Law Flowing across the Seven Seas: An Overview of the Ethical, Regulatory and Liability Issues Surrounding LPOs

Shouvik Kumar Guha[1]

I. Introduction

The term 'legal outsourcing' simply refers to the business practice of taking a specific legal function of a company previously performed in-house and having another company perform the operation[2], with advances in information technology having contributed generously to the growing popularity of this practice.[3] The outsourcing of jobs that had for long belonged to the bailiwick of the legal professionals of the United States of America (U.S.), to offshore workers has, for the past few years, been the subject-matter of heated disputes, attracting controversies in galore. Outsourcing in its initial stage was confined to disciplines such as manufacturing and information technology. However, such is no longer the case, with white-collar jobs including legal trade being subjected to frequent delegation across the seas. What previously used to be duties of solely U.S. paralegals, office assistants and attorneys, is being outsourced to countries like India in particular, where business costs are less expensive and the finished product is usually equivalent to, if not better than, what would be produced in the U.S. Alarmed at the brisk rate at which domestic legal jobs are disappearing overseas, American legislators have proposed during the recent times several Bills, both at the federal as well as the state level, the enactment of which can, at least potentially, entice corporations to keep in-house legal work onshore.[4]

---

[1] The author is an Assistant Professor at The W.B. National University of Juridical Sciences, India, having the correspondence email–id shouvikkumarguha@gmail.com.

[2] See Thomas L. Friedman, The World Is Flat: A Brief History of the Twenty-First Century, 137 (2d ed. 2006), wherein the author has differentiated outsourcing from offshoring, defining the latter as a company moving a factory to a foreign country and producing the same product in the same manner, only with lower production costs.

[3] See Mark B. Baker, *The Technology Dog Ate My Job: The Dog-Eat-Dog World of Offshore Labor Outsourcing*, 16 Fla. J. Int'l L. 807, 811 (2004).

[4] Lee A. Patterson, *Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation*, 7 Richmond Journal of Global Law and Business 177 (2008), at p. 177.

Not much legislation have been proposed, however, that can provide incentives to private law firms to limit outsourcing, with Bills restricting sending of private information overseas being the only exception.[5] There exists a very formidable hindrance to the effectiveness of such legislations intended to restrict offshore outsourcing of legal services –the potential benefits outweigh the risks by far, with the huge amount of cost saved allowing the law firms and corporations to stay competitive. Today in the offshore legal departments of some corporations, international lawyers perform legal drafting at a fraction of the cost demanded by an U.S. attorney.[6] Example can be given of companies like General Electric that had been able to save about 200 millions of dollars by virtue of opening an Indian office in 2001 to perform legal work for its plastic and consumer finance divisions.[7] Moreover, in terms of efficiency enhancement too, legal outsourcing has been proved to be effective, with offshore workers displaying an eagerness to perform well in even those jobs that lack prestige and good pay in the U.S., thereby increasing profits for U.S. firms that utilize these workers.[8] In addition to this low-cost, highly skilled labour market, however, there are other economic incentives for legal outsourcing firms interested in India, such as the Indian government's generous provision of multiple-year tax holidays as well as exemptions from import and export duties to U.S. legal outsourcers[9] and assuring the latter of removing obstacles such as bureaucratic regulations from its business operations. The low cost of labor, the surge in information technology, favourable macroeconomic policies, the high quality of workers with advanced educations, the democratic system of government, and the historical ties to the United States, are thus all significant factors for why India is fertile ground for American legal outsourcers. In addition to the financial benefits, advocates of Legal Process Outsourcing (LPO) point to several other noneconomic benefits, such as improved quality of final work product, reduced response time to clients, and reduction of junior associate churn. However, the frequency with which the LPO boom has led to increase in corporate profits and a reduction in the job security for legal professionals in the countries that indulge in such practice, has rendered the concept of legal outsourcing to

---

5 Ibid.

6 See Baker, supra note 2, at p. 812.

7 See Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 Wm. & Mary L. Rev. 2189, 2202 (2007)

8 See generally Martin N. Baily & Diana Farrell, McKinsey Global Inst., Exploding the Myths about Offshoring 2 (2004), available at http://www.mckinsey.com/mgi/ reports/pdfs/exploring_myths/exploringoffshoringmyths.pdf, last visited on February 19, 2015

9 Julie Forster, Law Firm Cut Rates by Outsourcing to India, Pioneer Press (St. Paul, Minn.), Mar. 3, 2004, at C1

evocations of extreme passion and heated political debate. The cost-cutting advantages of outsourcing for law firms and the potential for national economic growth have not been enough to offset the loss of jobs to American taxpayers (and voters), thereby leading to the proposal of many protectionist bills in state and federal legislatures, starting from early 2004 onwards.[10] However, the author believes that neither aforementioned legislations nor their proposed objective to limit or eliminate legal outsourcing has dampened the spirit of law firms and corporate legal departments, who continue to reap benefits from the practice.

II. Globalization, Legal Outsourcing and the Indian Scenario

The first known instance of legal outsourcing from U.S. to India took place in the early 1990s, with the firm of Bickel & Brewer starting an Indian subsidiary to perform basic office tasks.[11] The entire practice has undergone complete transformation since then, especially in terms of specialization. Perusal of available literature will reveal three known models of legal outsourcing, viz. outsourcing of legal work to subsidiaries, direct hiring of foreign law firms, and third party vendors known as legal process

---

[10] When the economic think tank National Foundation for American Policy (NFAP) first studied state-level outsourcing legislation in December 2003, North Carolina, Indiana, New Jersey, and Michigan were the only states with such legislation pending. At the end of 2004, NFAP reported more than two hundred bills in over forty states. A large amount of this legislation relates to state contract awarding. Proposed laws range from giving a three percent preference in contract bidding wars to in-state firms, to an absolute requirement that all state contracts be performed within the United States. Other bills focus on issues such as, the implementation of a task force on ways to reduce outsourcing and mandatory disclosures of a call centre's location. For further details, see generally National Foundation for American Policy, *Anti-Outsourcing Efforts Down but Not Out*, 2 (2007), available at http://www.nfap.com/pdf/0407 OutsourcingBrief.pdf, last viewed on February 19, 2015. The federal legislative counterparts, on the other hand, aim at privacy protection of personal information sent offshore. Examples can be given of the Safeguarding Americans from Exporting Identification Data (SAFE-ID) Act, which requires businesses that send consumer information offshore to first disclose this to the consumer and give the consumer the opportunity to object. Federal legislation also addresses the issue of government contracts, exemplified by the Dodd Amendment, a multi-pronged anti-outsourcing measure that, amongst other things, prohibits the outsourcing of federal contract work unless the president decides the contract is in the best interest of national security. See Shannon Klinger & M. Lynn Sykes, National Foundation for American Policy, *Exporting the Law: A Legal Analysis of Outsourcing Legislation*, 2004, at pp. 16-17, available at http:// www.nfap.com/researchactivities/studies/NFAPStudyExportingLaw_0404.pdf, last viewed on February 19, 2015.

[11] See Krishnan, supra note 6, at 2201.

outsourcers. The first model can claim superiority both in terms of seniority as well as profitability.[12] Statistical indicators of cost saving and the precedence of adoption of this model by prominent companies like Dupont and West, indicate that other prominent players are also likely to follow suit. The second model is also an attractive option in terms of cost savings. Example can be given of the Indian law firm Nishith Desai Associates that has expanded from its home office in Mumbai all the way to California and boasts a diverse list of American clients including Motorola, Clorox, and Warner Brothers.[13] The third model, legal process outsourcing, describes companies that connect law firms and legal departments with legal outsourcing solutions. The LPO industry has grown rapidly in the recent times and there being no shortage of demand for these services, future continuance of such unabated growth can be safely predicted. Some of the more prominent LPOs include Atlas Legal Research, Pangea3, and Lexadigm, majority of such firms being U.S.-based and having secondary offices in India. While initially LPOs focused on rote paralegal work, and smaller LPOs continue to primarily work on such routine tasks as document reviews, these larger LPOs produce more sophisticated work product and in turn charge more money.

The primary risks facing LPOs are ethical issues, elite clientele's distaste with the idea of outsourcing, risk of poor work quality, and protectionist legislation in the outsourcing country. Although the protectionist legislative movement is at present only a shadow of its former self, yet it threatens to haunt the growth of legal outsourcing. With all the economic benefits to firms, there is no way around the fact that outsourcing costs many ordinary Americans their jobs. Examples of regulations proposed in state legislatures include prohibition of state contract work being performed overseas, preferential treatment for in-state businesses, restrictions on the sending of personal information overseas, mandatory disclosure of the location of call centers, tax incentives to private corporations that keep jobs in-state and requirements that a study be conducted in relation to outsourcing's effect on a state's economy.[14]

An outsourcing law firm ought to closely monitor privacy legislation, since it is not possible for a lawyer to properly serve his client without obtaining confidential personal information. Such information has to go overseas for an offshore legal assistant to aid the lawyer in the case. Thus, legislation that would restrict the transmission of personal information overseas or require disclosure of such a practice has more potential than other types of legislation to hinder legal outsourcing for both corporate legal

---

12 Ibid, at pp. 2201-02.
13 Ibid.
14 See Baker, supra note 2, at 822.

departments and law firms. In fact, as many as 13 bills introduced in 2005-2006 U.S. state legislative sessions were designed to restrict the sending of personal data overseas.[15] On the other hand, federal pre-emptive concerns can override state laws, with an example being the Gramm-Leach-Bliley Act that places strict privacy restrictions on financial institutions regarding the protection of private customer data.[16] Furthermore, any prohibition on overseas data transmission could violate WTO agreements and other international treaties to which the outsourcing country is a party to. There is no doubt that the application of such privacy laws could harm legal outsourcing, with an outright ban on sending information overseas, though improbable, would seriously cripple the practice itself. Nonetheless, the author would like to indicate that simply by disclosing that client information will be sent to India to aid in preparation of the case, and obtaining permission, a lawyer can satisfy legal and ethical requirements while reaping the benefit of less expensive research.

Constitutional concerns limit the applicability of state contract regulation to legal outsourcing. However, if a state legislature passed these laws such that they that met constitutional scrutiny, legal outsourcing could be affected. Laws that disallow the awarding of state contracts to firms that outsource might affect a corporation's choice to outsource legal services. Mention must also be made of protectionist federal contract legislation such as the SAFE-ID Act and the Personal Data Offshore Protection Act, although any analysis of their effect on legal outsourcing is till date only speculative, despite such analysis being similar to state contract legislation. Corporations that outsource might be inclined to keep those jobs on U.S. soil in order to avoid Thomas-Voinovich style discrimination in the bidding process. As with state contract legislation, private law firms who wish to outsource face little threat from federal contract legislation. There is no federal legislation directly intended to stop private law firms from outsourcing, and it appears that no proposed, enacted, or pending bill would have a seriously debilitating effect on the practice.[17]

One must not lose sight of the fact that legal outsourcing to India occurs against the backdrop of an Indian legal system in crisis, with the judiciary struggling against a backlog of cases, docket explosions, lack of progressive legislative development and paucity of funding. It is true that for the beneficiaries of legal outsourcing, the payoffs are indeed rewarding, but

---

[15] See Nat'l Found. for Am. Pol'y, Anti-Outsourcing Efforts Down but Not Out 2 (2007), available at http:// www.nfap.com/pdf/0407OutsourcingBrief.pdf at 7, last visited on February 19, 2015.

[16] Ibid.

[17] See generally Lee A. Patterson, *Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation*, 7 Rich. J. Global L. & Bus. 177 (Spring, 2008).

majority of the Indian populace do not belong to either the participant group or beneficiaries of this practice. Naturally, the problems associated with the Indian legal system, which have existed for decades, may appear to some as lacking any correlation to the phenomenon of legal outsourcing. The Indian government's attempt to liberalize its market economy has enticed outside capitalists to enter the legal market for profit maximization and in that quest, these investors cannot really be expected to focus on anything else. Moreover, from a perspective of basic rights and access to justice, it is the state and not these private foreign investors, on whom the burden of remedying the legal loopholes lies. However, the author would herein like to opine that since legal outsourcing investors enjoy a spate of distinct political, employment, educational, historical, and linguistic advantages by working in India, in addition to receiving a host of affirmative incentives, economic or otherwise, they share nothing short of an ethical obligation to provide some type of assistance to India, such as contributing to legal reform efforts. Furthermore, with a growing number of American firms operating in India, the reliance and expectation on the courts to deliver rulings on business matters in a fair, efficient, and timely manner will only increase with time and hence it is also in these investors' self-interests to have a better-functioning Indian judiciary.

III. Ethical and Tortuous Liabilities: Whether Compounded by Legal Outsourcing?

It can safely be concluded that the evolution of technology in the workplace has had both a positive and a negative influence on the practice of law, with some developments having been liberating on the one hand, giving attorneys the means with which to maximize both efficiency and mobility without sacrificing quality, while others having ended up holding lawyers captive to their own profession by ensuring constant accessibility. By way of a combination of technology (that in turn enables proliferation of information and facilitates the division and distribution of tasks to the most efficient personnel regardless of their location) and geo-economics, globalization has succeeded in causing a shift in the way work is accomplished and enabling new collaboration and competition.[18] The author feel it worth examining whether this particular feature holds true with respect of offshore outsourcing of legal services, which is possible when services are divided into discrete tasks that are delegated to less-costly service providers located far from the outsourcer. These activities signify such relocation of the activities of a business that allows the business to

[18] See generally Mary C. Daly and Carol Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-related Services*, 38 Geo. J. Int'l L. 401 (Spring 2007).

capture some efficiency, often through lower labour costs.[19] The tendency of legal practice to follow business is easily ascertained, especially in connection with factors like international expansion, diversity of the workforce etc. Nor is legal outsourcing an exception to this rule. Till date, law firms have been known to have outsourced certain support services, such as data processing and copying, and, significant portions of their back-office support services in particular.[20] With the focus having shifted recently from outsourcing back-office, administrative and support functions for law firms and legal departments to outsourcing legal and law-related services themselves, one can more easily identify the unique nature of law, compared to business and to other professional services such as accounting. Aside from, and perhaps more important than, the moral outrage and job security issues, outsourcing legal work to foreign companies also raises a host of ethical and professional conduct issues, implicating the professional obligations of lawyers. LPO workers are not licensed to practice law in the United States, which means they are not bound by the Rules of Professional Conduct. Moreover, neither the Model Rules of Professional Conduct nor the Formal Opinions issued by the Committee on Ethics and Professional Responsibility of the American Bar Association (ABA Committee) provide any concrete formal guidance for firms interested in exploring this new opportunity without risking unnecessary exposure to ethics violations, although opinions to the contrary also exist, as has been mentioned hereinafter. By downplaying these concerns, LPO providers betray a fundamental misunderstanding of the roles that ethics and professional responsibility play in the U.S. legal profession. An attorney considering LPO should not be comforted and reassured by the knowledge that other outsourced businesses care about security too. The legal profession may have become progressively more corporate and automated, but an attorney still has a fiduciary relationship with her client that goes beyond the mere "business" of practicing law.

Indian companies may feel comfortable with their levels of security and their employees' discretion, but law firms still need to be more conscious of the ethical ramifications of outsourcing than regular companies. The growth of a healthy U.S.-based LPO clientele depends, in large part, on the ability of Indian companies to sensitize their workers to the added layer of responsibility underlying what may otherwise seem to be a paranoid abundance of caution.

---

[19] Jane Mayer, Outsourcing Torture, NEW YORKER, Feb. 14, 2005, at 106, available at www.newyorker.com/archive/2005/02/14/050214fa_fact6, last visited April 15, 2012.

[20] See Julie Creswell, Law Firms Are Starting to Adopt Outsourcing, N.Y. TIMES, Oct. 27, 2006, at C3

LPO does raise some interesting issues that place the business of practicing law in tension with a lawyer's ethical responsibilities as a member of a noble profession. The Evalueserve report[21] acknowledges these concerns, emphasizing that confidentiality and conflicts of interest are major issues for U.S. firms, and that successful Indian start-ups must put processes in place to resolve these issues. As LPO becomes more widespread, more formal guidance will be necessary to help firms and LPO companies prevent problems before they arise. The ethical and regulatory issues are further complicated by the outsourced activities being sent offshore to jurisdictions where regulatory restrictions and judicial systems differ from those in the originating states and consequently issues from unauthorized practice to enforceability of contracts may assume relevance.[22]

As has already been mentioned, among the legal work that is commonly subjected to outsourcing, administrative back-office work and services commonly performed by paralegals and new law graduates, including preparation of patent applications and document review, are the most prominent. Outsourcing of such activities illustrates how services can be disaggregated for purposes of capitalizing on the efficiencies of sending work to lower cost service providers situated overseas.[23] Most of such work is of a discrete nature, delegated to either licensed lawyers or other experts concerned. Once the outsourced work is completed, it is re-integrated into the larger mainstream context of the client’s project. It has often been seen that the process of legal outsourcing is actually being accomplished with the aid of an intermediary outsourcing firm whose job is to identify foreign lawyers to work on outsourced projects, communicate assignments to them, set and collect fees, and might even provide review of outsourced work.[24] In

---

[21] In 2005, Evalueserve, an Indian LPO company, released a report intended to temper these optimistic predictions, entitled "Legal Process Outsourcing (LPO)-Hype vs. Reality." Available at http:// www.evalueserve.com/Media-And-Reports/WhitePapers/Evalueserve%20Article%20on% 20LPO.pdf, last visited on February 19, 2015.

[22] Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189 (2007)

[23] Laura Lewis Owens, *With Legal Services, World Is Flat*, NAT'L L.J., 15 (Jan. 15, 2007).

[24] There are a few different emerging models. Vendors like Lexadigm Solutions and Lawwave.com rely exclusively on Indian lawyers to conduct low-level legal work and analysis. Others, like Office Tiger, use a mix of lawyers and trained professionals to handle legal and non-legal tasks such as managing conflicts databases and document management and review. A few vendors specialize. Intellevate has hired an Indian staff of lawyers and Ph.D.s to conduct patent research and other IP work. The company has a dedicated team devoted just to Microsoft's patent work. For further details, see Helen Coster, *Briefed in Bangalore*, AM. LAW., 98 (Nov. 2004).

this context, it must be noted that each of the outsourcing firms take extra care to provide the disclaimer that they are not providing services of a legal nature and are not involved in any lawyer-client relationship. Such disclaimers cause the dilemma of separating legal from law-related and non-legal services. When legal services are being outsourced, one can generally apply the same rules of professional conduct regulating lawyers' activities, triggering concerns about unauthorized practice and other ethical issues. However, the range of ethical concerns with respect to law-related services is, in contrast, rather limited. Applying ethical rules to administrative and paralegal services will however depend on the larger context in which the services are integrated. Such differences in turn raise the issue of what one exactly means by the term 'the practice of law'.[25] The problem is further complicated by the fact that a bulk of the work handled by LPOs, such as definition of legal services, including searching for prior art, drafting specifications, and preparing drawings in context of patent claims etc., can be performed either by lawyers, or by paralegals or other support staff working under supervision of lawyers.

The question has often been posed as to whether the benefits of legal outsourcing are even likely to entice top-flight law firms from countries such as the U.S.A. to embrace offshore outsourcing as a new organizational model. The author believe, however, that the said firms tend to focus on cutting-edge and high fees work at the opposite end of the spectrum from the routine and low-level work currently being outsourced offshore and hence it may be anathema to the identities of these firms, as providers of highly sophisticated expertise, to connect with service providers at the other end of the spectrum whose attraction is their low cost. Moreover, the more routine aspects of the work of these firms is critical to their ability to train new lawyers, since it allows them to offer sufficient routine and lower stakes experiences to enable new law school graduates to develop the kind of judgment that forms the basis for the reputation of the firms' top lawyers.[26] Either way, the most important asset for a law firm is its reputation for quality, irrespective of whether its work actually involves mere routine services. An offshore outsourcing relationship may be perceived as undermining that reputation because of the suspicion that the foreign legal education and training of the lawyers providing the outsourcing services is different and consequently of lower quality. Furthermore, the implication of commoditizing legal services is a so-called 'stigma' associated with

---

[25] It has been cumbersomely defined as the rendering of professional services to a person who believes that he or she is a client dealing with a lawyer. See Robert R. Keatinge, *Multidimensional Practice in a World of Invincible Ignorance: MDP, MJP, and Ancillary Business after Enron*, 44 ARIZ. L. REV. 717, 723 (2002).

[26] Supra note 17.

outsourcing that few firms can bear to connect with themselves, despite the lack of rational basis for claiming participation in the high-fees-sophisticated tier of the market.

From the very moment of inception of the practice of LPO, the principles of professional ethics and tort liability that constrain a lawyer's decision to engage in such practices have come into limelight. For example, a lawyer is generally under no obligation to inform a client that other lawyers and non-legal personnel within the lawyer's firm will be working on the client's matter, while at the same time, client's consent must be obtained before entrusting his work to an outside lawyer.[27] A logical extension of the said principle is that the lawyer should inform the client even if the outsourced work is only law-related (i.e., not specifically belonging to the category of legal services) and is being sent to a foreign vendor rather than a foreign law firm. Need for such principle assumes further importance if the said work involves confidential client information and/or there is any form of a financial relationship between the provider and the law firm. Among the instruments that lays down the guidelines regarding principles of professional ethics and tort liability that are likely to arise in a decision to offshore legal services, the most prominent ones are the Restatements of both Agency and the Law Governing Lawyers in the U.S. context and their counterparts under the different national regimes, judicial precedents on negligent referrals and failures to monitor law firm employees, third-party organizations, outside lawyers to whom referrals have been made, and the provisions of ethics codes that place a particular responsibility on lawyers to supervise the firm's lawyers, non-legal employees, and under certain circumstances, third-parties.[28]

Unauthorized Practice of Law (UPL) is another vital fallout of legal outsourcing, since the legal work is being sent directly to foreign lawyers and/or non-legal professionals lacking authorization to practice law in the outsourcing country. Nor can one find an easy solution to this problem, with the available jurisprudence lacking coherence on the one hand and the judiciary having displayed an unfortunate lack of interest in enforcing prohibition of aforementioned practice against organizations in analogous

---

[27] Restatement (Second) of Agency, § 18 (1994); See generally Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics--The Lawyer's Deskbook on Professional Responsibility (2004-05 ed.).

[28] There are also other substantive law dangers that a firm should be aware of, such as the possibility that it might be considered a joint employer with an offshore vendor, exposing it to potential liability for the employment law violations of the offshore company or that its transfer of materials to an offshore company might violate a U.S. export law or the privacy laws of foreign jurisdictions. See Sam Ramanujan & Sandhya Jane, *A Legal Perspective on Outsourcing and Offshoring*, 8 J. Am. Acad. of Bus. 51, 52-54 (2006)

circumstances.[29] By and large, enforcement of prohibition of UPL is perceived as an action aimed to protect consumers, which prompts the enforcers to concentrate their limited resources on non-lawyers who mislead unsophisticated clients about the clients' rights in areas such as domestic relations, bankruptcy, real estate, etc.[30] Sanctions await lawyers only on their failure to supervise their employees that may in turn give rise to UPL[31] or when the lawyers deliberately assist the UPL activities of affiliated organizations[32]. Occasions such as one in which lawyers assist out-of-state lawyers in the practice of law in a jurisdiction in which the lawyer is not licensed are seldom dealt with in such a strict manner[33], thereby leaving legal outsourcing mostly unaffected as long as consumer interest is not threatened. Mention can be made in this context of the Model Rule 5.7 of the American Bar Association, which allows lawyers to offer law-related services under certain circumstances. The ethical restraints of the said rule can potentially affect a law firm's decision to offshore both legal and law-related services.[34]

Most of the ethical principles governing the client-lawyer relationship and the common law principles determining a lawyer's tort liability to a client with respect to legal outsourcing owe their origin to Section 405 of the Restatement of the Law of Agency, or rather Subsections (2) and (3) thereof.[35] While application of said provisions to a lawyer's

---

29 A possible justification for such lack of response may be that the law firms and legal departments that retain these organizations supervise them and bear a significant marketplace and reputational risk if the organizations' final product is sub par.

30 Cleveland Bar Ass'n v. Slavin, 62 Ohio Misc. 2d 570, 572

31 Mays v. Neal, 938 S.W.2d 830 (Ark. 1997)

32 In re Rodkin, 798 N.Y.S.2d 430 (N.Y. App. Div. 2005)

33 Office of Disciplinary Counsel v. Pavlik, 732 N.E.2d 985 (Ohio 2001)

34 MODEL RULES OF PROF'L CONDUCT R. 8.5 (2003): Disciplinary Authority; Choice of Law provides in relevant part:
(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.
The comment to Rule 8.5 notes: The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

35 Section 405:
(2) An agent is subject to liability to the principal if, having a duty to appoint or to supervise other agents, he has violated his duty through lack of care or otherwise in the appointment or supervision, and harm thereby results to the principal in a foreseeable manner. He is also subject to liability if he directs, permits or otherwise takes part in the improper conduct of other agents.

decision to offshore legal services or law-related services is theoretically pretty simplistic, requiring the lawyer to exercise a duty of care in selecting and monitoring the offshore vendor, it is important to note that the said section 405 refrains from imposing vicariously liability on the lawyer for the vendor's negligence.

Next comes the turn of legislative guidelines of the likes of the Model Rules of Professional Conduct, which by virtue of Rules 5.1 and 5.3, create three categories of ethical responsibilities. The first requires partners and lawyers holding managerial responsibilities within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance of all its lawyers conforming to the said rules of conduct and the conduct of a non-lawyer employed, retained or associated with a lawyer being compatible with the professional obligations of the lawyer. The second focuses on lawyers who have direct supervisory authority over other lawyers and non-lawyers, while the third duty imposes direct liability on lawyers for conduct by non-lawyers that violates the Rules of Professional Conduct or other professional obligations of the lawyer. The lawyer incurs liability if she either ratifies wrongful conduct or fails to take reasonable remedial action.[36] Of particular significance is the introductory language in Model Rule 5.3, "*a non-lawyer employed or retained by or associated with a lawyer*," because it indicates the broad range of relationships for which the lawyer must assume ethical oversight.[37]

With regard to offshoring legal services, the aforesaid provisions of law and their counterparts in other nations as well as supporting judicial precedents clearly require a law firm to implement a policy of instructing its offshore vendors and providers to conform to the ethical obligations of the Model Rules and to adopt practices and procedures to monitor their compliance. In the light of the paucity of public knowledge regarding the details of the working relationship between law firms and the offshore vendors of legal and law-related services, the author find it difficult to conjecture with any precision about the content of those policies, practices, and procedures that a firm is supposed to engage in. However, it seems highly improbable that simple modification of existing policies and procedures will suffice, especially keeping in mind the huge chasm of differences between the legal systems and nature of professional education provided in the outsourcing countries and the destinations, such as U.S. and India respectively.

---

(3) An agent is subject to liability to a principal for the failure of *432 another agent to perform a service which he and such other have jointly contracted to perform for the principal.

[36] American Bar Ass'n, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-1998 229 (1999)

[37] Ibid.

As has been mentioned hereinabove, the basic ethical considerations that an outsourcing law firm can keep in mind, nonetheless, include the duty to maintain confidentiality of client information, avoid conflicts of interest, and provide competent representation.[38]

The first will involve the firm to take multiple affirmative measures (such as physically and electronically segregating sensitive documents, severely limiting access to the same etc.) to ensure that its offshore agents understand the scope of the duty of a lawyer (working under the national legal regime concerned) to preserve information relating to the representation of a client. Any breach of confidentiality can lead to violation of the Model Rules of Professional Conduct as well as the precursor to tort liability[39]. Both inadvertent[40] as well as deliberate[41] disclosures have been known to have attracted such liability. The problem is compounded by the fact that while most of the countries having common/civil law regimes acknowledge a lawyer's duty to maintain client confidentiality, such duty may be subjected to differing interpretations by the judiciary and the legal system concerned. A question that often arises is that whether sharing documents containing confidential communications between a client and his counsel with the employees of a third party vendor (and not lawyers) may result in a waiver of the attorney-client privilege that protects them from disclosure. The author have been satisfied on this issue that there is sufficient precedent to suggest that privileged communications shared with third parties may remain privileged if such access is necessary or integral to the attorney-client relationship. In other words, so long as the disclosure to an outsourcing vendor was only to assist the client's outside counsel in rendering legal advice, the vendor is deemed an agent of the attorney and the privilege may remain intact.[42] From a pragmatic point of view, the outsourcing firm must make it clear to its agents that the duty of confidentiality generally extends to all information even if it is a matter of public record and that the said duty continues even after the completion of the engagement. To achieve this goal, the law firm may even find it necessary to examine the offshore agent's hiring practices to ensure that only reputable employees have access to confidential information and that

---

38 Coster

39 Okla. v. McGee, 48 P.3d 787, 792 (Okla. 2002)

40 In re Mandelman, 514 N.W.2d 11, 12 (Wisc. 1994)

41 Sherman v. Klopfer, 336 N.E.2d 219, 232 (Ill. App. Ct. 1975)

42 See Vijay V. Bondada and Ram Vasudevan, *Erasing The Hurdles: Offshore Outsourcing Of Litigation Services*, MEALEY'S LITIGATION REPORT: Discovery Vol. 3, (March 6 2006). For further details, see *Cold Metal Process Co. v. Aluminum Co. of America*, 89 F.Supp. 357, 358-59 (D. Mass. 1950); *In Re Consolidated Litig.*, 666 F.Supp. 1148, 1156-1157 (N.D.Ill. 1987); *Advanced Technology Associates, Inc. v. Herley Industries*, 1996 WL 711018 at 15

adequate preventive measures to prevent both physical and electronic theft of the information have been taken.

It may also be a wise policy to analyse the substantive law prevailing in the destination country regarding the duty of confidentiality. A law firm, performing a service on behalf of a global organization, must further consider the risk, if any, to confidential client information that would result if a disgruntled employee, customer, or creditor of the vendor instituted a lawsuit and sought to seize the organization's property within any of numerous possible national jurisdictions. The disclosure of confidential client information might also be an issue if a dispute arose between the law firm and vendor, and suit was brought in foreign jurisdiction where the work was performed.[43] An evaluation of risk ought to include an assessment of the efficiency and honesty of the jurisdiction's court system.

The duty to avoid conflicts of interest presents a rather fascinating problem for the firm, so to speak. While the admonition to avoid conflicts of interest is a regular feature of codes of professional conduct in both common and civil law countries, the interpretation of that admonition is far from uniform.[44] Foreign lawyers and organizations that employ them are seldom sensitive to conflicts of the nature as those occurring in the outsourcing nation. Consequently, an outsourcing law firm must take necessary precaution to communicate the standards of the conflicts to be applied by such foreign lawyers or organizations.[45]

The final obligation in the list, viz. duty of competence requires a law firm to conduct two simultaneous inquiries, with the first being directed to answering whether the foreign lawyer or offshore vendor possesses the knowledge and skills necessary to carry out the client's objective and the second being an assessment of the real and constant capability of the foreign lawyer or offshore vendor to deliver the promised service. Any neglect of either inquiry may bring down on the firm ethical and/or liability peril.

While tortuous liability of a lawyer for the actions of another lawyer to whom legal work has been outsourced has always been a reality, the governing principles with regard to the same have become rather blurred with the passage of time. Traditionally, a law firm and its partners were

---

[43] This possibility has also been a matter of concern for state bar association ethics committees with respect to the hiring of temporary lawyers from an agency. E.g., State Bar of Cali. Comm. on Prof'l Responsibility and Conduct, Formal Op. 1992-126 (1992).

[44] See Mary C. Daly, *The Dichotomy* B*etween Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT'L L. 1117, 1121-22 (1999).

[45] In re Bell Helicopter Textron, Inc., 87 S.W.3d 139, 145, 151 (Tex. App. 2002)

vicariously liable for any malpractice indulged in by the firm's employees. Hence, if a partner outsourced an assignment for a client to an associate or another partner in the firm, all the partners bore the risk that the associate or partner might negligently represent the client and expose the firm and all its partners to financial ruin.[46] However, the principle of vicarious liability has been diluted to a considerable extent, with lawyers having been permitted by the legislature and the judiciary to organize as professional limited liability partnerships and limited liability corporations. Despite that, the general proposition of the law firm and its partners being vicariously liable for negligent and damaging actions of employees still holds true.[47] Further complication is added by a scenario wherein the negligent conduct is of a lawyer who is not formally affiliated with the referring law firm and where vicarious liability may be grounded on the non-delegable character of the responsibility being transferred to the receiving lawyer, the existence of a joint venture between the two lawyers, or the referring lawyer's failure to exercise due care in selecting the unaffiliated lawyer and/or in monitoring the lawyer's activities. Especially in offshoring legal and law-related services, a law firm should consider how any financial arrangement between the lawyer and the vendor may impact a later claim that the vendor was not an independent contractor, but a joint venturer of the law firm, making the law firm vicariously responsible for the vendor's negligence. One must mention in this context the decision in *Tormo v. Yormark*[48] that bears a

---

[46] See Restatement (Third) of the Law Governing Lawyers § 58 (2000 & 2005 Supp.)

[47] In some circumstances, they are liable for the acts of of-counsel attorneys [Staron v. Weinstein, 701 A.2d 1325 (N.J. Super. Ct. App. Div. 1997)] and independent contractors who are performing non-delegable duties [Kleeman v. Rheingold, 614 N.E.2d 712 (N.Y. 1993)] Local counsel may also be liable to a client for the malpractice of an out-of-state lead attorney [Streit v. Convington & Crowe, Cal. Rptr.2d 193 (Ct. App. 2000)].

[48] 398 F. Supp. 1159 (D. N.J. 1975); therein a lawyer licensed to practice in New York had referred a client with a potential personal injury claim to a lawyer in New Jersey. The New York lawyer did not research the New Jersey lawyer's competence or reputation for ethical behaviour. He simply verified the lawyer's admission to the bar. Had he conducted a more complete investigation, he might have learned that the New Jersey lawyer had been indicted for conspiring fraudulently to obtain money from an insurance company. The New Jersey lawyer ultimately embezzled the funds received from the client's settlement of the personal injury claim. The client, in turn, sued the New York lawyer seeking to hold the lawyer vicariously liable for the embezzlement. The court's opinion in this case is important for two reasons. First, it rejected on public policy grounds the client's argument that the New York lawyer had an independent obligation to conduct a comprehensive investigation into the character of the New Jersey lawyer. Second, it concluded that the New York lawyer could be held liable for the embezzlement if the lawyer failed to make "*such an inquiry as was required*

direct consequence on a lawyer's decision to offshore law-related or legal services. This decision represents the proposition that a lawyer may have some duty of inquiry before referring a client to another lawyer, especially one admitted in another jurisdiction. Although it does not address the related question of the referring lawyer's vicarious liability for the negligence of the lawyer receiving the referral. Thus following this case, while making the decision to offshore back office, law-related, or legal services, a lawyer should make "*such an inquiry as [is] required by ordinary prudence*." The scope of that inquiry should reflect the sensitivity of the information and data being offshored. At a minimum, the lawyer ought to interview the prospective contracting party's business references thoroughly.

The author would like to suggest herein that prudence may dictate a more exhaustive investigation of the foreign lawyer, law firm, or vendor that the lawyer is considering directly retaining or recommending that the client retain, in matters involving trade secrets, confidential client information, and work product. In matters of extraordinary sensitivity, the services of an outside investigator can also be availed of to evaluate the prospective contracting party's professional integrity and competence.

IV. Conclusion

It seems obvious to the author that as the stigma associated with LPO dissipates and more firms start to explore it, states will need to create rules regulating the interactions between law firms and LPO service providers. There are multiple ethical issues fairly raised by sending confidential legal work overseas, and very little guidance for law firms currently considering LPO. However, the limited authority currently available appears to conclude that the ethical implications of LPO are adequately addressed by attorney supervision of the final work product and, where applicable, client disclosure and consent. The author finds a distinct irony with this perspective, in that while the proffered solutions to the ethical dilemmas created by LPO are that the work can be sanitized by supervision and review of the final product by the U.S. attorneys, the work was offshored in the first place because those attorneys were either too busy or too expensive to attend to it. It is thus grossly unrealistic to assert that attorneys will be able to adequately supervise LPO work for professional conduct purposes under these conditions, especially if more and more work starts going overseas.

---

by ordinary prudence." The court denied the New York lawyer's motion for summary judgment except for the investigation claim because the pre-trial testimony of the lawyer, the client, and the client's father raised genuine issues of material fact with respect to whether the circumstances under which the referral was made triggered "such an inquiry as was required by ordinary prudence."

The threshold of adequate attorney supervision for LPO projects highlights the tension between law as a business and law as a profession. The perspective of the profession of law involving fiduciary responsibilities raises enough concerns justifying a thorough rejection of LPOs altogether. At the other end of the spectrum, law viewed as product, concerned less with fiduciary duties than with maximizing profits and competitive advantages, tends to say otherwise., perceiving the ethical threats as mere business risk with relative burdens capable of being contractually allocated.

LPO is undoubtedly a global phenomenon, and beyond the control of any individual economy. The inevitability of it is obvious, with global acceptance being only a matter of time. However, since LPO is still in the early stages of development at present, a collective opportunity still exists to help guide the growth of a phenomenon that could very well revolutionize the practice of law.

For law firms considering whether to engage in offshore outsourcing themselves, there persist risks such as that outsourcing may tarnish their reputations, especially since the most efficient offshore outsourcing relationship will include only minimal time spent on supervision and training of the outsourced lawyers, and this raises concerns of quality control. In addition, outsourcing routine and low-stakes matters may hinder a firm's ability to provide sufficient training opportunities for its own new lawyers. While it is impractical to expect the destination country's legal regime to attain the same level of sophistication as the outsourcing nation's, law firms can nonetheless revise their structures to accommodate a sort of in-house outsourcing arrangement, facilitating thereby training and referral agreements. Another fascinating result of offshore outsourcing is that firms with international offices may be provided with the opportunity to develop relationships with local lawyers in jurisdictions otherwise closed to foreign firms, such as India, where the local rules prevent U.S. and other non-Indian firms from operating openly. When Indian regulations are liberalized, these firms may use their relationships to build their own offices, or bring the outsourcing workers within their fold. Whether offshore outsourcing will motivate law firms to reconsider their relationships with firms occupying different tiers in the legal market remains to be seen, but the attention devoted to offshore outsourcing in the legal and business press indicates its perception as a threat to the status quo.[49] It appears to the author that national rules of professional conduct and principles of tort liability will never be able to eliminate prevent offshore outsourcing, although they may well render it less efficient. Instead, what is more likely is that the competition for role of corporate adviser will be settled by the rules of the marketplace, including

[49] See Richard J. Newman, Coming and Going, U.S. NEWS & WORLD REPORT, Jan. 23, 2006, at 50

price as well as quality and prestige. While there is no doubt that offshore outsourcing creates new opportunities for foreign lawyers, these opportunities do not put foreign lawyers on an equal footing with U.S. lawyers. Rather, they enable foreign lawyers to escape the strictures of their home legal professions. Having said that, an enormous chasm exists between finding new opportunities in the home jurisdiction market and gaining position abroad. Such effects of globalization are further enhanced and highlighted by the phenomenon of offshore outsourcing. While the author will not claim to predict the future, an educated and rational guess can perhaps safely be made that offshore outsourcing will consolidate its position in the near future as a contributing factor to the existing divisions in the legal market while simultaneously enabling shifting positions among the purchasers and sellers of legal and law-related services.