litigation costs, challenges and potential pitfalls exist which companies and claim professionals should ponder when considering or implementing such techniques. Let's first identify potential problems.

1. Risk of AFAs incentivizing superficial investigation, discovery and assigning cases to least experienced counsel. Flat fee arrangements might come under fire from policyholders/insureds who are concerned that AFAs create monetary incentives to take shortcuts in investigating claims, conducting discovery, or slanting assignment of such cases to less seasoned attorneys who command smaller hourly rates.

2. *Distort claim disposition toward settlement*. AFAs – especially fixed fee arrangements – might distort claim disposition processes toward settlement versus defense to "close the case" and maximize profit on case-handling. Alternative fee arrangements may come under fire from policyholders/insureds who believe that any financial incentive for early case disposition could tilt the decision-making playing field toward settlement. While this is apropos in clear or probable liability cases, in other instances policyholders may hotly dispute liability and/or contest causation between liability and the alleged damages. In engagements where clients or policyholders feel strongly that a case's and the client's business interests lie with an aggressive defense, AFAs that incentivize early resolution may clash with those desires.

3. *De-values the worth of process*. AFAs may override an insured's desire to "see the process through," sacrificing the value of process at the altar of quick file turnover. Many clients and policyholders harbor concerns not only about litigation results but also the decision-making process that gets them to that result. Some clients/policyholders want "their day in court." Others want to make sure that a thorough process validates both liability and causation to provable damages. In balancing the need for speed of claim resolution with respect for a deliberative process, some policyholders/clients may feel that AFA's upset that balance, favoring speed of file closure over due process in documenting legal liability, causation, or the full extent of verifiable damages.

4. *Potential bad faith claims*. AFAs may provide grist for assertions that the insurer places its financial interests above the insured's. Due to the foregoing, some policyholders may believe – rightly or wrongly – that AFAs are a better deal for insurers than the customers. Disgruntled insureds might argue that certain AFAs place the carrier's financial interest in quick resolution and minimal transaction fees above the policyholder's financial interests in a deliberative process and a high-quality, vigorous defense.

Lest you think such concerns are the product of a paranoid or overwrought imagination, they are not. In January of 2013, the CLM's Mini-Conference on Bad Faith, Insurance Coverage and Fraud included a breakout session addressing the bad faith implications of flat fee billing arrangements. Granted, flat fee arrangements are but one variant of AFAs. Nevertheless, the presence of such a topic on an industry conference agenda signifies that concerns are not purely theoretical. Rather, it is a sign that the interrelationship between AFAs and insurance companies' good faith and fiduciary duties can become tangled in troublesome ways. Clearly, the issue is on the radar screen of the insurance, claims and litigation defense industry.

5. *SIR exhaustion documentation spats*. Insureds with self-insured retentions (SIRs) may have difficulty overcoming institutional inertia of insurers wanting a dollars-and-cents breakdowns of legal fees spent to gain credit for SIR exhaustion. For insurers, the customary documentation is a copy of an Expense check accompanied by an itemized time-and-expense bill. Many commercial entities carry a self-insured retention, wherein once they spend a certain amount of dollars, the remaining monetary exposure lies with an excess insurance carrier (or carriers).

To prove to excess carriers that an insured has exhausted its self-insured retention, typically the policyholder documents an expense itemization to the insurance company. Some excess insurers may raise eyebrows and skeptically view a policyholder's notice that it has exhausted its self-insured retention by virtue of what it paid in an alternative fee arrangement. They may think they smell a "sweetheart deal" between the underlying insured and defense counsel.

Excess insurers are used to accustomed to receiving itemized copies of time-and-expense bills and payments made by the client that prove that the latter has met or exceeded its self-insured retention. This itemized breakdown may not be available under alternative fee arrangements and could lead to friction between the client and insurers over whether or not the self-insured retention has been genuinely exhausted.

6. *Time-suck* imposed by already overloaded claim staffs to negotiate such arrangements and "sell" the idea to policyholders. Negotiating alternative fee arrangements, obtaining buy-in from all parties, etc. takes time. Time is the most precious and the scarcest commodity that claim professionals have. Adjusting staffs are trimmed and tight in an era of corporate belt-tightening and expense management. In the real world, the amount of time and effort needed to negotiate alternative fee arrangements and obtain the appropriate buy-in from all stakeholders may be a subtle but powerful impediment to implementation. That is not to say they can't be overcome, only that solutions which sound nice on paper can face real-world obstacles in execution.

Strategies to Mitigate Risks

1. *Early disclosure*. Disclose the use of AFAs to insureds and prospective insureds. The appropriate time to do this is at the <u>insurance placement stage</u>. Conduct a dialogue with prospective policyholders. Let them know that they will be defended for covered claims if they face a lawsuit and that the insurer may use alternative fee arrangements to reach cost-effective solutions. Transparency and disclosure at the front-end is preferable. Too often, dialogue about claims-handling and litigation management are taboo subjects at the insurance placement stage. Nobody wants to dwell on the possibility of loss, often in the zeal to do the deal. Nevertheless, disclosure should be made at the outset of the insurance relationship. The time to have this dialogue is not when suit papers arrive, but when the coverage is being placed or contemplated.

2. *Informed consent*. Obtain policyholder consent for AFAs. Not only disclose alternative fee arrangements to policyholders but garner buy-in. Insurers can do this on a case-by-case basis or – preferably – at the beginning of the policy term.

3. *Sell the mutual benefits*. Explain and communicate to insureds early on the rationale for AFAs and why they are in the mutual interest of both the insurer and insured. Just as in real estate the three prime factors are location, location and location in managing policyholder relations on claims three prime factors are communication, communication and communication. At the insurance placement phase, there should be a dialogue between the carrier and the client about using alternative fee arrangements. The underwriter or a claims representative should explain to the client what kind of alternative fee arrangements the company uses and why the arrangement redounds to the mutual benefit of the policyholder and the insurer. Any questions or concerns about alternative fee arrangements should be flagged and addressed fully at this point.

Admittedly, many if not most of these critiques address flat rate variety of alternative fee arrangements. One solution therefore may be to gravitate toward alternative AFAs that are not linked to flat fees.

None of this commentary is to suggest that alternative fee arrangements are a bad idea. Rather, it is to spotlight potential potholes in the path of implementation. Insurance companies – by their very nature – are in the business of managing risk. Carriers need to make sure that in taming one risk (excessive legal spend) they do not simply replace it with another risk (client disaffection or bad faith exposures).

Reduce Legal Spend by Embracing Technology and Ethics

Trimming the bottom line is at the top of every legal department's to do list. Ideas on how to reduce legal spend have fluxed like the ocean tides. One wave reduced company personnel and hired outside counsel to obtain a net fiscal gain. Unfortunately, that wave caused an onslaught of billable hours and turned the tide back to hiring in-house attorneys to complete the company's legal work. Now, the focus is to obtain legal work that is "efficient with results" regardless of who completes the task for the company. As one of the largest consumers of legal services, the insurance industry is leading this charge.

New technological tools like smart phones, tablets, video conferencing, and the cloud offer additional avenues for efficiency. Scores of vendors also offer software, apps and their "innovative" services to trim the bottom line. But, how can a legal department appropriately embrace technology to reduce legal spend?

Whether this question is posed to the legal or IT department, the thoughtful answer is, "it's complicated." One reason is the forever tension between the goal of reducing legal spend and the need to provide top notch legal services (to both the company and to its clients). Thus, a more focused inquiry is: what technology should be embraced to reduce legal spend and what is the ethical risk of doing so?

The Right Technology for the Right Purpose

In-boxes and conferences are densely populated with vendors hailing cost-effective ways to maximize efficiency and productivity of a legal department. Overall, remote access, smart phones, tablets and laptops are a net positive (as long as one is comfortable being accessible and responsive to work anytime and anywhere, the merits of which is beyond the scope of this article but the subject of numerous others). Efficiency is realized as response times of a day or more have vanished. Decision-makers are an email or text away. Decisions on the fly can be more informed than ever as case files and emails are accessible online or via a mobile device. While costs are not insignificant, implementation is generally made along with system upgrades and the improvements make it worth the investment.

Software is a mixed bag. Licenses are customarily sold by the seat, costs can be steep, training of users is necessary and upgrades are required. New software may not be worth the financial outlay absent a targeted purpose and a specific metric for measuring its success. Legal software is most effective in reducing legal spend when it is utilized by people with first-hand case knowledge and paired with a long-term goal of reviewing and modifying legal strategy.

For example, several of the largest insurance companies have implemented billing software that permits a department to scrutinize legal costs by task, activity, time period, jurisdiction, firm, or timekeeper. Outside counsel bears the responsibility of appropriately coding the task or activity. The company can then run a slew of searches and reports to evaluate the "effectiveness" of their legal tactics. For example, let's say an insurance company wants to determine whether a motion to transfer venue out of certain judicial hellholes are, on the whole, cost effective. The company can utilize billing software to obtain a report detailing the expense of certain motions over a period of time in specific jurisdictions. Company personnel familiar with the cases can review the reports, discuss specific case facts and help the company evaluate whether or not the motions were worth the investment. Based on this analysis, the company can make decisions on how to advise outside counsel going forward. Thus, while the reports are backward looking, when paired with additional facts and expertize, such information can lead to a forward looking, long-term, cost-effective approach.

Still, some companies only utilize the billing software to cut bills inconsistent with billing guidelines. A company's billing department is charged with implementing the software and has little contact with those who oversee the cases on a day-to-day basis. While, in this instance, billing software has the benefit of trimming legal spend, it does not effectuate long term change (other than teaching outside counsel how to work around the software) as the change implemented is focused on how time is entered and not on how time is spent. A more useful way to enforce billing guidelines is to incorporate "trip wires" on cases. A legal department can set an upper time limit or dollar amount on a pre-determined category of time. Both in-house and outside counsel are made aware of this limit and once it is exceeded, a conversation is spurred as to what gains have been achieved in the mater to date and how to best manage the case going forward.

In the end, generally speaking, legal software is most useful at reducing legal spend when the individuals utilizing it are engaged in the legal process and case handling.

The Ethical Cost of Technology

While mobile devices and software can be used to reduce legal spend, the majority of outside legal costs are spent on attorney-type tasks. Less than ten years ago, law firm paralegals reviewed and coded case documents. Now, to cut costs, overseas individuals or computer programs routinely conduct these tasks at a fraction of the price. While this practice is accepted as common, the type of legal work being outsourced is rapidly expanding. Today, outside vendors gather, review, analyze, code, summarize and ready documents for production. What is more, legal vendors are now instructed to be the sole holders of the file and given the responsibility to identify key documents, isolate key individuals, classify notable legal issues, pinpoint key deposition testimony, and ascertain exhibits for trial without the law firm attorney (tasked with handling the case) ever seeing a single case document that is not identified by the vendor. The vast majority of these tasks are unarguably attorney work and have been conducted only by outside vendor retained at the insistence of the client.

Whether or not vendors and their technology can (or should) be used to conduct these legal services creates interesting ethical questions. What are the limits of unbundling legal services or sending attorney work to vendors, contract attorneys or programs all in the effort to reduce legal spend? What are the ethical implications of outsourcing legal work in this manner?

In this instance, two ethical guideposts are central: a lawyer has a duty of competence and confidentiality in representing a client. While other ethical guidelines apply, an analysis of the duties of competence and confidentiality provide preliminary boundaries for outsourcing of legal, attorney-type tasks.

Specific to the duty of competence, ABA Model Rule of Professional Conduct 1.1 requires that a lawyer provide "competent" representation to a client. To be competent, a lawyer must not only have knowledge of the law but also be able to conduct "preparation reasonably necessary for the representation." Utilizing a vendor (who is not the lawyer handling the case) to conduct the only review, selection and summary of key legal documents and testimony, even when the key legal issues are first identified by the attorney, bumps up against the duty of competence as it could interfere with a lawyer's ability to reasonably prepare for a case. A lawyer in this situation should ensure he or she can, among other things, analyze relevant facts, juxtapose those facts among applicable law, and articulate the most persuasive legal arguments available.

Still, the attorney must find a way to get comfortable with the vendor's process. Outside counsel can do so by interviewing those working on the case, conducting weekly conference calls, and diligently providing feedback on work generated and conclusions drawn by the vendor. Outsourcing attorney-type work is an innovative model for legal representation, and, if managed correctly, the vendor-attorney relationship can work ethically and successfully.

A second ethical nuance presented by utilizing outside vendors and their technology to conduct attorney-type work is the risk of disclosure of confidential client information. ABA Model Rule of Professional Conduct 1.6(c) requires that a lawyer shall make "reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client." Now, three risks to the inadvertent disclosure of confidential client information are vendors, people and technology. The outsourcing of attorney-type work hits all three of categories as it requires disclosure of key client documents to third parties who utilize admittedly cutting edge technology. An attorney should always inquire if his or her client's information will be safe and conduct reasonable diligence as to security prior to using any vendor. Still, given that company legal departments are often the ones insisting on the use of the vendors, the ethical risk to the attorney of being the cause of the confidentiality breach reduced.

In the end, it is entirely possible, even likely, utilizing technology in new ways will lead to legal representation that is "efficient with results." It is exciting to see new products and services emerge that make counsel's job easier, more efficient and, ultimately, more successful. It is also exciting to see legal departments that are the forefront of technology. Still, it is imperative that the efforts to embrace technology and reduce legal spend are mindful of the ethical parameters. Not necessarily because ethics are at risk but because ethics serve to keep the balance between diligence and zealousness both in legal advocacy and financial reality.