

**Public and Private Sector Legal Process Outsourcing:  
Moving Toward a Global Model of Legal Expertise Deliverance**

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**Abstract:**

Legal process outsourcing (“LPO”) involves the use of foreign lawyers to conduct, perform and apply domestic law, most often for cost-saving purposes. Large, global firms have already begun to embrace the concept of LPO, and small firms and sole practitioners are increasingly reaching out to foreign firms, seeking more efficient, lower cost providers. Ethical considerations, liability limiting agreements, ERISA compliance, certification and oversight models are all part of the LPO landscape. This paper discusses these aspects, as well as related issues related to outsourcing in non-traditional areas such as the public sector and the judiciary.

## I. Outsourcing of the Legal Profession

In the words of Thomas Friedman<sup>1</sup>, outsourcing is flattening the world as we know it.<sup>2</sup> As the world becomes “flatter,” the playing field levels, forcing businesses to compete both nationally and internationally. Outsourcing<sup>3</sup> is just one of the many ways in which business organizations are attempting to better situate themselves in the global market. Even professions such as medicine which were thought to require face to face interaction between the doctor and the patient can now be practiced remotely with the help of evolving technologies.<sup>4</sup> Technology facilitates the division and distribution of tasks to those able to most efficiently accomplish them, regardless of their location.

The legal profession has also benefitted from the advent of new technologies, enabling attorneys throughout the globe to work together for mutual advantage. However, some

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<sup>1</sup> Thomas Friedman. The World is Flat: A Brief History of the Twenty-First Century. (2005).

<sup>2</sup> According to Friedman, apart from outsourcing, there are nine other major "flatteners" leveling the global playing field: 1) The collapse of Berlin Wall leading to the end of the Cold War and allowing previously excluded parties into the economic mainstream, 2) Netscape's increasing internet availability to all and accompanying media digitization, 3) Networking software allowing computers to communicate with each other without the need for human interface, 4) Open source communities, such as Wikipedia, that allow for public comment, 5) Offshoring, outsourcing outside one's home country, 6) Increases in supply chain management and technology, 7) Insourcing, where a company brings activities that were, 8) In-forming, an aspect of the internet, that allows information to be readily accessed and transmitted by virtually anyone, and 9) Personal digital devices such as ipods, cellular telephones and PDAs that allow people to access information, computers, and other people from remote locations. Id.

<sup>3</sup> Outsourcing is arranging for work to be done by someone else, based on reasons of cost, competence, or convenience. In this paper, the authors are most often referring to offshore outsourcing which involves outsourcing activities to foreign countries; however, many of the ideas expressed here can also be applied to domestic outsourcing, otherwise known as homesourcing, farmsourcing, or onshoring.

<sup>4</sup> See Michael Cross. “Face to face with the future of remote medical consultations.” The Guardian. February 7, 2008. See also Thomas R. McLean. “Symposium: Shaping a New Direction for Law and Medicine: An International Debate on Culture, Disaster, Biotechnology and Public Health. Article: Telemedicine and the commoditization of medical services. DePaul Journal of Health Care Law. 10 DePaul J. Health Care L. 131. Symposium 2007.

American companies are reluctant to have their legal work performed by a company that is not located in the United States, because of possible negative press and correlative public backlash.<sup>5</sup> Nonetheless, many corporations are setting up captive centers, or locating part of their organizations' legal department to locations such as India where labor cost is often 15- 20% of what their U.S. counterparts charge.<sup>6</sup> This is known as legal process outsourcing ("LPO").

While global law firms, those already engaged in multinational activities, have been engaging in LPO since around 2001, small firms and sole practitioners have largely ignored this trend. Indeed, many domestic firms have only recently considered outsourcing their back office activities, let alone their legal activities. This paper describes emerging trends in the LPO arena, along with the associated legal, regulatory, and professional issues..

## **II. Historic Perspective and Current Examples**

Outsourcing of legal services is a relatively new concept. According to Anita Jain, the first U.S corporation to outsource legal services was GE Plastics in 2001.<sup>7</sup> GE Plastics had its U.S. staff interview and supervise the new offshore employees who were located in Gurgaon, India. These employees were mainly drafting outsourcing agreements and confidentially contracts. Over a two-year period, GE reported saving "nearly \$2 million in legal fees that otherwise would have gone to outside counsel."<sup>8</sup> In 2006, Nasscom published a report predicting the rapid increase of worldwide LPO, estimating the market potential for legal services

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<sup>5</sup> Jain, Anita. "The Emerging Indian Legal Offshoring Opportunity" The Financial Times. April 17, 2006.

<sup>6</sup> Flahardy; Rowthorn.

<sup>7</sup> It should be noted that Rahul Jindal, a prominent LPO blogger, places the first instance of legal work being outsourced to India to have occurred in 1995. See Arin Greenwood. "Manhattan Work at Mumbai Prices: Inside India's hottest legal outsourcing firm." ABA Journal. American Bar Association. October, 2007.

<sup>8</sup> Flahardy, Cathleen "Overhyped, Underused, Overrated: The Truth about Legal Offshoring", Corporate Legal Times. July 2005.

outsourcable from the US to be approximately \$3-4 billion.<sup>9</sup> At the time of the release of this report, Nasscom estimated that only two to three per cent of this market had been tapped (\$60-80 million).<sup>10</sup>

Although the majority of work to date has been low-level tasks such as transcriptions, document conversions and legal data entry, there is a gradual shift towards higher value services.<sup>11</sup> In 2006, an Indian law firm specializing in patent law, Pangea3, received \$4 million from private equity firms.<sup>12</sup> This funding illustrates why some industry analysts believe that the LPO market will increase, rapidly reaching 11.5 billion by 2010.<sup>13</sup>

Another current example of LPO is the Dallas-based law firm of Bickel & Brewer.<sup>14</sup> The first U.S. law firm to open an office overseas, Bickel & Brewer established an office in Hyderabad, India.<sup>15</sup> The project's founders explained that this was initially a solution to "handling the millions of pieces of information that confront [them] in each case."<sup>16</sup> This office has since spun off to become a separate entity, Imaging & Abstract International, which handles work for several additional U.S. clients.<sup>17</sup>

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<sup>9</sup> Deccan Herald. "LPO, To Create The Next Large Employment Wave." Nasscom. <http://www.nasscom.in/Nasscom/templates/NormalPage.aspx?id=44596>

<sup>10</sup> Abhinav Ramnarayan. "Go slow' in order." The Hindu Business Line. February 6, 2006. <http://www.thehindubusinessline.com/bline/ew/2006/02/06/stories/2006020600020100.htm>

<sup>11</sup> Sandburg, Brenda. "India Inked: Local law firms and their clients save money with Indian patent shops." The Recorder. January 14, 2005.

<sup>12</sup> Kannan, Shanthi "Legal outsourcing firm gets funding." The Hindu Business Line. Aug 05, 2006

<sup>13</sup> Jain supra.

<sup>14</sup> "Not Your Father's Law Firm." New York Magazine. December 17, 2007.

<sup>15</sup> "Litigation Support Services." Bickel & Brewer. <http://www.bickelbrewer.com/72.html>

<sup>16</sup> Devi, Laxmi "Indian legal eagles wing their way to BPOs." The Economic Times. June 9, 2005.

<sup>17</sup> Id.

DuPont is another example of a large U.S. corporation that has entered into LPO arrangements. DuPont has hired lawyers in the Philippines to work 24 hours a day (in three, 8 hour shifts), seven days a week.<sup>18</sup> These lawyers conduct first-level document review for upcoming cases. This includes preparing documents and coding potential evidence for such cases. Understandably, the benefits of sending work abroad to such offices—such as saving time and money—increases with increases in the amount of data that needs to be researched and reviewed in a case. DuPont is hoping to cut down the time involved in processing from 18 months to 3 months and to achieve a savings of 40-60%, or \$6 million, of their annual budget for these tasks.

Rhodia, a Paris-based producer of specialty chemicals, signed a six-year contract with Accenture to outsource a majority of its legal and accounting work to Prague, Czech Republic in order to keep up with increasing work.<sup>19</sup> Accenture initiated the standardization process by moving 15 existing systems of Rhodia to Prague. In less than two years, the concept of a shared service center led to a cost reduction of over 35%.<sup>20</sup>

More recently, production houses like 20th Century Fox, Sony Pictures and Universal Studios are working with SDD Global Solutions, headquartered in India, who will support the legal requirements of their movie releases. SDD Global, a LPO firm with 40 attorneys, is already preparing arguments and counter-arguments to support some of the most complex legal issues in Hollywood. The company has signed to work on three global movie releases and will be handling their pre-and post-production legal issues.<sup>21</sup> Additionally, the widespread financial downturn may lead previously disinterested firms to look toward LPO. Attempting to “do more

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<sup>18</sup> Engardio, 2006, p. 42.

<sup>19</sup> Stein, 2003.

<sup>20</sup> Cooper, 2003.

<sup>21</sup> “Hollywood comes to Mysore.” Nasscom BPO Newslines. Issue No. 73. November 2007. <http://www.nasscom.in/Nasscom/templates/NormalPage.aspx?id=53090>

with less,” firms providing Chapter 11 bankruptcy reorganization services are likely to look towards LPO to enable them to handle the “deluge” that many are predicting.<sup>22</sup>

### **A. LPO Host Countries**

Although India is the biggest and most common country to receive legal outsourced work, other countries like the Philippines, Australia, China, and South Korea are also in the market of offshore LPO. As India’s costs have risen 15% within the past few years, other Asian LPO locations have gained in popularity. In particular, the Philippines have become an attractive alternative for U.S. and British firms for a variety of reasons. The Philippines have high marks for its large, educated talent pool and English language skills. The Philippines is an appealing location because historically, the Philippines was an American colony, contributing to cultural resemblance and a legal system based on U.S. law.<sup>23</sup> Conversely, the Philippines lacks infrastructure compared to other locations. Other locations, such as Australia and South Africa, are similarly attractive because of their history as British colonies and hence, British, common-law legal system.<sup>24</sup>

### **B. Virtual firms and the small practitioner**

Large U.S. international firms take advantage of LPO because they “have the critical mass to justify the time and expense of everything necessary--from selecting and developing relationships with outsourcing companies, deciding what work will be outsourced, setting up

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<sup>22</sup> Stephen D. Kong. “Preparing For The Bankruptcy ‘Wave’: Using Legal Process Outsourcing Before, During And After Chapter 11.” Metropolitan Corporate Counsel. Northeast Edition. June 2008. Pg. 20 Vol. 16, No. 6.

<sup>23</sup> Rudyard III Avila. “Legal Process Outsourcing in the Philippines: The Legal Culture.” <http://lpophil.blogspot.com/>

<sup>24</sup> George Beveridge. “South Africa: The next legal outsourcing hub?” Asia Legal Business News. January 21, 2009. <http://asia.legalbusinessonline.com/news/breaking-news/32154/details.aspx>

systems and procedures to coordinate the work-flow processes, and setting up the technical infrastructure (both at home and abroad) to support the flow of information and documents”.<sup>25</sup>

However, small to medium-sized firms have yet to enter the LPO market in force.

An exception to the general hesitancy on the part of sole, small and medium-sized legal practitioners to enter into LPO relationships has been the virtual firm. Virtual law firms first came into the modern lexicon in the mid-1990s.<sup>26</sup> With no physical offices, virtual firms interface with clients almost entirely via the internet and other electronic methods of communication such as email and teleconference. For example, the Rimon Law Group set up a virtual firm so that its clients can access lower-priced attorneys in Israel.<sup>27</sup> Rimon describes its LPO virtual firm process as follows:

When a potential client first contacts Rimon, the client speaks with a managing attorney in Rimon’s San Francisco headquarters. The managing attorney provides a free initial consultation to evaluate the client’s legal needs and helps the client decide which specializing attorney or team of attorneys best suits those needs. From then on, Rimon’s clients deal directly with their specializing attorneys, which fosters the development of a strong and personalized attorney-client relationship. Throughout this process, the client can continue to approach the managing attorney in San Francisco with questions or for assistance.<sup>28</sup>

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<sup>25</sup> K. William Gibson. “Outsourcing Spotlight: Outsourcing Legal Services Abroad: A Trend Grows into a Phenomenon (Like it or not). *ABA, Law Practice*. 34:5. July 2008. 47.

<sup>26</sup> Jill S. Chanen. “The Virtual Law Firm: Lawyer Practices on the Internet.” *A.B.A. J.*, July 1995.

<sup>27</sup> Rahul Jindal. “Press Release: Rimon Law Group Introduces Virtual Law Firm of Americans in Israel”. *Legal Process Outsourcing Blog*. July 09, 2008.

<http://legallyours.blogspot.com/2008/07/press-release-rimon-law-group.html>

<sup>28</sup> *Id.*

This is just one particular operational structure, but since what makes virtual firms attractive is their flexibility; any structure that improves efficiency and lowers overhead expenses could be utilized.

According to a 2005 article in the Delaware Lawyer, “the virtual firm structure is critical for law firms to adopt in order to succeed in the years ahead.”<sup>29</sup> While virtual firms may have become more common, traditional firms have held on to their physical offices for a variety of reasons. First, a client’s perception of a firm may be influenced by the firm’s physical manifestation – its office and its staff. Clients may prefer face-to-face interaction and attorneys may prefer having a physical office, away from the home, in which to conduct business. Additionally, attorneys often work collaboratively, discussing cases and issues with each other to come up with solutions to client problems. Whether any of these considerations will continue to outweigh the benefits of virtual firms remains to be seen, but as small firms embrace the idea of relegating some of its operations to the electronic field, they will no doubt become more comfortable with LPO as well.

### **C. Medical Experts**

A new, interesting area combining LPO services with technology advancements is that of medical malpractice and personal injury litigation.<sup>30</sup> Perhaps more than in any other area of law, medical malpractice and personal injury require extensive medical research and hiring of expensive experts to prove one’s case. Many cases necessitate multiple experts to testify in their respective areas of expertise.<sup>31</sup> For instance, in a case regarding an automobile accident, the

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<sup>29</sup> John W. Anderson. “The Virtual Law Firm.” 23 Del. Law. 36, 37 (Winter 2005/2006).

<sup>30</sup> Rahul Jindal. “Indian doctors reach U.S. courts.”

<http://legallyours.blogspot.com/2007/10/indian-doctors-reach-us-courts.html>

<sup>31</sup> See

plaintiff may want an expert on human responses to impacts to testify to the expected types of injuries that would be incurred in that sort of crash. Medical experts are needed to testify on the standards of care; there may be several of them depending upon the medical specialties of treating physicians and the various facilities where the plaintiff was treated. Additionally, these cases are usually taken on contingent fee basis, with the lawyer being paid a portion of the amount of settlement at the conclusion of the litigation.

Experts, medical and otherwise, often charge more per hour than the attorneys hiring them and thus can add considerable expense and even serve as a barrier to litigation. The hiring of doctors licensed outside of the U.S. can significantly decrease this cost. ~~A company,~~ MDinaBox, based out of Ocala, Florida provides medical experts located in India for personal injury and medical malpractice plaintiffs.<sup>32</sup> The uniqueness of MDinaBox is that “[i]t provides lawyers real-time access to medical doctors in India during deposition or trial while they cross-examine the opposing doctor.”<sup>33</sup>

### **III. Public Sector Legal Process Outsourcing**

LPO is less prevalent in the public sector. Many municipalities have written and unwritten policies that government contracts should favor local companies. If this is impractical, then in-state companies or alternatively U.S. corporations are used.<sup>34</sup> While such protectionist practices may not be legal as an impermissible hindrance to interstate commerce, these policies

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<sup>32</sup> Naseem Sowti. “A global courtroom: Company uses doctors in India for cross-examination in U.S. courts.” The Star Banner. March 11, 2007.

<http://www.ocala.com/article/20070311/BUSINESS/203110332>

<sup>33</sup> Id.

<sup>34</sup> Lee A. Patterson, III. “Outsourcing of Legal Service: A brief survey of the practice and the minimal impact of protectionist legislation.” Richmond Journal of Global Law and Business. Spring, 2008. 7:177, 181.

are nonetheless put in place for a variety of public policy considerations.<sup>35</sup> For instance, any legal position outsourced -- at city level, county level, or in office of the attorney general -- represents a job lost by a member of the voting public. On the other hand, the adoption of LPO practices leads to lower costs and the cost savings can be passed on to the taxpayer.

### **A. Outsourcing in the Judiciary**

The high cost of our nation's judiciary and the backlog that it can never seem to get out from under are just two of the reasons U. S. courts should look at the benefits of outsourcing. Courts have long outsourced non-core functions such as transcription services and processing of traffic tickets.<sup>36 37</sup> Ingo Keilitz, past president of the National Center for State Courts and head of CourtMetrics, a private consulting firm, proposed the idea of outsourcing court performance measurement systems in his blog in 2006.<sup>38</sup> However, none of what has been proposed or outsourced to date constitutes higher-level legal tasks.

Most judges' chambers are relatively small operations. From top to bottom, they consist of the judge, his or her permanent clerk (usually one, but maybe two), administrative secretary, judicial externs (also known as temporary law clerks), and courtroom personnel. Courtroom personnel consist of a bailiff, a court reporter, and U.S. Marshalls in the federal courts. City judges, magistrates, and justices of the peace may operate with a much leaner staff.

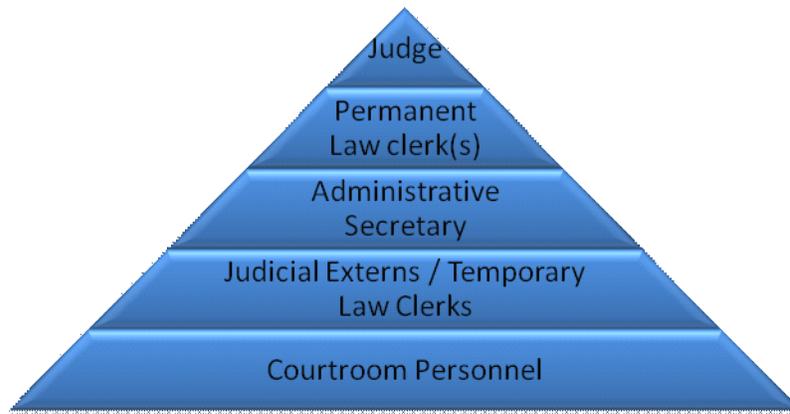
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<sup>35</sup> See Amar Gupta and Deth Sao. "Anti-Offshoring Legislation and United States Federalism." *Texas International Law Journal*. Volume 44, Issue 4. April 2009.

<sup>36</sup> Rachanee Srisavasdi. "County supervisor opposes court outsourcing." *OC Register*. July 27, 2007. <http://crime.freedomblogging.com/2007/07/27/county-supervisor-opposes-court-outsourcing/256/>

<sup>37</sup> See *Kwasnik v. Leblon*, 228 Fed. Appx. 238, 241 (3d Cir. N.J. 2007).

<sup>38</sup> Ingo Keilitz. "Outsourcing Court Performance Measurement" *Made2Measure*. March 13, 2006. <http://made2measure.blogspot.com/2006/03/outourcing-court-performance.html>



Legal work begins with the judicial externs who review the case documents and condense and brief them for review by the law clerk. Judicial externs are typically unpaid law students. Because they must attend classes during the year, judicial externs are in limited supply except during the summer months. Additionally, they are not attorneys and must often spend many hours educating themselves as to various topics of law and procedure in order to begin projects on which they are working.

The clerk's primary responsibility is to read the motions presented to the court, brief the issues, look at the record, and present this information in a condensed format to the judge. Some judges also have the judicial externs write the first draft of the opinion that is reviewed by the permanent clerk and then by the judge. If a judge were able to hire additional judicial externs and clerks, this would greatly increase the speed with which a judge is able to respond to motions.

One of the counter arguments to outsourcing judicial clerking work abroad is that this is an important training ground for law students to become successful lawyers or permanent clerks. LPO will not obviate a judge's need for an in-chambers clerk. This is because there are many aspects of cases that must be dealt with in real time. For example, an evidentiary issue arises during trial, the concerned legal issue will need to be researched while the judge takes a recess to examine the issue. Having to package such a task and send it to someone located abroad would

most likely take more time than the research effort itself. Instead, LPO of initial review of motions made to the court should free the clerk and the judge up to examine the more difficult issues and cases, rather than trying to manage their dockets. Furthermore, the domestic clerk, upon whom the judge ultimately relies, will be tasked with reviewing the work of the LPO clerks.

Thus, while LPO may result in their being fewer clerking positions within the court, it will not obviate their need completely. Additionally, following their first year of law school, many students take unpaid positions with the courts. These positions, as they cost nothing to the court and serve the public purpose of professional edification, are unlikely to disappear.

One of the counter arguments to outsourcing legal work abroad is that the sluggishness of our nation's judiciaries is a feature rather than a problem; it is a tool for lawyers and the litigants, as well as a valuable deterrent. Long wait times for judicial opinions give parties' time to settle matters amongst themselves, rather than by court decree. Additionally, the knowledge of the length of the judicial process may deter frivolous suits. Of course, it may also deter valid suits that simply cannot afford the expense of protracted litigation.

Although outsourcing of judicial functions may appear farfetched, at one time, the use of electronic documents by the courts was also thought of as improbable. In the 1980s, optical disc technology made it possible to store large numbers of documents in electronic format on write-once discs.<sup>39</sup> IBM initially determined the technology to be unworkable for legal purposes because they believed the courts would always require original documents in the place of electronic versions. Thus, attorneys and clients would always be required to maintain storage of

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<sup>39</sup> P. Asthana , B. I. Finkelstein , and A. A. Fennema “Rewritable optical disc technology.” IBM Journal of Research and Development. Volume 40, Number 5, 1996. See also “Optical Disc Technology: An A-Z on Laser Light Storage.” ExtremeTech. <http://whitepapers.silicon.com/0,39024759,60022023p.00.htm>

original documents and the utility of optical disc storage would be greatly undermined. At that time (in the early eighties), one of the authors (of this paper) wrote a white paper describing how the “write-once” capability of the initial generation of optical devices would make these devices ideal for storing legal, educational, and medical records; the non-erasability feature was a major asset in terms of using these disks for archival use, especially in situations where later questions may arise on what transpired at what point in time.

Today, electronic data is accepted and used by the courts for a wide variety of purposes. For example, the principal rules that regulate document retention and preservation for brokers, dealers, and self-regulatory organization members are Rules 240.17a-3 and 240.17a-4, promulgated by the Securities and Exchange Commission (“SEC”), pursuant to the Securities Exchange Act of 1934.<sup>40</sup> According to Rule 17a-4, which lays out preservation requirements for those records that must be produced by exchange members, brokers, and dealers pursuant to Rule 17a-3 of the 1934 Act, electronic storage is assumed as the appropriate medium for electronic correspondence and other electronic data.

#### **IV. Concerns and Pitfalls of Outsourcing Legal Work Abroad**

According to the Institute for Global Challenges and the Law, common concerns of those considering outsourcing include ethical, liability, privacy and quality control issues. The issue of whether or not it is lawful to have non-licensed foreigners engage in legal work has come before the San Diego and Los Angeles County Bar associations, among others. While the Bars have

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<sup>40</sup> 15 C.F.R. 240.17a-3, 240.17a-4. See also Jayant W. Tambe and Jonathan M. Redgrave. “Electronic Discovery Emerges As Key Corporate Compliance Issue .” The Metropolitan Corporate Counsel. October, 2002.

consistently found that outsourcing legal work is permissible, as long as it is supervised by a licensed attorney, questions of quality have been met with mixed responses.<sup>41</sup>

### **A. Stability of Outsourced Nations**

Inherent in LPO practice is the concern over the political and economic stability of the host country. ~~There is some degree of correlation between a nation's level of development and the prevailing wages there. is-is-because-a-nation's-lack~~ of development ~~and the prevailing wages there. is-also-what-keeps-its-wages-low.~~ As a nation's collective affluence and stability increases, so does the worker compensation ~~in many instances.~~ Given this dichotomy, locations which are attractive for outsourcing purposes may ~~always-have-be-characterized-by~~ a tinge of social or political instability.

The recent uprisings in Mumbai, India and the financial scandal involving ~~outsourcing-giant,~~ Satyam Computer Services; ~~have-given-rise-to-concern-on-the-part-of-LPO-consumers-deserve-to-be-mentioned-here.~~ On November 27, 2008, armed gunmen attacked the city of Mumbai, one of India's large financial and business centers, killing 101 people and injuring many others.<sup>42</sup> On February 7, 2009, B. Ramalinga Raju, the founder of India-based outsourcing firm Satyam Computer Services, was arrested for accounting fraud estimated to be in the billions of dollars.<sup>43</sup> ~~Some observers feel that Satyam,-struggling-to-meet-its-payroll-and-other-expenses,-~~ may not be able to continue serving "as the back office for one-third of the Fortune 500, including some of the largest banks, manufacturers, health care and media

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<sup>41</sup> "International Outsourcing of the Legal Profession." Institute for Global Challenges and the Law. Boalt Hall, University of California, Berkeley. April 25, 2008.

<http://www.law.berkeley.edu/centers/gcl/outsource/>

<sup>42</sup> "Mumbai rocked by deadly attacks." BBC News. November 27, 2008.

<sup>43</sup> Heather Timmons. "Financial Scandal at Outsourcing Company Rattles a Developing Country." The New York Times. January 7, 2009.

companies in the world.”<sup>44</sup> ~~Should this occur, Events of this type can potentially impact consumer confidence in outsourcing to India, and outsourcing as a whole, would certainly decrease, although to what~~ though the extent; remains to be seen. John C. McCarthy, an analyst with Forrester Research in New York, believes that scandals such as Satyam’s happen “like clockwork in the high-tech business,” and are thus unlikely to have any real impact on consumer confidence.<sup>45</sup>

~~Although violent attacks are much less predictable than economic scandal, and will no doubt continue to cause concern among LPO clients it is unlikely that these risks will sufficiently offset the value gained through offshoring relationships to deter many.~~ Commentators, noting that the current events in India will have a minimal impact on outsourcing, have compared the Mumbai attacks to those of 9/11 and Satyam to the Enron scandal in the United States. They argue that following 9/11, there was a general concern that international corporations would leave New York City for fear of future attacks, however, these fears never materialized.<sup>46</sup> Likewise, the months following the Mumbai attacks have not seen an exodus of business from the Indian city, but rather a return to the status quo.

Overall, it is unlikely that risks of this type will sufficiently offset the value gained through offshoring relationships to deter many.

## **B. Attempts to Limit LPO Practice**

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<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> “Scandal at Satyam: Truth, Lies and Corporate Governance.” IndiaKnowledge@Wharton. The Wharton School, University of Pennsylvania. January 09, 2009.

The National Federation of Paralegal Associations (“NFPA”) released a position statement in July 2005 stating that while “it may be tempting for some law firms and legal departments to outsource portions of their legal work, there is not enough evidence that there is a true cost savings for the average firm.”<sup>47</sup> The group emphasizes that those looking to outsource should consider whether cost savings actually be realized once costs of management, review time, revisions and formatting have been factored in.<sup>48</sup>

Some have made more overt attempts to curb LPO. Joseph A. Hennessey, an attorney in Bethesda, Maryland, brought suit in the Federal Court for the District of Columbia seeking declaratory judgment that LPO is against the law. In May 2008, Hennessey asked a federal judge to decide whether sending legal work abroad waives attorney-client privilege and search-and-seizure protections because the U.S. government monitors communications between people in the U.S. and people in other countries. The action was filed against Acumen, an India-based legal outsourcing firm, and President Bush.<sup>49</sup> Mr. Hennessey’s case was dismissed, ~~but~~ he is ~~currently seeking out~~ now looking for individuals whose legal work has been outsourced and whose right may have been infringed upon in an effort to form a future class action lawsuit.<sup>50</sup>

### **C. Ethics of Outsourcing Legal Work Abroad**

Several persons have written about the ethical implications of outsourcing legal activities to counsel not licensed to practice within the jurisdiction.<sup>51</sup> Lawyers may outsource services

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<sup>47</sup> Wayne D. Akin. “Position Statement on the Outsourcing of Paralegal Duties to Foreign Countries.” National Federation of Paralegal Associations. July 2005.

[http://www.philaparalegals.com/pdf/NFPA%20paralegal\\_outsourcing\\_position.pdf](http://www.philaparalegals.com/pdf/NFPA%20paralegal_outsourcing_position.pdf)

<sup>48</sup> Id.

<sup>49</sup> Caryn Tamber. “Outsourcing challenge dropped for now by Bethesda lawyer.” The Daily Record. Baltimore, Maryland. September 4, 2008.

<sup>50</sup> Id.

<sup>51</sup> See Mary C. Daly and Carole Silver. “Flattening the World of Legal Services? The Ethical and

abroad to a non-lawyer and not break any ethical considerations, as long as the lawyer obtains advance permission from the client, carefully monitors the non-lawyer, and bills the client accordingly.<sup>52</sup> Unique issues are raised in the case of patent filing, because of restrictions emerging from technology export laws. The US Commerce Department allows export waivers for technology, as well as blanket export waivers, to avoid such issues. In fact, blanket export licenses have been obtained by many multinational corporations in order to support their transactions.<sup>53</sup>

A recent American Bar Association (“ABA”) opinion resoundingly endorsed the outsourcing of legal tasks.<sup>54</sup> The decision concluded that:

There is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided the outsourcing lawyer renders legal services to the client with the ‘legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,’ as required by Rule 1.1.<sup>55</sup>

The ABA went on to note the various benefits that outsourcing can have, from cost reduction, to provision of labor intensive legal services in a time-saving manner, to allowing small firms to compete with larger firms by allowing them access to qualified personnel without having to employ those people full time.<sup>56</sup>

#### **D. Privacy Issues for Clients**

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Liability Minefields of Offshoring Legal and Law-Related Services.” *Georgetown Journal of International Law*. 38 *Geo. J. Int'l L.* 401. See also Aaron R. Harmon, “The Ethics of Legal Process Outsourcing—Is the Practice of Law a ‘Noble Profession,’ or is it Just Another Business?” *Journal of Technology Law & Policy*, June, 2008, 13 *J. Tech. L. & Pol'y* 41.

<sup>52</sup> New York City Bar Decision, 2006; San Diego Bar, 2006.

<sup>53</sup> Harris, 2005.

<sup>54</sup> “Lawyers Obligations When Outsourcing Legal and Non-Legal Support Services.” American Bar Association Standing Committee on Ethics and Professional Responsibility. Formal Opinion 08-451. August 5, 2008. <http://www.abanet.org/cpr/08-451.pdf>.

<sup>55</sup> *Id.* at 1.

<sup>56</sup> *Id.* at 2.

Due to the inherent protected quality of the work engaged in by lawyers, either protected under the Work Product Doctrine<sup>57</sup> or as part of the attorney-client privilege, lawyers are often hesitant to hand over client-related information to outside counsel. Although a client may have agreed and even requested that certain tasks be outsourced as a method of cost control, it is the attorney's job to make sure that the client is protected from any unauthorized use or distribution of protected materials.

One area that is of particular privacy concern is that of intellectual property or IP. Intellectual property, by its very nature, must be safeguarded in order to have value. This idea is embodied in U.S. copyright law which only protects things that are not common knowledge or in the public domain. According to U.S. copyright law:

Copyright protection subsists... in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.<sup>58</sup>

The United States has copyright relations with many countries; as a result of these agreements, we honor copyrights on a reciprocal basis. For members of the World Trade Organization,<sup>59</sup> the TRIPS<sup>60</sup> Agreement establishes minimum levels of copyright and other IP

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<sup>57</sup> The work product doctrine describes the protection from discover that is accorded to that portion of an attorney's trial preparation materials representing mental impressions or opinions, generally referred to as "opinion" work product. The doctrine is codified in the Federal Rules of Civil Procedure and the respective rules of the various states. Fed. R. Civ. P. 26(b)(3).

<sup>58</sup> 17 U.S.C. § 102(a).

<sup>59</sup> As of July 23, 2008 the WTO had 153 members. See <http://www.wto.org/> for further information.

<sup>60</sup> "TRIPS" is an acronym for "trade-related aspects of intellectual property rights." [http://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/trips_e.htm)

protection to be extended to other members. However, the United States does not have such copyright relationships with every country.<sup>61</sup>

### **E. Privacy Issues for Lawyers**

Privacy issues arise not only in regard to client information, but also in relation to firm information. Firms need to identify the types of information that should not be transmitted outside of the business and then establish procedures to prevent such occurrences. LPO providers in turn must also have security measures in place to prevent undesired transmission of protected information.

LPO providers have attempted to secure both firm and client proprietary information through extensive security procedures. At Integreon Managed Solutions (“Integreon”) facilities in Mumbai and Gurgaon, guards search employee belongings to ensure they are not carrying electronic storage devices such as flash drives or laptops. The facility’s computers are not equipped with disc drives, usable USB ports or compact disc burners, and most do not have printing capabilities. These “dedicated delivery centers” are accessible only via fingerprint scan; further, they are continuously monitored by security cameras, and do not store saved data locally. Rather, the lawyers work directly on the client's server and only over a secure line or via the Internet.<sup>62</sup>

### **F. ERISA and FLSA Compliance**

One of the ~~most~~ difficult ~~issues for~~ ies faced by employers seeing to enter into LPO arrangements is compliance with the complicated federal schemes of ERISA and the FLSA.

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<sup>61</sup> “International Copyright Relations of the United States.” U.S. Copyright Office.

<http://www.copyright.gov/circs/circ38a.pdf>.

<sup>62</sup> Suzanne Barlyn and Simon Robinson. “Call My Lawyer ... in India.” Time Atlantic. 171:19. May 12, 2008.

ERISA, the Employee Retirement Income Security Act, passed by Congress in 1974, sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans.<sup>63</sup> ERISA specifically relates to outsourcing in that section 510 prohibits an employer from discharging an employee for the purpose of interfering with the attainment of any right which the employee is entitled to under the Act.<sup>64</sup> Either terminating an employee or changing an employee's status to independent contractor to save a benefits cost to the employer has been held to be an ERISA violation by the courts.<sup>65</sup>

Benefits costs are often one of an employer's highest costs, secondary only to payroll.<sup>66</sup> Thus, benefits cost analysis undoubtedly goes into an employer's decision of whether or not to outsource. In *Inter Modal Rail Employees Association v. Atchison, Topeka & Santa Fe Railway Co.*, the U.S. Supreme Court found that an employer railroad company could be liable under ERISA's section 510 for transferring work from railroad's wholly-owned subsidiary to an independent corporation for purpose of depriving association members of pension and welfare benefits.<sup>67</sup> Thus, employers should be wary that when outsourcing certain positions, that they are not terminating an employee or class of employees that have attained or come close to attaining ERISA benefits such as pensions.<sup>68</sup> Luckily for those seeking to enter into LPO arrangements, laying off current employees will most likely not be necessary. Instead, In

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<sup>63</sup> Employee Retirement Income Security Act of 1974. 29 USCS §§ 1001 et seq.

<sup>64</sup> Id. at § 1140.

<sup>65</sup> See B. Janell Grenier. "Outsourcing: Traps for the Unwary." August 9, 2004. <http://www.benefitscounsel.com/archives/001165.html>

<sup>66</sup> "Employer Costs for Employee Compensation Summary." Bureau of Labor Statistics. United States Department of Labor. December, 2008. <http://www.bls.gov/news.release/ecec.nr0.htm>

<sup>67</sup> *Inter Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway Co.*, 520 U.S. 510, 117 S.Ct. 1513 (1997).

<sup>68</sup> See *McLendon v. Continental Can Company*, 749 F. Supp. 582 (D.N.J. 1989), aff'd sub nom., *McLendon v. Continental Can Co.*, 908 F.2d 1171 (3d Cir. 1990); see also *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1259 -1260 (10th Cir. 2004).

The Fair Labor Standards Act (“FLSA”) is another federal law that those entering into LPO relationships must be aware of. Passed in 1938, the FLSA established the federal minimum wage, requirements for overtime pay, and prohibitions against child labor. Firms need to be aware that even though they may have contracted with an outside LPO provider, this does not mean that they are exempt from FLSA compliance and oversight of that outside provider. For example, in *Zheng v. Liberty Apparel*, a garment manufacturer who had contracted with an outside contractor was found to be a “joint employer” of the contractor’s employees for purposes of the FLSA.<sup>69</sup> While the FLSA may not extend to LPO providers overseas, in light of the *Zheng* opinion, those looking to outsource domestically should ensure their LPO provider is FLSA compliant.

## **V. Legal Process Outsourcing Models**

A current trend in the legal industry is to conceptualize legal tasks as a set of commodities. Clients can designate certain tasks that they want one law firm to perform and then select another law firm to perform another task. This process has been termed “unbundling” and is based on client’s assessment on a firm’s cost or quality. For example, DuPont needed external help in managing documentary evidence for product liability cases. Since the work was not extremely complex and did not require a legal background to complete, DuPont employed Office Tiger, a large business process outsourcing provider. Interestingly, DuPont added the stipulation that the Office Tiger staff working on DuPont cases could work solely on DuPont related matters.<sup>70</sup>

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<sup>69</sup> *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 63 -64 (2nd Cir. 2003).

<sup>70</sup> Metropolitan Corporate Counsel, 2006.

This decision-making process took approximately two years to execute, due to a detailed examination of several factors. As previously mentioned, one factor involved the restraints that govern the amount of information on new technologies that can be sent abroad, as dictated by U.S. export control laws. DuPont, a company founded and driven by technology, was concerned with this issue and reacted by hiring a U.S. law firm to conduct those tasks that could not be performed abroad. With respect to work that could be sent abroad, DuPont conducted onsite interviews and employed its own staff to impart hands on training to the foreign employees.

The law industry, as a whole, is comprised of research, writing, and litigation tasks. However, most lawyers are not litigators, but are involved in negotiating intricate legal disputes among private parties and organizations. In the United States, over 90% of civil legal disputes are settled outside of the courtroom. In addition to litigation, lawyers often assist clients with constructing such documents as, but not limited to, will, trusts, corporate charters, and contracts. Understandably, writing, research, litigation, and constant interaction with clients can cause fatigue from a hectic work schedule heavy work load that results from research and writing.<sup>71</sup> Fatigue may arise during the trial phase of a case in which a lawyer must conduct constant research in order to construct an appropriate defense or offense. Outside of trial practice, those attorneys and paralegals that deal with mergers and acquisitions, SEC and patent law, and contract law also work with comparable workloads.

Financial functions and the legal tasks necessary for successful litigation are considerably alike. Both financial and legal require the accumulation of immense amounts of information -- in electronic and hard copy formats -- that needs to be reviewed and indexed for quick retrieval.

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<sup>71</sup> Waldmeir, Patti. "Lawyers argue the case for a lifestyle revolution." Financial Times. London (UK): Dec 15, 2003. 15.

Logically, legal tasks should be able to be outsourced at low costs, based on the precedent for financial tasks.

### **A. Standardized legal certification testing**

The Global Legal Professional Certification (“GLP”) test has recently been introduced in India, and gaining use worldwide, to aid in distinguishing the most talented of the nearly 200,000 law school graduates each year.<sup>72</sup> The exam tests four topics: English, technology and professional ethics, personal effectiveness, and legal knowledge and proficiency. However, as Maya Karwande notes:

Although the GLP may present an interesting concept in regard to the idea of a certification test for the LPO industry, it is important to note who is behind the program. Although reputable companies aided in the design of the test, the top companies of the industry were not involved. In order for a certification test have real relevance; a broader network of consultation and input from LPO companies will be necessary. In addition, it may be beneficial to involve the American Bar Association as a way to form a link between a business and legal solution.<sup>73</sup>

Legal outsourcing is not only a means to lower costs, but also to make the most efficient use of time. Consider the following example. Andrew Corporation, a communications equipment manufacturer, acquired a division of Deltec Telesystems, a New Zealand manufacturer, and decided to use local IP firm that Deltec had originally used for filing patents.<sup>74</sup> This particular IP firm was well known in the U.S. and other world markets for filing radio frequency patents. Due to the firm’s good reputation, Andrew Corporation sent all of their U.S. radio frequency patent

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<sup>72</sup> <http://www.glptest.com/>

<sup>73</sup> Maya Karwande. “Legal Process Outsourcing Efficient And Ethical?” Immigration Daily. September 26, 2008.

<sup>74</sup> Fried, 2004.

work to the foreign IP company. Moreover, due to the differing time zones, the IP firm could research or review drafts, and send them to Andrew Corporation before the latter's work day began the following day. This decreased the total amount of time involved in filing patents and acts as a case study to the notion of a true 24-hour knowledge factory that is discussed in the next section of this paper

The adoption of the offshoring model for legal tasks serves as the harbinger of the day when corporations will offshore other business functions to foreign locations in order to cut costs, improve quality, and provide greater dividends to their shareholders. Human resources, marketing, advertising and strategic planning are examples of business functions that were traditionally performed in-house and will gradually witness phased migration to foreign pastures. Traditional spatial and temporal considerations will become notions of the past, with growing blending of on-shore and off-shore activities.

### **B. Limitation of Liability Agreements**

The incorporation of limitation of liability clauses into agreements serves to strengthen LPO arrangements and to promote LPO practice as a whole. The ethics rules governing lawyers state that “[a] lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.”<sup>75</sup> Thus, the lawyer may prospectively limit his or her liability if “(1) the jurisdiction's law permits it, and (2) the client consults another lawyer before agreeing to the limitations.”<sup>76</sup> The comment to Model Rule 1.8 warns that such agreements “are likely to

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<sup>75</sup> Model Rule 1.8(h)(1).

<sup>76</sup> ABA/BNA Lawyers' Manual on Professional Conduct § 31:201 (2007) (noting in “Practice Guides--Lawyer-Client Relationship—Competence” section that most jurisdictions have adopted the Model Rules version of Rule 1.1. New Hampshire imposes more detailed competency

undermine competent and diligent representation” and “many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen.” The comment also notes that Model Rule 1.8 does not preclude lawyers from agreeing with the client to define the scope of representation under Model Rule 1.2, “although a definition of scope that makes the obligation of representation illusory will amount to an attempt to limit liability.”<sup>77</sup>

## **VI. LPO Providers**

As a newly emerging legal service, companies that offer LPO vary widely in their business structures and the services they provide. SDD Global Solutions (“SDD”) is an LPO provider with offices in Mysore, Bangalore, New York, and London that offers high-end legal research, analysis and drafting, as well as patent and immigration visa services. SDD has U.S.-licensed attorneys and outsources legal services to India, managed by the U.S. law firm of SmithDehn LLP. SDD’s clients include motion picture studios, law firms, retail brands, television companies, publishing houses, and manufacturers. It has received funding from State Bank of India and investments from organizations such as Cisco Systems, Barclays Capital, and one of the Asia’s largest hedge funds. SDD sees itself as solving one of the most urgent problems of today’s businesses, namely, the inefficiencies of having legal work done in locations that often are among the most expensive, and the least productive.<sup>78</sup>

Integreon<sup>79</sup> is another well-known LPO provider with approximately 2,000 worldwide associates located onshore in Fargo, North Dakota and Manhattan, New York and offshore in

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requirements that impose additional responsibilities).

<sup>77</sup> Joshua A. Bachrach. “Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(h).” Georgetown Journal of Legal Ethics. Summer, 2008, 21 Geo. J. Legal Ethics 631.

<sup>78</sup> “Firm Profile.” SDD Global. [http://www.sddglobal.com/legal\\_outsourcing\\_firm\\_profile.htm](http://www.sddglobal.com/legal_outsourcing_firm_profile.htm).

<sup>79</sup> Discussed at 15 supra.

India and the Philippines.<sup>80</sup> The company allows clients to package services such as discovery management consulting, data processing, online hosting, and document review in an a la carte manner, with fixed-price document options. Customers can also choose to have either U.S. or foreign attorneys work on their projects. Integreon attempts to assuage customer confidentiality concerns by promoting its “combination of physical and virtual measures [to] protect [client] data and ...ISO 27001 security certification.”<sup>81</sup> Integreon also employs workers across separate time zones to achieve a 16-hour, close to round-the-clock workforce.

As indicated by the above examples, LPO providers have carved out specific spheres for themselves in specific areas of the law, catering to certain types of firms and clients. Additionally, each packages its offerings in unique ways, best suited to their respective clientele.

## **VII. Conclusion**

Legal Process Outsourcing, if utilized in a careful, well-planned manner can efficiently utilize firm and client resources. Small and sole practitioners stand to greatly benefit from outsourcing arrangements because they allow access to quality legal services and experts at a fraction of the cost, thereby leveling the playing field between clients with disparate funds to contribute to dispute resolution. Most firms already outsource some segment of back office activities, and large, global firms have gradually embraced LPO in their continuing efforts to cut costs, streamline operations, and dedicate employee activities to core functions. Outsourcing of legal processes has not yet occurred in our nation’s judiciary, but as public monies are restricted and courts are forced to look toward new cost-cutting avenues, LPO may become a more attractive option. However, whether entered into by public or private entities, there are many

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<sup>80</sup> “Legal and Discovery Services.” Integreon. 2009. <http://www.integreon.com/>.

<sup>81</sup> Id.

considerations to be assessed prior to achieving a successful LPO relationship. Due diligence should ensure that firms, no matter what the size, are able to take advantage of the benefits LPO has to offer.