Compliance Best Practices: On-Demand Legal & Regulatory Analysis

Legal Insights White Paper
# Table of Contents

I. **Introduction / Executive Summary** ................................................................. 3  

II. **Legal Ethics and Outsourced Analytical Research** ........................................ 4  
    A. Legal Ethics Framework ............................................................................ 4  
    B. LPO and the Practice of Law .................................................................. 6  

III. **Professional Responsibility Protections and LPO Services** .......................... 8  
    A. Conflicts of Interest .................................................................................. 8  
    B. Confidentiality ......................................................................................... 9  

IV. **The LPO Business Case for Corporate Legal and Compliance Departments** 11  
    A. On-Demand Experience .......................................................................... 12  
    B. LPO Pricing Models ................................................................................ 13  

V. **Conclusion** .................................................................................................. 14  

VI. **Best Practices Checklist** ............................................................................ 15
I. Introduction/Executive Summary

In an age of increasing regulatory complexity, corporations are faced with many challenges. Multi-state and national operations bring additional rules and potential enforcement actions, while activist agencies at the federal level issue new standards at a rapid pace. Without ready resources, corporate legal and compliance offices must often play catch-up to the current state of the law.

Corporate legal and compliance departments are being asked to find new methods to reduce costs, improve performance, and avoid risks. While research is a fundamental part of the legal and compliance workload, the larger organizational focus is increasingly on compliance program implementation, enhancement, and improvement. Staying abreast of the dizzying array of ever-changing compliance regulations is a time-consuming task that diverts resources away from effective program management. Outside law firms or additional internal staff may appear to be the only responses, but those choices come with high costs.

There is another option. Contracting with legal process outsourcers (LPOs) to create and sustain an analytical view of the regulatory landscape provides an efficient and cost-effective means to avoid compliance and operational issues before they arise. LPOs offer a range of legal support services that at one time were handled inside law firms, from discovery work to court-ready printing. Most LPOs specialize in a particular area, with a select few offering expert-level legal research and writing to corporate counsel and compliance professionals.

Although outsourcing legal research has been an option for many decades, it may be unfamiliar to many legal professionals. Corporate attorneys may query whether professional responsibility standards apply to work completed by a third party other than a law firm. This White Paper examines how:

1. Corporate legal and compliance departments can forge ethical, customer-focused, and cost-effective relationships with LPO companies that provide legal research.

2. Professional responsibility rules applicable to practicing attorneys also pertain to outsourced legal research firms, providing customer protections parallel to those found in an attorney-client relationship.

3. Best practices demonstrate how corporations may leverage LPO firms that offer legal research to their strategic and cost advantage.
II. Legal Ethics and Outsourced Analytical Research

Some corporate counsel and compliance professionals express reservations about LPO for research functions, seeing that work as fundamental to a lawyer’s role. While legal research and analysis is an advanced task that requires keen judgment, the ethical status of legal outsourcing is well-established for these functions.

A. Legal Ethics Framework

Research outsourcing has been carefully considered under a professional responsibility rubric. In 2008, the ABA’s Standing Committee on Ethics and Professional Responsibility issued a formal opinion describing acceptable guidelines for outsourcing legal and other support services.¹ To satisfy the requirement to provide competent legal advice, a supervising attorney must supervise the LPO vendor’s delivery of services and adherence to ethical rules. This supervision and the supervising attorney’s input renders any resulting advice—to a private or corporate client—ethical.

The ABA provided a list of best practices for US-based LPO vendors to help ensure positive outsourcing results:

- Check the vendor’s references.
- Interview key staff or review credentials.
- Learn about the vendor’s practices for hiring and handling client information.
- If sensitive client information will be shared, review the vendor’s security practices.²

State and local bar associations followed the ABA’s lead, issuing a series of opinions echoing the national association’s position. So long as appropriate supervision is given, outsourcing legal research and writing is


2 Id. The ABA provided additional guidelines for foreign firms, or those using foreign attorneys, as follows:
   - Ascertain whether the country in which services are being delivered has a legal educational system comparable to the U.S.
   - Determine whether the country of delivery has a professional regulatory system that provides ethical principles to local attorneys.
   - Determine whether there is a disciplinary system enforcing professional accountability.
   - Review the local laws to ensure safety of client information from seizure or compromise regardless of confidentiality claims.

2009: In Hildebrandt’s Law Department Survey, 22% of corporate law departments reported using LPO vendors.
2013: Hildebrandt’s survey placed this figure at 35%, while Corporate Counsel reported over half of corporate legal departments were actively outsourcing some functions.
2020: Projections are for this trend to increase by 2020.
ethically permissible.\textsuperscript{3} Ethics opinions relating to contract or temporary attorneys indicate that they are subject to the same rules of ethics as other attorneys, and these same rules apply to attorneys working for legal research companies. In both cases, the supervising or requesting attorneys in the client corporation retain ultimate responsibility for directing and reviewing the work, as they would the work of a subordinate lawyer employed in their own law department.\textsuperscript{4}

The 2008 ABA opinion was based on the Model Rules and commentary then in place. In 2012, the ABA voted in a revision to comment 6 to Model Rule of Professional Conduct 1.1:

\begin{quote}
[The] reasonableness of the decision to retain or contract with other lawyers outside the lawyer’s own firm will depend upon the circumstances, including the education, experience and reputation of the non-firm lawyers; the nature of the services assigned to the non-firm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.\textsuperscript{5}
\end{quote}

In short, when assigning legal research or writing functions to an LPO provider, corporate counsel are well within ethical boundaries so long as they (1) assure themselves of the vendor’s credentials, and (2) retain final oversight.


\textsuperscript{4} See, e.g., Minn. R. Prof. Cond. 5.2 (stating responsibilities of a subordinate lawyer).

\textsuperscript{5} Model Code of Professional Responsibility Rule 1.1, cmt. 6, available at \url{http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html}. 
B. LPO and the Practice of Law

Outsourced research services for corporate counsel or compliance needs should be provided by attorneys. These attorneys need not, however, be licensed in the organization’s primary jurisdiction. For much compliance research, the licensure question is of no particular consequence: completion of multijurisdictional compliance research by individually state-licensed attorneys would be impossible in most corporate legal departments. But does such research amount to the unauthorized practice of law?

Legal research performed for counsel is not the practice of law. In 1967, the American Bar Association issued a formal opinion definitively stating that an attorney may use other staff “to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings that are part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible for it to the client.”\(^6\) The ABA’s position has remained constant on this issue for almost 50 years.

The opinion is not surprising when one considers the actual practice of law. While not lawyers themselves, law clerks have provided attorneys with a range of services for hundreds of years. In 1827, Charles Dickens became a law clerk, a role that informed legal plots in many of his later novels.\(^7\) Clerks—and now outside lawyers and paralegals—frequently conduct legal research and analysis for attorney review.

The same is true for lawyers who complete work for attorney-customers. The work of lawyers with legal research firms has the same ethics profile as work by clerks or paralegals: all these entities complete work for the attorney-customer’s

---

\(^6\) ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 316 (1967). See also ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1437 (1979) (considering and upholding “the propriety of publicizing a lawyer’s use of assistants drawn from other disciplines. The Model Code contains no prohibition against the use of such assistants by a lawyer.”).

review and ultimate responsibility. The difference is in the extent of the work. An LPO lawyer’s research and resulting in-depth analysis remains an ethical adjunct to the attorney’s own direct representation of clients or organizations.

The American Bar Association approved this approach in a 1986 opinion. Lawyers who work for a legal research company are not “performing their work as individual practicing lawyers, as members of a law firm, as members of a professional corporation or as members of an association authorized to practice law. A corporation organized as a business corporation, not authorized to practice law” is not bound by the Model Rules and the Model Code in the same way as the practicing attorney hiring the legal research company. Even if an LPO research company employs attorneys, the rules apply in the same fashion.

ABA decisions are based on the Model Code, so decisions may differ at the state level. But no U.S. jurisdiction limits or prohibits the use of outsourced legal research and writing. The long-standing ABA rulings have not found any counterpoints in state-level legal ethics.

As organizations not engaged in the practice of law, LPOs that provide legal research and analysis services are not required to carry malpractice insurance. The responsibility for any legal or compliance research used in corporate counsel’s practice remains with counsel, as it would for research by less-trained support staff. Counsel's relationship with the outsourcing company is analogous to an attorney's relationship with an assistant, governed by Model Rule of Professional Conduct 5.3.

In addition to the ABA guidelines discussed earlier about “reasonableness of decision to retain lawyers outside the lawyers own firm” the comments to Rule 5.3 emphasize the oversight role,

---


9 This position is consistently applied. ABA Informal Op. 86-1519 also stated that an attorney cannot enter into a contingent fee arrangement with a corporate legal research provider because to do so would constitute an improper sharing of legal fees.

10 Two bills to prohibit legal outsourcing were introduced in the 2011 session of the Connecticut General Assembly, but both died when the General Assembly adjourned. See CT HB 5083, 6477 (2011).

11 See Model Rules of Prof'l Conduct R. 5.3, Responsibilities Regarding Nonlawyer Assistants (2002). With respect to such a party working with a lawyer:

i) . .

ii) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

iii) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer . . .

Id.
stating that the commissioning lawyer “must give such assistants appropriate instruction and supervision . . . and should be responsible for their work product.”

III. Professional Responsibility Protections and LPO Services

While ethics rules and rulings unquestionably permit outsourced legal research work, outsourcing may also offer professional responsibility protections to corporate customers. Customers of legal research firms employing licensed attorneys benefit from ethical safeguards not available from other outsourcers.

A. Conflicts of Interest

Outsourcing poses a potential for conflicts of interest, but these conflicts may be avoided by observing legal ethics rules. All licensed attorneys are obligated to comply with the ethical requirements of their licensing state. As of 2016, 49 states, the District of Columbia, and the U.S. Virgin Islands have adopted a version of the ABA's Model Rules of Professional Conduct. Attorneys who provide outsourced research and writing services are bound by several ethical rules that are specifically designed to avoid conflicts of interest.

In addition to binding ethics rules applicable to LPO attorneys, legal and compliance research firms should also maintain conflicts procedures. Conflicts best practices offer law firm-level protection to LPO customers. A prospective LPO customer should ask what specific procedures the firm uses to check for conflicts (including technology and process aspects), as well as how the company responds when a potential conflict arises.

An LPO conflicts program should include at least the following aspects:

1. In addition to ethics rules, LPO attorneys should be trained by their company not to work on any project that presents them with a conflict of interest.

2. Each attorney bears the first responsibility for identifying conflicts of interest; where a conflict exists, the attorney should decline to work on that project.

3. If a conflict becomes apparent only after work has been started, the attorney should inform the outsourcing company, and cease to work on the project.

---

12 Id., cmt. 1.


14 See, e.g., Rules 1.7–1.11.
4. An LPO provider should decline a project if the company itself or one of its attorneys have provided services to opposing counsel on the same case.

5. For conflicts-sensitive matters, a conflicts check should be completed. Potential customers should be asked to identify the following items to be checked in the LPO company’s system:
   a. all opposing counsel
   b. the firm names of each opposing counsel
   c. each party to the lawsuit

6. The LPO company should maintain a complete conflicts database with a strong search function and regular back-ups.

7. Conflicts checks should involve database checks and explicit confirmation with assigned attorney staff.

Following these fundamental steps prevents the LPO firm, the customer, and the assigned LPO attorney from encountering a conflict of interest problem.

B. Confidentiality

Outsourcing legal and compliance work often involves sharing otherwise confidential information with the LPO firm. As with conflicts of interest, confidentiality can be maintained in the first instance by relying on the ethical obligations of LPO attorneys. These strictures include the attorney-client privilege and the work product doctrine, and are supported by LPO best practices.

When an LPO provider employs attorneys, customer confidentiality is protected by various Rules of Professional Conduct. Rule 1.6 prohibits a lawyer from revealing information relating to representation of a client,15 and Rule 5.2 specifies that even subordinate lawyers who act at the direction of another person are bound by the Rules of Professional Conduct.16 Further, the law is well-settled that a lawyer must conform to the

A lawyer generally has authority to use or disclose confidential client information to persons assisting the lawyer in representing the client. Those include other lawyers in the same firm and employees such as secretaries and paralegals. A lawyer may also disclose information to independent contractors who assist in the representation such as investigators, lawyers in other firms, prospective expert witnesses, and public courier companies and photocopy shops to the extent reasonably appropriate in the client's behalf.

- Restatement of the Law Governing Lawyers (Third), § 60 cmt. f (emphasis added)

15 Unless the client consents after consultation, except for disclosures impliedly authorized to carry out the representation. Model Rules of Prof'l Conduct R. 1.6.

16 Id., Rule 5.2.
requirement of the applicable lawyer code even when acting at the direction of another. And of course corporate counsel does not compromise confidentiality simply by enlisting third-party assistance.

The confidentiality of client information is also protected by privilege. Every U.S. jurisdiction observes the attorney-client privilege. The privilege generally provides that "neither a client nor the client's lawyer may be required to testify or otherwise to provide evidence that reveals the content of confidential communications between client and lawyer in the course of seeking or rendering legal advice or other legal assistance." The extension of the privilege to cover confidential communications to and from agents of the lawyer, and to and from independent contractors who have a contractual relationship with the lawyer to assist in representation of the client, is supported by substantial case law and recognized in the Restatement.

Courts have held that attorney-client communications may be protected by privilege if disclosed to another party when the communication with the third party is necessary—or even highly useful—for the client to obtain informed legal advice. These third parties may be co-litigants or other professionals assisting the attorney in representing the client (in the case of corporate counsel, the corporation itself). If a third party is providing assistance in developing

---


18 Id. § 60 cmt. f. See also Fireman's Fund Ins. Co. v. Superior Court, 196 Cal. App. 4th 1263, 1274 (2011) (legal opinions may be shared with an agent retained by the attorney to assist with his or her representation of a client without losing their confidential status); In re International Oil Trading Co., LLC, 548 B.R. 825, 834 (Bankr. S.D. Fla. 2016) (communications with a third party are confidential as long as those communications were necessary for the provision of legal advice).

19 See Restatement § 68 Introductory Note (2000).

20 Id.; see also Uniform Rules of Evidence Rule 502 (1974).


litigation and legal strategies in a manner similar to multiple attorneys working on a case at a law firm, the attorney-client privilege extends to those consultants.  

Depending on the circumstances of a project, the workproduct doctrine may also protect the confidentiality of materials created by an LPO research company. As codified in the Federal Rules of Civil Procedure, the doctrine protects from discovery by one party “documents . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent).”  

When determining whether a document is protected as workproduct, courts will look at on the motivation behind the document's preparation, rather than looking to the party who prepared it. Should corporate counsel commission an LPO research project in anticipation of or in connection with litigation, the materials generated would be covered by the workproduct doctrine.  

Finally, LPO firms should also bind their attorney staff to confidentiality agreements covering customer information. These provisions reinforce existing ethical obligations, and make confidentiality an organizational priority. Between professional responsibility and contractual terms, LPO research providers can demonstrate how seriously they take customer confidences.

IV. The LPO Business Case for Corporate Legal and Compliance Departments

With the ABA decided on the outsourcing issue, the analysis turns to service value. Corporate counsel and compliance officers have demanding roles, translating regulatory requirements into compliance programs that fit the specific culture and environment of their organization. These compliance programs generally have two primary goals.

1. Reduce the risk of an unwanted event that could give way to corporate liability, such as enforcement actions, investigations, union complaints, or bad publicity that would harm the brand or business relationships.

2. Mitigate the impact of such an unwanted event should it occur.

---


27 See United States v. Nobles, 422 U.S. 225, 238–40 (1975) (recognizing doctrine protects materials prepared by agents on behalf of attorney as well as those prepared by attorney himself).
To support these goals, compliance programs are designed to prevent issues, but also to alert legal and compliance departments of problems as early as possible so they may take quick action. As if that were not stressful enough, attempts to achieve these goals typically must be balanced by budgetary and performance considerations.

To reduce risks and mitigate impacts, legal and compliance professionals must keep a constant eye on the regulatory landscape and horizon. To do so, they have three options: hire additional staff, retain an outside law firm, or engage an LPO firm. Working with an LPO firm confers a considerable benefit upon corporate compliance and legal professionals.

A. On-Demand Experience

A legal research company provides the experience and knowledge of actual attorneys completing legal and compliance research, without training and overhead and without a billable-hour cost. With corporate counsel providing the requisite “managing supervision,”28 outsourced research work allows a corporate legal or compliance department to expand and contract professional bandwidth expediently and cost-effectively.

The costs associated with hiring new staff are deep. Beyond compensation and benefits, organizations need to factor in facilities, tools, and training. The productivity of the new staff member will likely improve over time, but the learning curve for complex regulatory compliance research and analysis cannot be underestimated. By contrast, an LPO firm staffed with experienced attorneys and geared for in-depth legal research can be brought into full service on short notice. Companies can also phase the LPO firm’s work so that they only pay for what they need, rather than the fully loaded cost of a new employee. The on-demand nature of LPO work allows companies to scale their resources with great ease, without sacrificing quality and expertise.

Turning to law firm options, while outside counsel and legal research LPO firms can fulfill complementary roles, hourly rate comparisons are the easiest way to start to understand LPO research value. TyMetrix surveyed billing data from 4,800 law firms from 2008 to 2012. The survey showed that the average hourly rate in 2012 for a law firm associate was $370.25—an

---

increase of 7.4% over 2011. A separate survey by Altman Weil found that 96.4% of the firms surveyed increased their fees in 2014, with a median reported change of 4%. Other reports place hourly rates for associates as high as $500. Associates are an immediate resource for partners and for corporate counsel. But these hourly rates are more than triple the standard rate of a national research firm using a researcher with analogous training and years of research-specific experience.

B. LPO Pricing Models

Legal research companies offer a range of billing options to meet corporate counsels' need for lower costs and predictability. LPO firms may offer any combination of:

- Hourly billing (substantially below large-law levels, with or without fee caps).
- Fixed-fee billing.
- Risk-reward fee structure
- Subscription-based billing.

Whichever fee system is preferred, a corporate customer should first confirm attorney education and training, provider quality control standards and policies, and willingness to partner with a legal or compliance department to achieve desired outcomes on time and on budget.

Hourly rates are not the sole option for unbundled attorney research work. Some companies reconfigure an hourly fee project with a capped cost, effectively making the project a fixed cost. Under either calculation, however, the final cost depends on a combination of the hourly rate and the researcher's facility with the legal issue at hand. Many LPO customers find that highly educated attorneys who do not happen to be large-firm associates produce excellent work at a substantially reduced cost, while complying with ethics rules and protections. Where the

As of 2013, in the 50 top-grossing American law firms, associates with one to four years of experience billed at an average rate of $500/hour.

Smith, On Sale: The $1,150-Per-Hour Lawyer

---


32 Legal Research Center, Inc., uses a standard hourly rate of $120/hour for hourly files due in 21 days; lower hourly rates may apply to specific files. Hourly rates rise by exigent due dates or project complexity.
research firm produces better or more consistent analysis on compliance or litigation issues, the value of the outsourcing relationship grows.

Fixed fees have the benefit of cost predictability, but may require a higher degree of assignment detail from corporate counsel. Research firms should raise the possibility of collateral or latent issues with counsel before proceeding; if such issues arise, the parties may jointly decide how to proceed and for what additional fixed cost.

Variations on fixed-fee outsourcing abound. One option is a risk-reward fee structure. Jeffrey Carr, former General Counsel of FMC Technologies, Inc., received the distinguished Legal Service Award from Corporate Legal Times for development of the innovative risk-reward fee structure, the FMC Alliance Counsel Engagement System (ACES™). ACES™ required FMC’s preferred law firms and service suppliers to agree upon project success criteria. All parties shared in the risk defined by that process. Under the system, FMC paid performance incentives for successful outcomes, which yielded measurable improvement in legal service quality, productivity, and cost-efficiency.33

As relationships between corporations and LPO providers deepen, more billing options arise. Subscription billing may be the most efficient means to underwrite a predictable data feed with associated services. Rather than paying law firm rates for custom multijurisdictional surveys of the law on corporate governance, employment, data security, or any number of other typical matters, counsel may opt for a low recurring fee to access shared data on common issues. By leveraging shared use, the customer corporation is ultimately taking advantage of a form of fixed fee cost sharing.

V. Conclusion

Outsourcing of legal research services gives corporate counsel and compliance departments an excellent and cost-effective resource for legal and regulatory information and analysis. While ethics questions are important to raise, LPO research providers employing licensed attorneys offer high-level professional protections. Prospective LPO customers should carefully review vendor attention to these issues, as well as their use of robust quality control processes and responsiveness to customer concerns. With appropriate due diligence, in-house counsel and compliance professionals can leverage LPO assistance to achieve multiple company goals.

## VI. Best Practices Checklist

### Best Practices: Checklist for Selecting an LPO

**Legal Research and Writing Vendor**

Use this checklist to help evaluate potential research and writing LPO providers for your law firm or legal and compliance department. Firms that check these boxes are likelier to provide high-quality materials protected by the ethics rules as described here.

- [ ] Researcher-writers are licensed US attorneys.
- [ ] Company requires strong US-based legal credentials and experience.
- [ ] Customers have direct access to the researcher-writers assigned to their projects.
- [ ] Customers have dedicated project managers for longer, ongoing projects.
- [ ] Company requires attorneys pass the bar, maintain license in at least one US jurisdiction.
- [ ] Company has strong reputation for quality and demonstrable expertise.
- [ ] Company uses law firm-level confidentiality standards for client information.
- [ ] Company uses up-to-the-minute subsequent history resources to check authorities.
- [ ] Company uses robust conflicts-check process.
- [ ] Company binds its attorneys to confidentiality agreements.
- [ ] Custom projects are tailored to needed level of analysis and number of jurisdictions.
- [ ] Company maintains staff with high-level compliance and corporate expertise.
- [ ] Pricing model offers high value work far under comparable law firm costs.
**About The Author**

**Stacey Supina**, Managing Director—GRC and General Counsel, oversees LegalResearch.com’s corporate and compliance services for general counsel and compliance professionals. Her professional background includes corporate compliance, business-to-business contracting, international trade, and employment and environmental issues. In addition to her work at LRC, Stacey teaches at the University of St. Thomas Opus College of Business. She received her J.D. from the University of Minnesota Law School and her LL.M. from University College London, England, where her thesis concerned environmental compliance issues. In her spare time, Stacey enjoys the outdoors as a master gardener.
About LegalResearch.com

Know the Law. Find a Path. Gain a Partner.

For nearly four decades of success as one of the first Legal Process Outsource providers in the US, we pioneered the expert outsourcing of winning legal briefs and managing risk with regulatory compliance surveys. Along the way, we earned the reputation for delivering the highest quality and responsiveness in the legal & regulatory market. But that was just our beginning. Introducing LegalResearch.com, a “first of kind” destination for litigation and compliance professionals.

Whether you’re managing complex litigation or regulatory compliance risk, our trusted legal research platform and expert research, analysis and writing services provide you with the essential resources you need for navigating the law with confidence and success.

Experience it for yourself. We encourage you to navigate our website (legalresearch.com), learn more about who we are and what we do, our products and services such as Litigation Advisor, Compliance Advisor and Law Insider — and we welcome your questions and requests, so just select Ask Us on our website, or call the number below.


Legal Research Center, Inc.
310 Fourth Avenue South, Suite 1100
Minneapolis, MN 55415-0126
800-776-9377
612-332-4950
www.LegalResearch.com