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HAS THE ATTORNEY-CLIENT RELATIONSHIP SUFFERED IN AN OVER-CONNECTED WORLD?

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The world is changing as it always has and always will. Technology enables us to research law from all over the country, to meet "face-to-face" through video chat, and to review statistics about hundreds of cases in order to better understand the one we are working on. It also allows attorney-selection based on electronically compiled metrics, the review of attorney fee bills through computer programs, and instantaneous electronic communication at all hours of the day – and night. As businesses continually seek to become more profitable and efficient the push to contain costs reaches down into legal departments. For lawyers, both inside and out, the pressure is on. Like it or not, this is law practice 3.0.

In this brave new world questions abound. Are lawyers and law firms fungible? Does a 3 a.m. email or a reply-all really move things along? How do big data and metrics affect the selection of counsel and the management of litigation both in the legal department and at the law firm? At a bigger level, are we glorifying being "busy"? Has the relentless forward march of progress worn us all down a little? Is the personal connection being lost? Is it better now than it used to be- or just different?

Let's explore these issues through the eyes of Orange GC and Orange Outside Counsel. The legal team at Orange Inc. has a problem and they know it. Their core product which skyrocketed them to the pinnacle of corporate America, made their shareholders millionaires many times over, and has a place in more than half of American homes is now a potential liability. The eponymous OPhone, king of smartphones has just been the subject of an expose in the New York Times over claims that the radiation given off by the devices has led to a spate of bizarre behaviors by users resulting in serious injuries and deaths. If that weren't enough, Orange's G.C. has just received notice of a class action lawsuit alleging gross negligence, and strict product liability on behalf of all OPhone users. Plaintiffs' counsel have taken a novel approach and brought suit in an unusual venue, the United States District Court for the District of Swamplandia. It's time to lawyer up. Orange's G.C. (sadly unaware of ALFA) has a decision to make.

SELECTION OF COUNSEL- HOW IS TECHNOLOGY AFFECTING HOW CARRIERS AND LAW DEPARTMENTS HIRE AND RETAIN COUNSEL

Orange GC's very first task is to select outside counsel to defend Orange in the class action. Since this is a new type of legal work, Orange GC does not have an on-going relationship with any lawyer for this type of work. Technology has made many options available to him.

Metrics

One of the most significant changes around selection and retention of outside counsel in recent years has been the increased focus on metrics. Metrics in this context means the use of various data points to evaluate law firm performance and make decisions about hiring outside counsel on the basis of the data. Some of the most often cited data points are:

- Cycle time – The number of days a matter is open
- Performance to Budget – How close is the fee budget
- Results to Predicted Outcomes – How often does the outcome of a case match the lawyer's prediction
- Timely Work Completion – Is work completed on-time; is it completed when the firm says it will be?

While many or all of these factors have been considered law departments in evaluating their outside counsel for decades, the use of metrics puts a numeric measure to these and other indicators. The science of big data, which in the past decade has been applied to all manner of business processes is then used to rank law firm performance. A cottage industry of third-party service providers has sprung up, usually offering both billing support and metrics/analytics to law departments and insurance companies.

As with all big data and statistical analysis a few questions come to the surface. What are the important things to measure? Is there an accurate way of measuring them? How is the result of any metrics analysis utilized? What about the intangibles? And then, over all of these questions, is it worth it.

Assuming metrics are going to be used by a client, developing this type of measurement program requires a carrier or law department to determine how outside counsel is going to be measured. Leaving aside bet-the-company litigation, where outcome is the only measure, this can be determined by a variety of factors such as cost, performance, knowledge of the company culture, and responsiveness, among others. What the client thinks is important and what they measure can vary greatly from client to client. While larger carriers might focus more on cycle time or performance to budget, mutual carriers, focusing on professional liability matters for example, may see results as the preeminent measure of performance.

Where does the data come from? The sources of data for tracking metrics are varied but often come from places like matter management systems; e-billing systems; monthly reports showing number of new matters open, existing matters closed; spending reports; internal evaluations and scorecards concerning outside counsel performance and information from outside counsel itself.

Whether an accurate way to measure exists is a third challenge. Of course, the third-party service provider with its "patented method" claims that they've figured out how to perfectly reduce everything to a number. But as lawyers know as well as anyone else, every system comes with its flaws.

Also, what about the intangible? Personal relationships, the skill set, worth ethic and attitude of firm lawyers, a history and long-time relationship, the knowledge the firm has of the client's business model, company culture and values, diversity. These are all things that are harder to quantify but are essential to any successful representation. If these are valuable to a client, whether it be law department or carrier, does the client's use of metrics allow for these intangible factors to be included in the performance analysis.

Finally, how is this information going to be utilized? Some law departments chose to evaluate outside counsel periodically (at the close of a matter or at set intervals such as every six months) allowing the department to build of repository of data on the outside counsel so when a new matter comes up, finding the best outside counsel to work with is as easy as looking into that evaluation data and picking a highly rated attorney. In terms of frequency of analysis, the assessment periods need to vary depending upon what is being tracked and the need for sufficient time to "course correct".

The bottom line is that this trend towards metrics isn't going away. Lawyers and law firms should understand what the use and purpose of metrics, what some of the most common measures are and how their firm stacks up. Most importantly, law firms should communicate with their current clients to understand what performance measures they value so that the firm can meet these goals.

Propriety of and Prohibitions on Working for a Competitor: Can You Do it, Should You Do It, Can a Client Prohibit It?

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. As laid out in Rule 1.7 of the ABA Model Rules of Professional Conduct, adopted in most jurisdictions, a lawyer cannot represent parties where the parties interests are directly adverse. A lawyer cannot represent parties when there is a significant risk that a lawyer's ability to do her job will be limited by the lawyer's other responsibilities or interests. With regard to this latter restriction, Note 6 indicates that "simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients".

As a matter of first order then, a law firm must determine whether from its own perspective, representing two client's that are competitors in the same industry is permissible. If one client is actively involved in suing the other, even if the lawyer or law firm is not a part of that litigation the interests are generally too adverse to permit simultaneous representation at least without client consent. *See Mylan v. Kirkland & Ellis LLP*, 2015 WL 12733414 (W.D. Pa. 2015) (representation of Teva pharmaceuticals in takeover bid of Mylan's parent company, impermissible when law firm represented Mylan subsidiaries in various other matters). However, even when a Court might determine the representation to be permissible without consent, *see Pioneer-Standard Electrics v. Cap Gemini America, Inc*., No 1:01CV2185, 2002 WL 553460, at *3-4 (N.D. Ohio 2002)(refusing to disqualify firm representing complaining adversary in unrelated transactional matter) proceeding without the original client's informed consent is ill advised. Even when matters are wholly unrelated, the client as to whom the representation is directly adverse is likely to feel betrayed and the relationship is damaged.

Going back to Note 6, though, an entirely different situation arises when a law firm represents, in unrelated matters, two clients with competing economic interests. For example, the law firm could represent a manufacturer of goods in tax litigation counseling and simultaneously represent one of its largest buyers in an unrelated lease dispute. Under 1.7(a) direct adversity would not exist in these scenarios and informed consent of the parties is not required. *See In re Caldor, Inc*., 193 BR 165, 181 (SDNY 1996) (lawyer represents both the creditors committees in a b'cy case of the debtor's competitors – no direct conflict; the fact that clients "are economic competitors in an allegedly consolidating marketplace is too speculative a basis for finding that [the lawyer's] loyalty to each of its clients will be divided as a result of the representation"). In short, as a general proposition, representation of clients having adverse economic interests is permissible and does not present a violation of Rule 1.7.

The fact that something is not ethically impermissible though is no a prohibition on an existing client threatening to move its business elsewhere if the firm chooses to represent a competitor.

While a client certainly can choose to move business elsewhere, what about the circumstance of a written agreement, perhaps in a settlement agreement or otherwise attempting to prevent a firm or lawyer from ever representing a competitor. Here the law is less clear.

ABA Model Rule 5.6 provides that a lawyer shall not participate in offering or making an employment or other type of agreement that restricts the right of a lawyer to practice after termination of the relationship. The comment to Rule 5.6 makes clear that the purpose of this rule is both to maintain lawyers' professional autonomy and to maintain clients' freedom to choose a lawyer.

ABA Formal Opinion 94-381, considered whether an employment agreement which prohibited corporate counsel from representing anyone against the corporation in the future would be impermissible under Rule 5.6. The ABA concluded that it would, reasoning that to restrict a lawyer from ever representing one with interests adverse to the corporation would impermissibly restrain a lawyer from engaging in his profession. Moreover, it would restrict the public from access to lawyers who, by virtue of their background and experience, might be the best available lawyers to represent them. The ABA noted that any concern about the corporation's confidentiality interests would be sufficiently addressed by Rule 1.9 and, therefore, any further restriction would unnecessarily compromise a strong policy in favor of providing the public with a free choice of counsel.

This author was unable to find any cases addressing the issue of a client requiring a law firm to enter into a written agreement prohibiting the representation of economic competitors. It seems possible though that this too would violate ABA Model Rule 5.6.

Finally, in a related matter, can a law department prohibit its own employees from leaving to work for a competitor though a non-compete covenant? The answer seems to be no.

Notwithstanding the widespread acceptance of reasonable non-compete agreements for all other professionals – including doctors and corporate executives – forty-eight states, following the American Bar Association's lead, prohibit all non-compete agreements among lawyers. Again, based in Rule 5.6, the prohibition is designed to protect both an attorney's professional autonomy and a client's right to choose her own counsel.

For years this prohibition has been held to apply to law firms and lawyers. On the subject of in-house counsel though, the rules are less clear. In fact, the most formal pronouncement on the subject comes from a state ethics opinion, rather than a court. In July 2006, the New Jersey Supreme Court Advisory Committee on Professional Ethics addressed the issue directly and announced that the flat prohibition on restrictive covenants applicable to outside counsel is equally applicable to in-house counsel. N.J. Comm. On Prof'l Ethics, Formal Op. 708 (2006). The District of Columbia, Virginia, Pennsylvania and South Carolina have also taken this stance.

ETHICAL CONSIDERATIONS FOR LITIGATION MANAGEMENT & BILLING GUIDELINES

The second thing Orange GC has to do is set a budget. Although this is definitely "bet-the company" litigation, Orange GC has a limited budget with which to work. Again, technology has given him options that may help with this part of his job. In considering what to do, Orange GC should keep in mind that he is not hiring a marketing professional or a PR person, he is hiring counsel, who have a whole set of ethical obligations.

The modern law practice often involves compliance with litigation management and billing guidelines. Such guidelines may place restrictions on discovery, the use of experts and other third-party vendors, the lawyers who may work on a matter, time spent on legal research or travel, time spent preparing for depositions, the number of lawyers permitted to attend to a particular event or task, and the management of e-discovery. They may also require that law firm invoices be submitted to a third-party billing auditor for review and approval.

Where these guidelines are imposed directly by the client, restrictions on the lawyer's work may result in tension or frustration within the relationship, but they rarely rise to the level of an ethical dilemma. But where the guidelines are imposed by an insurance company who has retained the lawyer to represent its insured, several Rules of Professional Conduct are implicated.

In most instances, the insured-client has neither been consulted nor approved the use of the litigation management guidelines or the billing review process. Yet the insured is the attorney's primary client to whom the attorney owes his/her first duty of loyalty and confidentiality.

INFORMED CONSENT & INDEPENDENT PROFESSIONAL JUDGMENT

Rule 1.8 of the Model Rules of Professional Conduct – related to conflicts of interest – provides that:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
> 1) the client gives informed consent;
> 2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
> 3) information relating to representation of a client is protected as required by Rule 1.6.

Regarding the first element, in the insurance defense context, it is often enough for the lawyer to obtain the client's informed consent regarding merely the fact of the payment and the identity of the third-party payer.[1]

However, because third-party payers frequently have interests that differ from those of the client – including interests in minimizing the amount spent on the representation and in learning how the representation is progressing – lawyers are prohibited from accepting or continuing such representations unless the lawyer determines there will be no interference with the lawyer's independent professional judgment. Rule 5.4(c) of the Model Rules of Professional Conduct – entitled "Professional Independence of a Lawyer" – states: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

Guidelines that place the onus of managing the litigation on a non-lawyer claims professional rather than the lawyer – particularly when combined with provisions that require the defense attorney and the claims professional to jointly develop the case analysis, defense plan, or litigation strategy – suggest interference with the lawyer's independence of professional judgment in violation of Rule 1.8(f)(2) or an attempt to direct or regulate the lawyer's professional judgment in violation of Rule 5.4(c). Also, several Bar Association Disciplinary Commissions have cautioned against permitting undue interference, direction, or regulation where the claims professional is required to pre-approve attendance by more than one attorney at an event, the engagement of experts, all research other a threshold amount of time, or the time spent in preparing for depositions.[2]

CONFIDENTIALITY

Additionally, the lawyer must conform to the requirements of Rule 1.6 concerning confidentiality. With a few enumerated exceptions, Rule 1.6 prohibits a lawyer from revealing information relating to the representation of a client "unless the client gives informed consent" or "the disclosure is impliedly authorized to carry out the

[1] If the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is non-consentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

[2] Several state bar associations have considered whether insurance company litigation management and billing guidelines impermissibly interfere with a lawyer's independence of professional judgment in rendering legal services to an insured client. See, e.g., Alabama, North Carolina, Florida, Indiana, Kentucky, Louisiana, Missouri, Montana, North Carolina, Pennsylvania, South Carolina, Utah, Washington, and the District of Columbia.

representation." Moreover, the lawyer must "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Third Party Auditing of Invoices

With increasing frequency, insurance companies require that law firm invoices be submitted to a third-party billing auditor for review and approval (or reductions or write-downs for real or perceived non-compliance with billing guidelines) prior to payment. Sometimes, not only are the bills themselves required to be submitted, but they must be accompanied by a status report or other attorney work product. And the billing guidelines typically require that the invoices contain detailed, itemized time and activity descriptions, including for instance the identity of persons with whom the legal professional has communicated, the purpose of the communication, and the topic(s) discussed.

While this level of detail invariably discloses attorney-client privileged information, whether law firm bills are protected by privilege generally depends upon the situation; and, protection is not automatic. The privilege is likely to apply where invoices are so detailed that they reveal client motive, client secrets, litigation strategy, or the specific nature of legal research which might reveal tactics or strategy.[3] It should be noted that the ethics rule on confidentiality (Rule 1.6) exceeds the scope of the attorney-client privilege, protecting "all information relating to the representation of a client," even if that same information might not be privileged. Thus, even if not privileged, billing records are protected as confidential client information under Rule 1.6.

For this reason, many state bar associations have held that client consent is required before billing information is submitted to a third-party auditing firm. *See, e.g.*, Utah St. B. Ethics Advisory Opinion Comm., Opinion 98-03, 1998 WL 199533 (1998) ("Before a lawyer may submit billing statements to an outside audit service, the lawyer must have the client's consent"); S.C. B. Ethics Advisory Comm., Advisory Opinion 97-22, 1997 WL 861963 (1997) ("Upon receipt of informed consent from the insurer as well as the insured, a lawyer would not be ethically prohibited from submitting his bills directly to a third-party auditing firm, unless the lawyer believes that doing so would substantially affect the representation."); S.C. B. Ethics Advisory Comm., Advisory Opinion 89-03, 1990 WL 709781 (1990) ("Disclosure to an insurance company as a part of its routine audit of the lawyer/agent of any information relating to the representation of a client without the expressed or implied consent of the client would be ethically improper."); Philadelphia B. Assn. Prof. Guidance Comm., Guidance Opinion 87-12 (1987) (client must consent to the release of client information for a union's prepaid legal plan audit).

The Alabama Disciplinary Commission not only recommends express client consent before disclosing billing information to a third-party auditor, but also warns against the risk of waiver of the insured's right to confidentiality or waiver of the attorney-client or work product privileges. "Attorneys who represent the insured pursuant to an employment contract with the insurer should err on the side of non-disclosure when there is any question as to whether disclosure of confidential information to a third party could result in waiver of the client's right to confidentiality or privilege."

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[3] *See generally Old Holdings v. Taplin, Howard, Shaw & Miller, P.A.*, 584 So. 2d 1128 (Fla. 2d D.C.A. 1987) (where billing statements may include detailed descriptions of the nature of the services rendered and could therefore reveal the mental impressions and opinions of the attorneys to opposing counsel, the billing statements may be protected from discovery by the attorney-client privilege); *In re Grand Jury Proceedings*, 896 F.2d 1267, 1273–75 (11th Cir.) (detailed discussion of when the privilege might or might not apply for legal bills), *vacated on other grounds*, 904 F.2d 1498 (11th Cir. 1990); *In re Grand Jury Subpoenas*, 123 F.3d 695, 698 (1st Cir. 1997) (legal bills "are not per se non-privileged merely because they were intended primarily for billing purposes. What matters is not the form of the information, but its content." (cites omitted)).

Law Firm Audits

In addition to routine invoice submission programs involving third-party auditors, insurers may require more in-depth audits from time to time. "A legal audit is a careful examination of the legal bills and the underlying documents for the purpose of detecting billing errors, abuses and inefficiencies." Accountability Services, *Management Analysis of Legal Services Rendered to ABC Insurance Company*, 561 Practicing L. Inst./Litigation 99, 157 (1997). Such an audit may take many forms, from superficial to a comprehensive audit involving a visit to the law firm and interviews of personnel involved in billing. Audits often catch math errors, discrepancies such as one attorney billing one hour for an interoffice conference with the second participating attorney billing two hours, or a single timekeeper billing more than 10 hours per day across multiple matters for the same client on a consecutive number of days.

Regardless of the form of the audit, most ethics advisory opinions reiterate the need for client consent before disclosing matters to an auditor. *See, e.g.*, Fla. B. Ethics Couns., Advisory Opinion 20762 (1998); While the insurance company may argue that the insurance contract between it and the insured grants permission to the insurer to audit the defense firm, this is a legal question on which bar ethics counsel have declined to opine. It is thus imperative to know the policy language and the law of the particular jurisdiction before presuming that permission exists by virtue of the policy of insurance.

In addition to securing client consent, law firms subjected to audits must act carefully preserve any attorney-client privileges attached to the audited materials. In *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997), the IRS sought to discover certain documents from MIT, a tax-exempt university, including outside counsel legal bills for representation of MIT in 1991. *See United States v. Massachusetts Institute of Technology*, 957 F. Supp. 301, 302 (D. Mass. 1997). Asserting the attorney-client privilege and work-product doctrine, MIT refused to produce the bills. But these same bills had been submitted to an auditing agency pursuant to MIT's contacts with the Department of Defense. *See United States v. Massachusetts Institute of Technology*, 129 F.3d at 683. It was the job of the auditing agency to review the bills "to be sure that the government is not overcharged for services." *Id*. So the IRS attempted to get the bills from the auditing agency, which refused to comply, citing concerns about "protect[ing] the contractor's information from unauthorized disclosure." *See United States v. Massachusetts Institute of Technology*, 957 F. Supp. at 302.

When the issue came before the federal district court in Massachusetts, MIT argued that the bills were privileged because they revealed "motive … in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law." *See United States v. Massachusetts Institute of Technology*, 957 F. Supp. 301, 303. The district court held MIT had "waived the privilege by voluntarily disclosing" the bills to the auditing agency. *Id*. This holding was upheld on appeal to the First Circuit, who isolated the key issue on appeal as "whether MIT's disclosure of [legal bills] to another government agency [for an audit] caused it to lose the [attorney-client] privilege." *See United States v. Massachusetts Institute of Technology*, 129 F.3d at 683, 686.

MIT argued its disclosure of the bills for audit was not "voluntary" due to the "practical pressures and the legal constraints to which it was subject as a government contractor." *Id*. at 868. In rejecting this argument, the First Circuit held, "assuming arguendo that [these pressures] existed, MIT chose to place itself in this position by becoming a government contractor." *Id*. "MIT's disclosure to the audit agency resulted from its own voluntary choice, even if that choice was made at the time it became a defense contractor and subjected itself to the alleged obligation of disclosure." *Id*. The First Circuit then issued this "warning":

> We add, finally, a word about reliance and fair warning. MIT may have had some reason to think that the audit agency would not disclose the documents to the IRS

> (and the agency did not do so). But MIT had far less reason to think that it could disclose documents to the audit agency and still maintain the privilege when IRS then sought the same documents [cites omitted]. The choice to disclose may have been reasonable but it was still a foreseeable gamble.

Id.

There are some obvious differences between an insurance defense firm submitting privileged materials as part of an insurance company audit, and a government contractor voluntarily submitting information to one government agency and risking waiver of the claim of privilege as to a separate government agency. Nonetheless, the risk exists that voluntarily submitting legal bills and supporting materials to a third-party auditor might subsequently be deemed a waiver of any evidentiary attorney-client privilege. *See, e.g., United States of America v. South Chicago Bank*, 1998 U.S. Dist. LEXIS 17445, *7 (E.D. Ill. 1998) (Case no. 97 CR 849) (holding that "auditors are not generally part of the circle of persons, including secretaries and interpreters, for example, with whom confidential information may be shared without destroying the privilege.").

GUIDELINE COMPLIANCE

Taking their cue from a chorus of advisory opinions across the country, most insurance company guidelines these days specifically state that they are not intended to interfere with or replace the lawyer's independent professional judgment in evaluating what is in the best interests of the lawyer's client, the insured. Still, the rules that require pre-approval for certain tasks often feel restrictive for practitioners. Open and frequent communication is the best means of dealing with the restrictive rules, including significant development reports that not only report on current status but advise on next steps and include the "why" behind a particular recommended course of action. If two attorneys are required to adequately prepare a witness for deposition, then make a recommendation, explain why, and ask for permission. Perhaps the deposition is of a critical fact witness or a corporate designee, and the adverse attorney is known to effectively use Reptilian tactics to gain devastating admissions. Specifically ask for pre-approval or for approval by a date certain after which it will be presumed. Document the date approval was obtained and from whom in all subsequent time entries related to the task (keeping a spreadsheet of billing approvals makes this documentation more efficient for each timekeeper). Asking for and obtaining approval can be perceived as an unnecessary and burdensome extra step that takes previous time, or it can be viewed as an opportunity to both substantively update the client and the claims professional and show a commitment to service, guideline compliance, and collaboration.

AVOIDING AUDITING PROBLEMS

Besides open and frequent communication that is undertaken with an attitude of collaboration and opportunity, there are other tangible steps both practitioners and clients can take to avoid problems with third-party auditing:

Clients

1. Be careful in selecting third-party auditors who have direct litigation experience.
2. Avoid reimbursement arrangements with auditors that encourage or incentivize overly aggressive write-downs.
3. Encourage auditors to apply guidelines so that the rule's underlying purpose is achieved rather than applying a literal interpretation with absurd results.
4. Allow for a meaningful appeal or review process for all write-downs, with at least one level of escalation directly to the client contact to whom the attorney reports.

5. Where an auditor questions the amount of time spent on a project as excessive, request additional explanation or submit the matter and an inquiry rather than a write-down that may appear arbitrary and insulting.

Practitioners

1. Create a "cheat sheet" or summary of key billing requirements or rules for each client or carrier that may be used as an easily accessible reference for timekeepers. Keep one spreadsheet per team of billing approvals obtained with the date and the person providing the approval so that timekeepers and "cut and paste" the required pre-approval language into their applicable billing entries.
2. Provide regular (at least annual) in-house training or refresher courses on billing and guideline compliance. Provide "Billing 101" training for all new timekeepers.
3. Have rough draft bills or pre-bills reviewed and revised by persons invested in the client relationship, committed to guideline compliance, and intimately familiar with the applicable billing guidelines.
4. Track write-downs, appeal results, and realization rights across clients.
5. Push work down to the appropriate staffing level; consider reducing the billing rate to the appropriate level where the work was not delegated for whatever reason (noting on the invoice "billed at paralegal rate" or "billed at associate rate").
6. Show "no charge" entries on the bill to show the value of services performed but not billed. Where the time spent is reduced, consider showing "actual time spent" in a parenthetical at the end of the time entry description.

USE OF METRICS FOR LAWYER/LAW FIRM EVALUATION

In addition to combatting fraudulent or inaccurate billing and monitoring and controlling costs, insurance companies and corporate clients alike may audit bills and use sophisticated billing software to benchmark and evaluate the performance of each firm or lawyer doing work for them, and to analyze their respective value, quality, and efficiency in the delivery of legal services.

The Rise of Technology and the Concomitant Fall of the Attorney-Client Relationship

And, finally, Orange GC is tasked with maintaining an efficient and productive relationship with the lawyer he has selected. It hardly does either of them any good if, once hired, they disagree on critical decisions or don't understand the other's perspectives.

It is axiomatic that technology has had an enormous impact on nearly every aspect of the practice of law. Telephone messages no longer require hand-written notes from secretaries and Shepardizing no longer requires the use of multiple books. Further, reading and writing a few letters a day has morphed into reading and responding to multiple dozens of e-mails and research has changed from scouring books to scouring websites. These changes are in most respects welcome. They permit more educated and informed decision-making about everything from the creation of the attorney-client relationship (both client and attorney can learn much about each other by a simple Google search) to the resolution of a claim or negotiation of a deal (attorneys and clients can easily exchange multiple drafts of documents). However, some of the very changes that we laud are the ones that can lead to reduced respect for others who are involved in the legal process, raising the level of conflict and discord.

This conflict and discord is reflected in the increase in the number of legal malpractice claims against defense counsel. *See, Sentry Select Ins. Co. v. Maybank Law Firm, LLC*, 826 S.E.2d 270 (S.C. 2019) (insurer may maintain

legal malpractice claim against attorney whom it hired to defend insured), but *cf. Arch Ins. Co. v. Kubicki Draper LLP*. 266 So. 3d 1210 (Fl. 2019) (insurer lacked standing to sue the law firm for legal malpractice because the law firm was in privity with the insured as the client, not the insurer). *See also*, Ronald E. Mallen, 4 Legal Malpractice §30.39 (2019 ed.). These claims can be reduced by improving the relationship between Orange GC and Orange Outside Counsel.

A children's song piquantly describes several negative aspects of technology that threaten the development and continuation of a strong attorney-client relationship.

> We're
> Very, very busy
> And we've got a lot to do
> And we haven't got a minute
> To explain it all to you
> For on SundayMondayTuesday
> There are people we must see
> And on WednesdayThursdayFriday
> We're as busy as can be
> With our most important meetings
> And our most important calls
> And we have to do so many things
> And post them on the walls
>
> We have to hurry far away
> And then we hurry near
> And we have to hurry everywhere
> And be both there and here
> And we have to send out messages
> By e-mail, phone, and fax
> And we're talking every minute
> And we really can't relax
> And we think there is a reason
> To be running neck-and-neck
> And it must be quite important
> But we don't have time to check
>
> Then
> We have to hurry to the south
> And then we hurry north
> And we're talking every minute
> As we hurry back and forth
> And we have to hurry to the east
> And then we hurry west
> And we're talking every minute
> And we don't have time to rest
> And we have to do it faster
> Or it never will be done

> And we have no time for listening
> Or anything that's fun

Sandra Boynton and Kevin Kline, *Busy, Busy, Busy*, Philadelphia Chickens, 2002.

The art of listening and taking time for it is a subject matter about which entire books have been written and courses developed. *See, e.g.*, Michael P Nichols, *The Lost Art of Listening: How Learning to Listen Can Improve Relationships*; Univ. Mass. at Boston, Center for Collaborative Leadership, *Effective Communication Master Class: The Art of Listening*. When clients and their lawyers communicated by landline phone and letter, they had the ability to listen in a way that is no longer possible. Even short phone calls usually included some personal connection—like a discussion about a weekend ball game or a mention of plans for a wedding. E-mail and text message, on the other hand, by their very nature are intended to be short, direct, and efficient. They are stripped of personal touches, which deprives the relationship of those critical personal touches. See, https://www.helpguide.org/articles/mental-health/emotional-intelligence-eq.htm, discussing the importance of emotional intelligence and connection. The advent and growth of emoticons and emojis evidences the inability to convey emotion or tone by e-mail and text, but the very crucial role that they play in effective communication. *See, https://www.wikipedia.org/wiki/List_of_emoticons*.

In this world of e-mail, OPhone, and fax, Orange GC and Orange Outside Counsel should make a concerted effort to have actual personal time with each other so they can listen to and get to know each other. Making it a point to call Orange GC and Orange Outside Counsel on a regular basis to discuss legal matters leads to a personal connection that allows both sides to understand how the other thinks and approaches issues. This allows for better assessment of the matter being handled so that the client's interests are understood and protected and the lawyer's expertise is leveraged. Taking the time to "explain it all" to the person with whom one is partnering on a legal matter is time-consuming, but essential to building the relationship.

Time constraints and considerations are frequently on the minds of both lawyer and client and should be taken into account. Although e-mail and the internet make it possible to be connected far beyond 9-5, Monday-Friday, not everyone is (nor should they be) connected 24 hours a day, 7 days a week. A recent internet post illustrates: "I possess a device, in my pocket, that is capable of accessing the entirety of information known to man. I use it to look at pictures of cats and get in arguments with strangers." Nuseramed, *https://memerial.net/6067-i-possess-a-device-in-my-pocket.* The quote is funny because it's true, but also because it highlights another truth: the need to take time to look at cat videos or whatever else you do to relax. Again, entire books have been written and courses taught on the need to disconnect and relax, but in the attorney-client relationship, it is often expected that that be done on the other's schedule. *See, https://www.cbsnews.com/news/why-you-need-to-disconnect/*. So, having sent an e-mail, the sender expects the lawyer or client to have accessed the entirety of information known to man and crafted a response within 30 minutes. That fast response allows Orange GC an Orange Outside Counsel to maintain their very busy schedules, but it does not allows allow adequate time to reflect.

When communication was done in large part by US mail or landline telephone call, both the lawyer and the client had the luxury of time to research, review file materials, and think about the question before a response was expected. There is value in that reflection. The digital world is one in which a "wealth of information creates a poverty of attention." *Designing Organizations for an Information-Rich World*, Computers, Communication, and the Public Interest, The Johns Hopkins Press (1971), pp. 40–41. And many, if not all, legal problems require a lot of attention, thought, and consideration to solve.

Orange GC and Orange Outside Counsel should give each other time to think the question, issue, or problem through. They should also be wary of responding quickly to an e-mail without researching the issue or before reviewing at least some of the 213 e-mails in the file or while at a ballet recital or during preparation for a Board

presentation. Reflection and full attention may just prevent that e-mail, which could support a products liability class action, discussing the unvetted research from Dr. Frankenstein that concludes the OPhone gives off radiation that leads to bizarre behaviors.

That many lawyers and clients fail in this regard is illustrated by the fact that miscommunication between the lawyer and client is responsible for nearly 15% of legal malpractice claims. ABA, 2012–2015 *Profile of Legal Malpractice Claims*. The miscommunication can take the form of failing to follow the client's instructions, failing to obtain client consent, failing to inform the client, or failing to communicate the administrative aspects of the legal matter (e.g., who is to take what action to effectuate the terms of a settlement).

All of these problems can be exacerbated by technology. One e-mail among hundreds is easy to miss; not so a phone call or a hard copy letter. Ensuring clear communication and expectations leads to fewer bad or unexpected results, which leads to fewer claims, contemplated or made, of legal malpractice. *See, Attallah v. Milbank, Tweed, Hadley & McCloy, LLP*, 168 A.D.3d 1026, 93 N.Y.S.3d 353 (2019) (lawyer's written engagement agreement precluded legal malpractice claim that was based on lawyer's failure to take action that was not promised to be undertaken).

In addition to ensuring that instructions are clear, Orange GC and Orange Outside Counsel should ensure that their expectations of each other are clear. The ability to electronically file means that it is no longer is it necessary to allow substantial lead time to get a pleading filed. Anything filed before midnight generally is timely. *Justice v. Town of Cicero*, 682 F.3d 662 (7th Cir. 2012) (filing any time before midnight on due date is timely). However, this does not mean that Orange GC should delay comments to Orange Outside Counsel until after 5:00 p.m. nor that Orange Outside Counsel should counsel should wait until Monday to send a draft to Orange GC of the pleading due on Tuesday. Both should respect that the other has other obligations and limitations, including the availability of support staff. *See, https://ecf.gand.uscourts.gov/cgi-bin/show_temp.pl?file=merged_41536_26785-1579474272.pdf&type=application/pdf* (opponent moved to strike brief that was filed at 12:01 a.m., technically day after due date, by attorney who at the time was without support staff).

The need to recognize and impose limitations on the digital world is perhaps most readily apparent in the context of e-discovery. Consider, for example, the e-discovery that is possible in Orange's class action lawsuit. From e-mail to marketing materials to medical records to engineering drawings, the electronic information available is tremendous. Both Orange GC and Orange Outside Counsel need to clearly communicate about the costs and benefits of various e-discovery options.

Orange GC is tasked with managing with efficiency and good results a limited budget for legal spend. Orange Outside Counsel is tasked with obtaining a favorable result in the litigation, or the investigation, or the negotiation. Client needs foreseeable costs. Counsel needs unforeseeable events to be avoided. This is an important and delicate balance. *See, Morris v. Scenera Research, LLC*, 2011 NCBC LEXIS 34 (Wake Cty N.C. Superior Court 2011) for a good discussion on e-documents, privilege, and production. *See also, United States v. Kubini*, 304 F.R.D. 208 (W.D. Pa. 2015) and *In re State Farm Lloyds*, 520 S.W.3d 595, 610 (Tx. 2017), quoting Hon. Nathan L. Hecht & Robert H. Pem Berton, *A Guide to the 1999 Texas Discovery Rules Revisions II.A* (1998):

> Innovations in computer word processing, facsimile transmissions, and photocopying quickly made it possible for litigants of even modest means to drive up litigation costs…by "burying" their opponents in voluminous "boilerplate" discovery requests or objections, often with little more than the touch of a button. Technological changes have greatly increased the volume of documents and things that can be discoverable in a lawsuit. These developments in discovery practice

> have been compounded by an unfortunate weakening of professional norms that in earlier times would have made misuse or abuse of discovery unthinkable.

Only by frequent, frank, and clear communication can Orange GC and Orange Outside Counsel come to understand the challenges that the other faces. And with that understanding comes a respect and an appreciation for the contributions of each to resolution of the problem.

As lawyers and their clients work towards resolution, as the song notes, they often hurry south and north, east and west. *See, Bloomgarden v Lanza*, 143 A.D.3d 850, 40 N.Y.S.3d 142 (2016) (California attorneys sued in New York by New York clients for work done in Florida). Clients open new offices in new states and continue to look to the same lawyer for help. Lawyers set up shop in new states and continue to work for the same clients. This mobility was possible before the digital age, but the advent of the internet and digital communication has made it much more prevalent. Time-zones are almost irrelevant and in-person meetings are optional. E-mails sent at 8:00 a.m. EST can be answered by the recipient at 8:00 a.m. PST. Videoconferencing can be used to make a round table presentation.

This ability to practice over state lines increases the work that a lawyer can do for the client and reduces the client's load by removing from him or her the need to find lawyers in every state. However, substantive errors, like failure to know or properly apply substantive law or the failure to know or ascertain a deadline, account for more than 46% of legal malpractice claims. *See, Allen v. James*, 381 F. Supp. 2d 495 (E.D. Va. 2005) (South Carolina lawyers failed to file suit in Virginia within Virginia statute of limitations). It is critical that lawyers and clients, regardless of whether they from Swamplandia or some other venue, take the time to research, discuss, and understand the differences in state laws and local jurisdictions and how that will impact the legal matter. *See, Mister Sprout, Inc. v. Williams Farms Produce Sales, Inc*., 881 F. Supp. 2d 482 (S.D. N.Y. 2012), discussing costs and expenses related to practicing across state lines.

The ability to practice remotely and over state lines also has given rise to another phenomenon that can affect the relationship of attorney and client: the decision by bodies that govern the practice of law that the lawyer is practicing in the state in which he or she is located (where the legal service is provided), rather than where the client is located (where the legal service is consumed). *See, In re Application of Jones*, 156 Ohio St.3d 1 (2018); *In re Application of Egan*, 151 Ohio St.3d 525 (2017); *Birdbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 142 (1998); Arizona State Bar Ethics Opinion 96-06; Unauthorized Practice of Law, Cal. Practice guide Prof. resp. ¶1:180.12. While certainly one would expect Orange to retain local Swamplandia counsel to defend the lawsuit in the District Court of Swamplandia, that does not preclude Orange's First Amendment Outside Counsel expert, who lives in Oregon, from advising Orange on what to say in press releases. Both lawyers and clients need to be cognizant and respectful of the applicable rules. ABA Model Rule of Prof Conduct 5.5(a), 5.5(b), 5.5(c). Good communication and a solid relationship permit discussion of the client's expectations and the lawyer's limitations.

The digital age both allows and demands that clients and lawyers be busier, more productive, and more knowledgeable. This very busyness and the enormity of the information that electronic information and communication provides can put a strain on the attorney-client relationship. Ensuring on-going and multi-means communication will help counsel and client to maintain respect for each other, their limitations, and boundaries as they work to resolve the legal matters at hand, even if it is a novel products liability suit over OPhones.

CONCLUSION

The digital age has made our lives easier, but also has made it more challenging. Both lawyers and clients need to communicate clearly and often so as to take advantage of the good that the digital age has to offer while holding on to the good that traditional practice of law has to offer. The lawyer has ethical obligations to the client, the GC has fiduciary duties to shareholders. Each has limitations, but each also has important contributions that should be leveraged to produce the best legal result possible under the circumstances. That good legal result comes when both sides remain respectful and civil, despite the multiple demands made on each of them.