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LEGAL PROCESS OUTSOURCING TO INDIA: SO HOT RIGHT NOW!

Alexandra Hanson*

INTRODUCTION

“**O**UTSOURCING legal work to India is no longer a novelty. It’s a reality.”¹ In stronger economic times, law firms did not give much thought to outsourcing or other ways of cutting legal costs; however, the world has changed, the global economy is suffering, and 2009 will be a tough year for most U.S. law firms.² By contrast, for Legal Process Outsourcing (LPO) providers in India, “it may be the dawn of a prosperous era.”³

As the phenomenon of delegating legal projects to LPO vendors grows, it raises significant legal and ethical issues for both American lawyers who outsource and their clients whose confidential information may be jeopardized or compromised. Fundamentally, “despite projections that outsourcing legal work to India will be a \$4 billion industry by 2015, the work is still controversial.”⁴ Moreover, many U.S. law firms and companies continue to struggle with concerns about how to “maintain quality control, keep client information confidential, supervise lawyers oceans away[,] and weather new difficulties presented by recent terrorist attacks in Mumbai.”⁵

To address this growing uncertainty about LPO providers, the American Bar Association (ABA) and a number of state bar associations have issued formal ethics opinions regarding the outsourcing of legal or nonlegal support services.⁶ While a recent ABA Ethics Opinion generally approves of outsourcing legal work with a few restrictions, it fails to adequately consider the nuances of modern legal outsourcing to India. In

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1. Anthony Lin, *Legal Outsourcing to India Is Growing, but Still Confronts Fundamental Issues*, N.Y.L.J., Jan. 23, 2008, at 1.

2. Richard Susskind, *Turning to India at Break-Neck Speed*, TIMES ONLINE, Dec. 11, 2008, <http://business.timesonline.co.uk/tol/business/law/article5320583.ece>.

3. *Id.*

4. Julie Kay, *India Work Grows, with Glitches*, NAT’L L.J., Dec. 9, 2008, at 1.

5. *Id.*

6. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 (2008); see generally *Outsourcing Legal Work Isn’t Forbidden, But It Implicates Several Ethics Concerns*, 77 U.S. L. WK. 2115 (2008) (discussing the Florida Bar Professional Ethics Committee Opinion).

reality, outsourcing legal work to India not only eliminates valuable U.S. jobs, but also raises a number of training, legal, benchmarking, privacy, and safety concerns. In order to better serve its constituents (member U.S. lawyers), the ABA should reevaluate its largely unqualified endorsement of legal outsourcing to India. Furthermore, to address more fully the serious legal and ethical issues that outsourcing legal work to India raises, the ABA should prescribe more exacting standards for examining the training of lawyers to whom work is outsourced and for evaluating the quality of and protections offered by the country to which work is outsourced. Additionally, the ABA should also better help U.S. lawyers and companies develop a more applicable matrix for measuring the progress of outsourced work. Finally, the ABA would better serve its constituent U.S. lawyers by helping to establish a means for those lawyers and U.S. companies to ensure the privacy and safety of their outsourced work, including examples and recommendations of force majeure clauses to address the growing prevalence of terrorism in India.

This Comment explores the nuts and bolts of LPO, particularly to India. Part I discusses the history of outsourcing and the rise of India as the most popular outsourcing destination. Part II examines LPO in particular, with emphasis on which services are outsourced and why, including a case study of the most prominent Indian LPO provider—Pangea3. Part III of this comment breaks down the recent ABA Ethics Opinion on this topic, and Part IV addresses lawyers' and clients' many concerns with outsourcing legal work to India as well as possible means for the ABA to address them. Finally, Part V concludes with a look ahead as to whether outsourcing legal work is ever a good idea, placing particular emphasis on first-level document review.

I. OUTSOURCING TO INDIA

A. THE BASICS OF OUTSOURCING

Outsourcing was formally identified as a business strategy in 1989⁷ and is generally defined as “an arrangement whereby a company carves out certain services that it has been providing internally and retains a third party to provide these services.”⁸ Importantly, outsourcing refers to sending work to a more efficient and cost-effective location, but the outsourced work has no legal relationship to the jurisdiction where the work is sent.⁹

The most common business functions to outsource are information technology (including network management, help desk, and hosting) and business processes (including human resources, finance and accounting,

7. Rob Handfield, *A Brief History of Outsourcing*, SUPPLY CHAIN MANAGEMENT, May 31, 2006, <http://scm.ncsu.edu/public/facts/facs060531.html>.

8. BHARAT VAGADIA, *OUTSOURCING TO INDIA—A LEGAL HANDBOOK* 1 (2007).

9. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: A LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 5.3-2 n.6 (2009-2010).

and claims process).¹⁰ Advocates of outsourcing these types of functions typically point to its successes in producing improved financial results (specifically, lower costs) as well as freeing senior management to focus more attention on internal management rather than the simpler tasks to be outsourced.¹¹ However, critics of outsourcing often recognize the loss of control over the outsourced function, the long-term commitment involved in typically lengthy contractual relationships, the negative impact on employees who must be transferred or terminated, and the potential negative tax implications of outsourcing.¹²

Outsourcing relationships are typically governed by an outsourcing agreement that must address and specify things such as: the scope of services to be provided, service levels (i.e. benchmarks), the length of the contract (typically long), choice of laws, and privacy and data protection.¹³ Agreements also typically include a force majeure provision that absolves either party from liability for failure of performance resulting from certain enumerated, unavoidable phenomena.¹⁴ In many popular outsourcing locales, like India or Taiwan, however, a provision that renders the contract unenforceable in the event of, for example, a terrorist attack or tsunami might unravel the outsourcing agreement all together.¹⁵

B. INDIA AS THE OUTSOURCING DESTINATION

While many overseas destinations can offer lower labor prices, India, as the second largest English-speaking country with more than 70,000 law students graduating annually,¹⁶ has taken the lead as *the* outsourcing destination for U.S. projects.¹⁷ Advocates of outsourcing to India point to the financial savings due to the low wage Indian work force, the time

10. Brad L. Peterson, *When and Why Companies Outsource and Offshore*, in *OUTSOURCING AND OFFSHORING 2008: PROTECTING CRITICAL BUSINESS FUNCTIONS* 11, 15-16 (Patents, Copyrights, Trademarks, & Literary Prop. Course Handbook Series, No. 14714,2008) PLI.

11. *Id.* at 16-17; *see also* VAGADIA, *supra* note 8, at 15 (noting that outsourcing “allows the achievement of cost-savings by reducing overheads and consequent reduction in training needs for employees”).

12. Peterson, *supra* note 10, at 17-18. The implications of these specific criticisms of outsourcing legal work to India are beyond the scope of this article.

13. VAGADIA, *supra* note 8, at 11-12.

14. *Id.* at 64-65.

15. *Id.* at 65.

16. Mike Dolan & John Thickett, *The Financial Crisis: How Can Corporate Legal Departments and Law Firms Manage the Aftermath?*, *ANDREW'S FIN. CRISIS LITIG. REP.*, Nov. 25, 2008, available at 2008 WL 4978829.

17. Bijesh Thakker, *The Extended Enterprise—Legal Hazards of Global Sourcing—The Indian Perspective*, in *OUTSOURCING AND OFFSHORING 2007: PROTECTING CRITICAL BUSINESS FUNCTIONS* 231, 237 (PLI Patents, Copyrights, Trademarks, & Literary Prop. Course Handbook Series, No. 11407, 2007) (noting the \$23.4 billion sourcing industry in India); *see also* Ashish S. Prasad & Violeta I. Balan, *Strategies for U.S. Companies to Mitigate Legal Risks from Doing Business in India*, in *DOING BUSINESS IN INDIA: CRITICAL LEGAL ISSUES FOR U.S. COMPANIES* 9, 20 (PLI Corp. Law & Practice Course Handbook Series, No. 11926, 2007) (noting India's dominance of the market for global offshore IT services because (1) India controls 70 percent of the outsourcing market share and (2) by 2005, over half of the Fortune 500 companies were outsourcing legal work to India).

zone difference (work can be sent to India at day's end in the United States, worked on all night by Indian outsourcers around the globe, and picked up the next morning by the original U.S. employee), and the large pool of available personnel.¹⁸

However, outsourcing to India is not without its critics. Not only is corruption "regarded as a widespread problem for U.S. companies doing business in India,"¹⁹ there are also many issues with respect to distinct cultural differences, language barriers (particularly relevant when using complex legal terminology), excessive distance (*i.e.* the costs associated with frequent overseas trips to maintain supervision of offshored services), poor infrastructure, data protection issues, and geopolitical risks (*i.e.* terrorist attacks or other unknown sources of political upheaval).²⁰ Furthermore, while the legal environment in India tends to be welcoming to foreign businesses, consideration must be given to the "legal, regulatory and cultural issues that arise when conducting business in India,"²¹ as discussed in greater detail in Part IV, C.

II. LEGAL PROCESS OUTSOURCING

A. THE BASICS OF LPO

"Outsourcing legal work to India began in 1995, when the 34-lawyer, Dallas-based litigation firm of Bickel & Brewer opened an office in Hyderabad."²² While Bickel & Brewer paved the way, outsourcing legal work was slow to catch on, with many lawyers and clients concerned about the legal and ethical ramifications of doing legal work in India. In fact, "[j]ust a few years ago, outsourcing legal work to India was a dirty little secret—law firms did it, but few admitted to it."²³ Those days, however, are long gone. The ailing U.S. economy has prompted companies to cut costs and, in doing so, has created significant legal problems.²⁴ "As a result, clients are pressuring the law firms they hire to trim fees,"²⁵ and those firms have sought to accomplish such cost reductions by outsourcing some of their legal work to India.

Legal outsourcing in India currently draws an estimated \$250 million in annual revenue;²⁶ Forrester Research, however, has projected that annual

18. Peterson, *supra* note 10, at 21; *see also* VAGADIA, *supra* note 8, at 7 (pointing to India as the world's largest democracy with a population over one billion).

19. Prasad & Balan, *supra* note 17, at 31.

20. Peterson, *supra* note 10, at 22-25.

21. VAGADIA, *supra* note 8, at 37.

22. Daniel Brook, *Made in India: Are Your Lawyers in New York or New Delhi?*, LEGAL AFFAIRS, May/June 2005, http://www.legalaffairs.org/issues/May-June-2005/scene_brook_mayjun05.msp.

23. Kay, *supra* note 4.

24. Niraj Sheth & Nathan Koppel, *With Times Tight, Even Lawyers Get Outsourced*, WALL ST. J., Nov. 26, 2008, at B1.

25. *Id.*

26. *Id.*

Indian offshoring revenue will balloon to \$4 billion by 2015.²⁷ Moreover, the U.S. outsourcing landscape is changing. No longer are law firms the only players in the outsourcing game. Nowadays, companies like Morgan Stanley, American Express, Dell, General Electric, Motorola, and General Mills are all sending portions of their legal work to India, jumping on the cost-savings bandwagon.²⁸

1. *What Work is Outsourced?*

LPO vendors would historically “target the more mundane but nonetheless time-intensive tasks associated with legal practice, reviewing mountains of documents for discovery rather than drafting appellate briefs.”²⁹ However, the “‘sophistication is increasing,’ according to an Indian lawyer, who seems to have worked on pretty sexy stuff, such as researching U.S. laws on drug labeling and representing banks in auction-rate securities matters.”³⁰

For example, Lexadigm, an LPO provider that purports to “provide large-law-firm-quality work at literally one-third the price,” is taking on more and more “sophisticated work like patent applications and appellate briefs because the work commands higher rates from clients.”³¹ In fact, “Lexadigm recently drafted its first brief for a U.S. Supreme Court case, involving the application to a tax dispute of the Fifth Amendment’s due process clause.”³² Though “[t]he brief will ultimately be filed by an American law firm, which can use all, part, or none of Lexadigm’s work—the same as if the draft had been written by one of its own associates,”³³ the message here is clear—outsourcing all kinds of legal work to India is the next big thing.

2. *Why Outsource Legal Work?*

a. Low Cost

The primary “reasons for outsourcing abroad are cutting costs and increasing efficiency.”³⁴ From the cost-cutting side, “LPO salaries for Indian lawyers are generally well below \$10,000 a year . . . while associate base salaries at major firms in New York start at \$160,000 a year,”³⁵ prompting one Wall Street Journal blogger to note, “[i]f you ever want to

27. Posting of Megha Pande to Legal Process Outsourcing Blog, 2009: *What Lies Ahead for Indian LPO Companies?*, <http://legallyours.blogspot.com/2009/01/2009-what-lies-ahead-for-indian-lpo.html> (last visited Sept. 1, 2009).

28. Kay, *supra* note 4.

29. Lin, *supra* note 1.

30. Posting of Nathan Koppel to WSJ Law Blog, *More Legal Work Moves to India, Including “Sexy Stuff”*, <http://blogs.wsj.com/law/2008/11/26/more-legal-work-moves-to-india-including-sexy-stuff/> (Nov. 26, 2008, 10:34 EST).

31. Brook, *supra* note 22.

32. *Id.*

33. *Id.*

34. Laura D’Allaird, “*The Indian Lawyer*”: *Legal Education in India and Protecting the Duty of Confidentiality While Outsourcing*, *PROF. LAW.*, Sept. 2007, at 1, 4.

35. Lin, *supra* note 1.

see a corporate counsel get red in the face, ask them whether BigLaw associates are worth their billing rates.”³⁶

Many lawyers, however, who are contemplating outsourcing legal work to India have expressed concern that the cost savings might not be as extensive as people originally thought.³⁷ One such doubtful attorney remarked, ““On its face, the hourly rates and the unit price are lower, but you have to factor in the additional costs of managing service providers, and in the context of legal services you can’t just take those and flow them through directly to your client.””³⁸ Nevertheless, as the economic downturn continues to pressure clients to cut costs, who in turn pass those cut costs to their legal teams, there will likely be a greater need to find alternative ways to be more cost efficient, including outsourcing more legal work.³⁹

b. Contract Attorneys are Not the Answer

In an initial attempt to cut costs and maintain the quality of certain types of legal work, firms began hiring contract, temporary, or staff (essentially, non-partner track) attorneys to manage document reviews, particularly as developments in electronic discovery made the already mundane task even lengthier.⁴⁰ While contract attorneys have helped boost associate (partner track attorneys) morale, they have not been the perfect solution, as many law firms had hoped, to the growing problem of skyrocketing litigation costs.⁴¹ First of all, the quality of contract attorneys is not consistent; second, contract attorneys leave when the job is done, failing “to provide any ongoing knowledge base that can be utilized for either the case at hand or the ongoing litigation of the client”; third, the presence of transient contract attorneys, poses a potential threat to the confidentiality of client information, particularly when contract attorneys float from firm to firm; and finally, some firms consistently mark up the rates they charge for contract attorneys so that the savings to clients are not as great as proponents initially hoped.⁴²

When compared to Indian lawyers, who are not licensed in the United States and must be closely supervised by U.S. lawyers to comply with ethical norms, “some U.S. firms may feel more comfortable using American temporary or contract attorneys.”⁴³ It is hard, however, to get past the hurdle that U.S. contract attorneys “typically bill at twice the rate of

36. Koppel, *supra* note 30.

37. Joshua Scott, *ANALYSIS: Legal Process Outsourcing: Just Hot Air?*, ALB LEGAL NEWS (Dec. 18, 2008), <http://asia.legalbusinessonline.com/news/breaking-news/32013/details.aspx>.

38. *Id.*

39. Sheth & Koppel, *supra* note 24.

40. Edward Burke & Prashant Dubey, *The First Step: Outsourcing Document Review to U.S. Contract Attorneys*, in *EDISCOVERY FOR CORPORATE COUNSEL* § 22:3 (2008), available at EDISCCORP § 22:3 (Westlaw).

41. *Id.*

42. *Id.*

43. Sheth & Koppel, *supra* note 24.

Indian attorneys,”⁴⁴ and the contract attorney model has had a mixed track record for quality.⁴⁵

3. Case Study: Pangea3

Understanding the benefits and pitfalls of outsourcing legal work to India is easiest via an examination of one of India’s most prominent LPO provider, Pangea3. According to its website, “Pangea3, the industry leading legal outsourcing firm, provides world class legal outsourcing solutions to Fortune 1000 corporations in the U.S., Europe and Japan and their outside law firms.”⁴⁶ David Perla, a co-founder of Pangea3 noted that “[c]ost certainly first sparks customers’ interest in the Indian option.”⁴⁷ At the time, Pangea3 was one of the largest LPO organizations in India with over 240 attorneys in three Mumbai offices. But that was then (January 2008), and even just one month later, Pangea3 had already opened another facility to increase their workforce totals to 475 attorneys in Mumbai, Delhi, and New York City.⁴⁸ Moreover, Pangea3 has reported doubling its “revenue in the last six months from a year earlier.”⁴⁹

Today, Pangea3’s lawyers service “more than 150 clients, more than 25 of which are Fortune 500 companies.”⁵⁰ Their Co-CEO, Sanjay Kamalani, will not give names—he says that Pangea3’s clients are hesitant to acknowledge their use of LPO providers because it is still an emerging area of the law; however, it has been reported that Yahoo and other prominent Fortune 500 companies are among Pangea3’s clients.⁵¹

In Perla’s view, contract lawyers “hired to perform document review on major litigation have minimal skills and zero motivation. In contrast, Pangea3 can attract the best and the brightest young lawyers in India, fluent in English and trained in English common law.”⁵² To prove his point, Perla and his clients orchestrated “bake-offs,” where Pangea3’s Indian lawyers went head to head with U.S. contract attorneys on a variety of legal tasks; according to Perla, “the Indians soundly trounced the Americans.”⁵³ In its blog, Pangea3 lists a story about one of its rare Indian attorneys who had passed a U.S. bar exam.⁵⁴ In her own words, Naina Hegde, a Senior Contracts Manager at Pangea3, said that once she moved to New Jersey, “the fact that I am a lawyer in India meant almost

44. *Id.*

45. Burke & Dubey, *supra* note 40.

46. Pangea3 Home Page, <http://www.pangea3.com> (last visited Sept. 5, 2009).

47. Lin, *supra* note 1.

48. *Pangea3 expands operations in India*, MONEYCONTROL.COM, Feb. 7, 2008, http://www.moneycontrol.com/india/news/business/pangea3-expands-operationsindia_325119.html.

49. Sheth & Koppel, *supra* note 24.

50. Arin Greenwood, *Manhattan Work at Mumbai Prices*, ABA J., Oct. 2007, at 36.

51. *Id.*

52. Lin, *supra* note 1; *see also* Pangea3, Our People, http://www.pangea3.com/people_team.html (last visited Oct. 31, 2009).

53. Lin, *supra* note 1.

54. Posting of David Perla to Panega3 Legal Blog, *Passing the New York Bar Exam*, <http://www.pangea3.com/legalblog> (Jan. 1, 2009, 01:29).

nothing.”⁵⁵ While it is clear that all foreign attorneys must pass a U.S. state’s bar exam before being admitted to practice in that state, the fact that Hegde’s accomplishment (passing the New Jersey bar) was lauded as extraordinary may raise some eyebrows regarding the quality of her legal education in India.

From the Indian lawyer’s perspective, joining an LPO provider like Pangea3 has become a popular alternative to working in an Indian law firm.⁵⁶ Most of the prominent law firms in India are family businesses that offer very “few chances for advancement for those lacking the proper connections On the other hand, LPO [providers] offer a technology startup-like environment.”⁵⁷ For example, at Pangea3, like many other U.S. startup companies, lawyers are rewarded with more stock options each year “depending in part on the quality and substance of their work, their initiative to take on responsibility, whether they mentored more junior lawyers, how well they were able to manage their client relationships, and whether they were able to generate new business from those client relationships.”⁵⁸ All in all, Pangea3 seems like a pretty great place to work; however, American lawyers and their clients still want to know: Is it legal? Is it ethical?

III. RECENT ABA OPINION

The ABA’s recent formal Ethics Opinion declared that “[a] lawyer may outsource legal or nonlegal support services provided” that: (1) “the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1”; (2) the lawyer makes “reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with ‘direct supervisory authority’ over them;” (3) the lawyer makes appropriate disclosures “to the client regarding the use of lawyers or nonlawyers outside of the lawyer’s firm” and obtains client consent “if those lawyers or nonlawyers will be receiving information protected by Rule 1.6” (regarding confidential information);” and, (4) the fees charged are reasonable.⁵⁹ In making its decision, the ABA looked to the outsourcing trend as a “salutary one for our globalized economy.”⁶⁰ It touted the low labor costs in other parts of the world and noted the need for this low-cost labor, particularly for small firms who might not regularly employ staff attorneys to accomplish often lengthy and detailed tasks like document review.⁶¹

Fundamentally, the ABA held that “[t]here is nothing unethical about a lawyer outsourcing legal and nonlegal services,” emphasizing, however,

55. *Id.*

56. Greenwood, *supra* note 50.

57. Lin, *supra* note 1.

58. Greenwood, *supra* note 50.

59. ABA Formal Op. 08-451, *supra* note 6.

60. *Id.*

61. *Id.*

that the outsourcing lawyer must render “legal services to the client with the ‘legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.’”⁶² While the ABA did not prescribe too many specific qualifications that American lawyers seeking to outsource legal work should look for, it did identify relevant factors for determining whether an outsourcing “lawyer employs the requisite knowledge and skill in a particular matter,” including:

[T]he relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field.⁶³

The ABA ultimately declined to provide a “blueprint” for the provision of competent legal services,⁶⁴ and firms are left to speculate as to how best to handle emerging outsourcing issues. Part IV of this article sets forth exactly why U.S. attorneys need greater guidance in selecting safe, qualified LPO providers.

Particularly surprising in light of the legal and ethical issues involved in outsourcing legal work, the Florida Bar Professional Ethics Committee, Op. 07-2 (approved July 2008) concluded that “a lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing.”⁶⁵ Other states are soon expected to follow the ABA’s and Florida Bar’s opinions regarding the endorsement of legal outsourcing.⁶⁶ As of early 2009, they were the only two major bars to provide attempted guidance on this issue. The opinions, however, have been the subject of much speculative debate with one commentator noting that while the “benefits of outsourcing make its continuing growth all but certain,” U.S. lawyers embracing the practice “must remember that the application of ethics rules does not necessarily diminish with distance.”⁶⁷

IV. CONCERNS WITH LPO

A. ELIMINATING U.S. JOBS

At a time when the U.S. economy is “troubled,” to say the least, and unemployment rates continue to rise across the country, a better policy

62. *Id.*

63. *Id.*

64. *Id.*

65. *Outsourcing Legal Work Isn’t Forbidden, But It Implicates Several Ethics Concerns*, *supra* note 6, at 2115.

66. Posting of Martha L. Arias to IBLS Speaker’s Corner Blog, U.S. Lawyers are Free to Outsource Legal Work, http://ibls.com/cs/blogs/internet_law/archive/2008/08/31/u-s-lawyers-are-free-to-outsource-legal-work.aspx (Aug. 31, 2008, 04:33).

67. Eileen Libby, *A Qualified Yes*, A.B.A. J. Nov. 2008, at 32, 32.

might be to focus on maintaining jobs here at home rather than sending more work (and dollars) abroad. However, recent trends in outsourcing and the endorsement of outsourcing by the very organizations charged with protecting the American legal vocation paint a bleaker outlook for American lawyers, particularly in a recessionary period.

“With the financial crisis in full swing, the number of lawsuits is steadily increasing.”⁶⁸ Furthermore, “[w]ith conflicts of interests among the top 100 law firms that have traditionally represented the bulk of financial institutions and the 2006 amendments to the Federal Rules of Civil Procedure, mid-market firms stand to benefit with new litigation work.”⁶⁹ And, with the issuance of ABA Ethics Opinion 08-451, “offshore document review has become a real option for firms looking to take advantage of the overflow.”⁷⁰ But what about American lawyers?

Forrester Research “estimates that 35,000 U.S. legal jobs will be moved offshore by 2010 and 79,000 will move by 2015 . . . a small portion of the 1.2 million licensed lawyers in the U.S. . . . But hiring is down now for junior lawyers in the U.S. as firms struggle with declining demand.”⁷¹ Thus, one of the initial problems with ABA Ethics Opinion 08-451, even before analyzing the merits of the approval and its restrictions, comes from the fact that the ABA, whose duty it is to help protect member U.S. attorneys and the U.S. legal profession,⁷² is endorsing a strategy that will take jobs away from its constituency. As the “national voice of the legal profession,”⁷³ the ABA should be particularly aware of the threat that outsourcing legal work to India poses to a nation of lawyers—from small firms to partner track lawyers at bigger firms to contract attorneys—already hard on their luck and in need of any legal work. Thus, while it is always nice to cut costs for clients, in this case, the cost to the American economy and to the thousands of displaced American lawyers might outweigh any potential client savings down the road.

B. INDIAN LEGAL TRAINING AND STANDARDS

1. *Indian Law Schools*

Since work outsourced to India will be performed by lawyers and nonlawyers, most of whom have not attended American law schools or passed an American state bar, there are significant concerns about the quality of outsourced legal work. The managing partner of a Washing-

68. Dolan & Thickett, *supra* note 16.

69. *Id.*

70. *Id.*

71. Sheth & Koppel, *supra* note 24.

72. About the American Bar Association, ABA Mission, <http://www.abanet.org/about/> (last visited Sept. 5, 2009) (“To serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.”).

73. Press Release, Nancy Cowger Slonim, ABA, *ABA Ethics Committee Issues Opinion Detailing Lawyer Responsibilities When Outsourcing Legal Work Domestically or Internationally*, (Aug. 25, 2008), available at http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=435.

ton-based law firm pointed to recurring apprehension regarding LPO providers from prominent clients, who have remarked, “[they] don’t know what [they are] getting’ with an LPO [provider] . . . They don’t have the same accountability and flexibility. Too many mistakes and errors can occur. We can’t train these people or supervise them. So, we’d rather hire our own people and put them through a rigorous training process.’”⁷⁴

Most LPO providers, through advertising on their website or dedicated marketing offices in the United States, claim to have the best and the brightest Indian lawyers. However,

[t]he essentialist definition of the “Indian lawyer” glosses over a reality that may create special implications related to the duty of U.S. lawyers to protect the confidentiality of their clients while outsourcing to India: namely, differences in the structure of legal education *within* India means that not all Indian lawyers have the same qualifications or training.⁷⁵

In today’s law programs in India, there is a paucity of unifying standards for the over 500 Indian law schools, serious overcrowding, wide disparity in funding, corruption, lack of qualified full-time faculty, instruction in Hindi rather than English, no standard law school admission examination (with some schools admitting all applicants), widespread award of legal degrees without focus on academic performance, and no uniform number of years for the programs (with some schools offering three-year degrees and others five-year degrees).⁷⁶ While there are certainly exemplary legal programs in India, in particular the internationally recognized National Law School in Bangalore,⁷⁷ U.S. lawyers seeking to outsource legal work cannot be certain that the lawyers who they are ultimately charged with supervising have such high accreditation standards. Therefore, if and when U.S. lawyers vet LPO providers to determine with which provider to outsource, they should pay close attention to the specific institutions from which the LPO vendors hire.⁷⁸

While ABA Ethics Opinion 08-451 does set forth general recommendations for seeking offshore lawyers,⁷⁹ given the complexities and significant variations in quality of the Indian legal training system in particular,

74. Kay, *supra* note 4.

75. D’Allaird, *supra* note 34, at 1.

76. *Id.* at 6-8.

77. National Law School of India University, Bangalore Academic Programmes, http://www.nls.ac.in/academic_programmes_undergraduate.html (last visited Oct. 31, 2009). For example, the National Law School of India program boasts advanced methods of teaching (“lectures, discussions, case studies, Moot Courts, and project work”), an excellent faculty-student ratio, Clinical Legal Education, the maximum number of in-class days per trimester, and alumni who pursue higher studies at the most prestigious American and British Universities. *Id.*

78. D’Allaird, *supra* note 34, at 8.

79. “When engaging lawyers trained in a foreign country, the outsourcing lawyer first should assess whether the system of legal education under which the lawyers were trained is comparable to that in the United States. In some nations, people can call themselves ‘lawyers’ with only a minimal level of training.” ABA Formal Op. 08-451, *supra* note 6.

the ABA must provide American lawyers with more specific guidelines in selecting foreign outsourcing lawyers. For example, rather than merely recommending that American lawyers “conduct[] reference checks and investigat[e] the background of the lawyer or nonlawyer providing the services,”⁸⁰ perhaps the ABA could start by offering general information about the Indian legal system on its website and then provide a recommended list of questions to vet potential LPO providers (and answers that would indicate that the proposed LPO provider has the same standards as a U.S. law firm). By pointing to potential questions like “From which law schools did your lawyers graduate?” and “Do you have a class-percentage cut off for interviews, and if so, what is it?” the ABA could not only encourage a background check, but also alert U.S. attorneys to the fact that not all Indian law schools produce high-quality attorneys and that LPO providers may not be choosing the best lawyers even when they come from the better law schools.

2. *Indian Practicing Lawyers*

In addition to the disparity in uniformity and quality of legal education in India versus the United States, there is also a lack of standardization in ethics and other requirements for practicing Indian lawyers.⁸¹ Due to a complex history with Britain, Indian lawyers were initially excluded from practicing law all together in their legal system at the higher court level. Even after integration of Indian and British lawyers, such a “graduated system prevented unification among lawyers within India and inhibited the development of unified professional controls over the legal profession.”⁸²

Accordingly, because the Bar Council of India does not have centralized power to regulate the standards of legal education, there is a serious and dangerous lack of emphasis on legal ethics and confidentiality in the Indian legal system.⁸³ Fundamentally, and unlike the United States, “India does not explicitly have a duty of confidentiality with respect to the legal profession.”⁸⁴ The closest standard to the United States’ focus on client confidentiality is the Indian codified attorney–client privilege; however, in Gurruaja Chari’s 1,263 page *Advocacy and Professional Ethics*, only three paragraphs are devoted “to what is termed ‘the duty of confiden[tiality]’” amongst lawyers and clients.⁸⁵ Thus, while the recent ABA decision does recommend that lawyers should be concerned with how their chosen LPO provider handles client confidentiality,⁸⁶ the ABA

80. *Id.*

81. D’Allaird, *supra* note 34, at 6.

82. *Id.*

83. *Id.* at 6-7.

84. *Id.* at 7.

85. *Id.*

86. When seeking to employ lawyers trained in another country, “the professional regulatory system should be evaluated to determine whether members of the nation’s legal profession have been inculcated with core ethical principles similar to those in the United

must go one step further to protect U.S. clients from costly and potentially embarrassing exposures of confidential information by outlining “recommended training for foreign lawyers with respect to confidentiality or methods of supervision that would provide guidance to U.S. lawyers seeking to comply with the ethics rules.”⁸⁷

Interestingly, in an attempt to make their country more attractive to those who have doubts about the current system of Indian legal training, Indira Gandhi National Open University (IGNOU) is launching a post-graduate diploma program in LPO, which is “expected to generate 15,000 jobs in the next two years.”⁸⁸ The program “would cover English proficiency, skill, personal effectiveness and enterprise development, virtual intelligence method and legal education and proficiency.”⁸⁹ Though it is unclear how successful such a program will be in creating a standardized “U.S.-style” training program and attracting Indian lawyers who have already completed between three and five years of Indian law school, it is certainly a step in the right direction toward alleviating U.S. lawyers’ (and their clients’) fears about Indian legal training, and it is an additional degree that the ABA should recommend for potential U.S. outsourcers.

C. INDIAN LEGAL SYSTEM

As a still-developing country, there are many inherent risks associated with doing business in India.⁹⁰ For example, U.S. corporations do not typically worry about the stability of the U.S. dollar; however, the effects of inflation or the re-valuation of the Indian Rupee could seriously affect the Indian economy and, closer to home, alter the terms of an outsourcing contract.⁹¹ From the legal perspective, the court system of India is generally strained in the same ways as the physical infrastructure—“court backlogs can be long, and may extend beyond a decade.”⁹² In fact, the Indian court system is significantly overburdened with more than 28 million cases pending in its court system “largely due to a lengthy trial process and insufficient number of judges available to hear cases.”⁹³ However, the fundamental issues with the Indian court system do not end there—the Indian appellate courts regularly overturn lower court decisions,⁹⁴ which serves to decrease the predictability and reliability of Indian court judgments even if one manages to wait long enough to get one. Further complicating matters, laws on critical issues may not exist or may

States, and whether the nation’s disciplinary enforcement system is effective in policing its lawyers.” ABA Formal Op. 08-451, *supra* note 6.

87. D’Allaird, *supra* note 34, at 9.

88. *IGNOU Launches PG Diploma in LPO*, ZEENEWS.COM, Dec. 22, 2008, <http://www.zeenews.com/nation/2008-12-22/493141news.html>; see generally PGDLPO: Home Page, <http://www.ignouonline.ac.in/pgdlpo/> (last visited Oct. 31, 2009).

89. *IGNOU Launches PG Diploma in LOP*, *supra* note 88.

90. Prasad & Balan, *supra* note 17, at 58.

91. *Id.* at 55-56.

92. Peterson, *supra* note 10, at 22.

93. Prasad & Balan, *supra* note 17, at 49.

94. *Id.* at 50.

be unclear or untested, and “the local security forces may not have the resources or the enthusiasm to enforce [a] judgment on behalf of a U.S.-based company.”⁹⁵

Another looming issue with India’s legal system for U.S. companies that seek to outsource legal work is its reputation for corruption and bribery.⁹⁶ For example, “Indian anti-bribery law only applies to a person or persons who are, or soon expect to be, public officials, and does not apply to private citizens accepting bribes for business.”⁹⁷ In the age of extraordinary sensitivity associated with matters of client confidentiality, and considering the extreme poverty that many individuals in India face, it is not inconceivable to imagine the embarrassing release of protected client information. And while some might point to a written compliance agreement with Indian employees as a sensible solution to preventing bribery and protecting client and company secrets,⁹⁸ such a policy is unlikely to address most under-the-table deals.

Because of all of these uncertainties with respect to the Indian legal system, many organizations seeking to outsource legal work will provide for an Alternative Dispute Resolution (ADR) process in their contracts.⁹⁹ ADR in India is governed by the Arbitration and Conciliation Act of 1996, which covers any dispute that could be decided by a civil court (except for antitrust matters and matters relating to the dissolution of a company) and honors stipulated contract provisions regarding “venue, number and qualifications of judges, scope, timetable, and procedural method for arbitration.”¹⁰⁰ Therefore, U.S. companies would do well to dictate that the ADR process be performed in a more predictable venue—the United States. Importantly, India is also a signatory to the New York Convention on the Recognition of Foreign Arbitral Awards, and thus foreign awards can be enforced in India.¹⁰¹ However, Indian courts have the option to refuse to enforce a foreign award if it is “contrary to the public good in India.”¹⁰² For example, in *ONGC v. Saw Pipes Ltd.*, the Indian Supreme Court ruled that “an award could be set aside if it is contrary to: fundamental domestic policy, domestic interests, justice or morality[,] or domestic law.”¹⁰³ Such uncertainty of enforcement would make even the riskiest U.S. lawyer nervous.

Nevertheless, given the inconsistencies of the Indian legal system, it is probably best to engage the protections of the Arbitration and Conciliation Act of 1996, which a lawyer can do by including certain language in the operative outsourcing contract, such as specifying that “all disputes

95. Peterson, *supra* note 10, at 22.

96. Prasad & Balan, *supra* note 17, at 31.

97. *Id.* at 35.

98. *Id.* at 36.

99. VAGADIA, *supra* note 8, at 13.

100. Prasad & Balan, *supra* note 17, at 52-54.

101. VAGADIA, *supra* note 8, at 13.

102. *Id.* at 50.

103. *Id.* at 50 n.74.

relating to the US customer's . . . confidential information be subject to confidential mediation or arbitration rather than litigation"¹⁰⁴ and be performed in the United States. This contract language and the basic strategy of indicating the choice of U.S. law is imperative because Indian law provides that "[i]n the absence of a chosen law, the law of the state that has the closest connection to the transaction is usually applied."¹⁰⁵ Because courts primarily look to the place of contracting, negotiation, and performance; the location of the subject matter; the currency of payment; the "domicile, residence, nationality, place of incorporation or place of business of the contracting parties";¹⁰⁶ and, without specific contractual language designating U.S. law as the preferred choice of law, it would be a close call as to which country's laws were proper for a disputed action. Obviously, India would be the less preferable choice. However, despite best efforts to indicate a preference for U.S. law, there are times that Indian laws will require the disregard of the stipulated choice of law, and instead apply Indian law, like in issues regarding IP transfer, registration and protection, real estate, labor law, and bankruptcy.¹⁰⁷

Because of the convoluted nature of an Indian legal system fraught with delays, inexperience, unclear rules, and even less clear exceptions to those rules, before recommending outsourcing to places like India, the ABA should make more of an effort to keep U.S. lawyers informed about the pitfalls of doing business in a developing country. At the very least, before endorsing outsourcing to India, the ABA should provide Indian legal resources for unfamiliar U.S. lawyers and perhaps even a list of local Indian counsel for U.S. lawyers to contact if they have questions about drafting an outsourcing contract that would be enforceable in India (particularly for small firm lawyers who may be most in need of the outsourcing cost savings but unaware of its pitfalls).

D. SERVICE LEVELS AND HOW TO SELECT APPROPRIATE METRICS

Another difficulty inherent in outsourcing legal work is deciding upon an appropriate Service Level. A Service Level Agreement (SLA):

[D]efines the boundaries of the project in terms of the functions and services that the service provider will give to its client, the volume of work that will be accepted and delivered and the quality of the deliverables. . . . They act not only as metrics of performance by which to measure the service provider's performance but also as a means of providing both parties with meaningful information on which to base fees, costs, remedies, and performance incentives and

104. Sonia Baldia, *Offshoring to India: Are Your Trade Secrets and Confidential Information Adequately Protected?*, BUS. & TECH. SOURCING REV. (Mayer Brown, Worldwide), Apr. 8, 2008, at 15, available at www.mayerbrown.com/business technologysourcing/article.asp?id=4420&nid=5854.

105. VAGADIA, *supra* note 8, at 40.

106. *Id.*

107. *Id.* at 44.

disincentives.¹⁰⁸

Traditionally, Service Levels are both subjective performance standards (*i.e.* the use of “reasonable efforts” in providing these services) and objective performance standards (*i.e.* conformance to specifications in the outsourcing agreement).¹⁰⁹ With respect to traditionally outsourced fields, like Human Resources or Information Technology, Service Levels often specify matrixes like: how many calls an outsource center must answer in a period of time, obtaining a certain score on customer satisfaction surveys, or building a certain number of widgets in an hour. However, measuring the success of legal work presents a considerably greater challenge. Fundamentally, outsourced legal work must be defect-free since outsourced work product could potentially make or break a case, costing a client millions of dollars. Beyond the focus on correctness, should legal Service Levels be set at a black and white level—either you win or lose a case—or should they focus on the amount of documents reviewed in an hour? Even for something as seemingly straightforward and close to the more traditional Information Technology outsourcing, such as patent applications, should the Service Level be set at the number of hours to produce the application or at whether or not the Patent Board ultimately accepts the patent? Because legal work is inherently subjective, it does not lend itself well to the SLAs that are required to police outsourcing work. Furthermore, not only are SLAs difficult to frame for complex legal work, agreements that specify for liquidated damages in the event of failure to meet a certain benchmark can also be construed as a penalty and thus unenforceable if too severe.¹¹⁰

Accordingly, in addition to its endorsement of legal outsourcing, the ABA should assist U.S. lawyers by (1) providing recommended Service Levels by which outsourced legal work may be monitored and evaluated and (2) warning U.S. attorneys, many of whom are unfamiliar with these complicated outsourcing concepts, that their Service Level Agreements may not be enforceable at all.

E. PRIVACY AND SAFETY ISSUES

1. Confidentiality Concerns

Protecting client confidentiality is a major concern of lawyers and corporations seeking to outsource legal work to India.¹¹¹ Because India is an ocean away and has a fundamentally different concept of and empha-

108. VAGADIA, *supra* note 8, at 93.

109. *Id.* at 94-95.

110. *Id.* at 105-07.

111. Kay, *supra* note 4. “[M]any still have deep concerns about outsourcing to India. Their concerns center on the confidentiality of client data in such a remote facility, the quality of the work being done and the ability to adequately supervise large groups of Indian lawyers.” *Id.*

sis on client confidentiality,¹¹² U.S. lawyers are justifiably apprehensive about the quality of Indian ethical standards when direct supervision of Indian LPO providers thousands of miles (and dollars) away is inherently challenging and very expensive. Even before the ABA's decision to generally approve the outsourcing of legal work, one attorney—Joseph Hennessey, a named partner of the former Maryland law firm Newman, McIntosh, & Hennessey—was worried enough about this privacy/confidentiality issue to file a lawsuit against Acumen Legal Services, an India-based LPO provider, in May of 2008.¹¹³ The basis of Hennessey's complaint was that “[g]iven that the federal government now monitors some communications between citizens here and foreign nationals, LPO providers can't guarantee that a client's personal information is safe from such surveillance.”¹¹⁴ In the complaint, Hennessey asked the D.C. Circuit Court, the D.C. Bar Association, and the Maryland Bar Association for opinions regarding the danger outsourcing may pose to confidential information.¹¹⁵ Hennessey's complaint requested that the opinions touch on “whether outsourcing of legal services compromises constitutional rights and whether consent should be required before such data is sent abroad.”¹¹⁶ The complaint also wanted “the court to order law firms to disclose their use of foreign legal support and to order that the government establish protocols to shield attorney-client information from surveillance.”¹¹⁷ Hennessey, however, ultimately voluntarily dismissed his complaint in September in response to Acumen's motion to dismiss (ironically enough, prepared by an Indian LPO provider).¹¹⁸ While no court or bar association has issued a specific ruling on whether or not such privacy concerns are relevant in light of the heightened necessity to protect client confidentiality in the legal realm, most LPO vendors aren't worried. Ram Vasudevan, CEO of Quislex, an LPO providers that employs about 200 lawyers in India, noted that while he did not feel that Hennessey's claim had a lot of merit, “LPO [providers] like his have hired independent auditors and taken other steps to ensure that client confidentiality is protected.”¹¹⁹

112. D'Allaird, *supra* note 34, at 1. “[D]ifferences in confidentiality standards between India and the United States, respectively, means that Indian lawyers may have a different understanding of their duty of confidentiality to clients than American lawyers do.” *Id.*

113. Zach Lowe, *Does Outsourcing Put Private Data at Risk?*, AM. LAW., Sept. 5, 2008, <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202424288646>.

114. *Id.*

115. Pedro Ruz Gutierrez, *Law Firm Files Suit to Bar Outsourcing of Client Data*, LEGAL TIMES, May 27, 2008, <http://www.law.com/jsp/article.jsp?id=1202421668147>; *see also* Lowe, *supra* note 113.

116. Gutierrez, *supra* note 115.

117. *Id.* Interestingly, the ABA Ethics Opinion, which came out four months after Hennessey's unsuccessful suit, did pick up on some of his concerns, providing that lawyers who outsource legal work must make appropriate disclosures to their clients and first obtain client consent if the outsourced lawyers or nonlawyers receive confidential information. ABA Formal Op. 08-541, *supra* note 6.

118. Lowe, *supra* note 113.

119. *Id.*

While the ABA Ethics Opinion does give both general¹²⁰ and specific¹²¹ confidentiality recommendations, there are certain fundamental aspects of the Indian legal system that still raise serious confidentiality concerns even after appropriate LPO provider vetting. On a macro-level, popular LPO destinations, like India, “generally do not have data protection laws comparable to the laws governing the confidentiality, security and protection of personally-identifiable information, customer information, electronic data privacy, trans-border data flows and data protection in the U.S.”¹²² Moreover, turnover at Indian LPO providers is relatively high, exacerbating client confidentiality concerns about what the outgoing LPO provider employees may take with them when they leave and to whom they might sell such private information.¹²³ As an information technology partner at Baker & McKenzie’s San Diego office explained, “If you tell a client, we saved a lot of money on document review but we got indicted—well, that’s not a good outcome, . . . [a]nd the last thing you want to see is your clients’ secrets plastered all over the front page of the *Times of India*.”¹²⁴

It is clear that the Indian government is aware of customers’ concerns regarding misappropriation of confidential information and is making strides to heighten security protection of data and client information.¹²⁵ For example, for increased technological data security, “Anti Cyber-Crime Cells have been established to investigate and prosecute cases of data theft and copyright infringement.”¹²⁶ For particularly egregious breaches, companies in India can also bypass the Anti Cyber-Crime Cells and make a formal complaint with the Central Bureau of Investigations of India under various Indian statutory provisions.¹²⁷ The Indian government has also “taken steps to introduce data protection legislation in a bid to ensure that European and [U.S.] companies looking to outsource

120. “Consideration also should be given to the legal landscape of the nation to which the services are being outsourced, particularly the extent that personal property, including documents, may be susceptible to seizure in judicial or administrative proceedings notwithstanding claims of client confidentiality.” ABA Formal Op. 08-541, *supra* note 6.

121. One of the few more exacting ABA recommendations provided that:

Depending on the sensitivity of the information being provided to the service provider, the lawyer should consider investigating the security of the provider’s premises, computer network, and perhaps even its recycling and refuse disposal procedures. In some instances, it may be prudent to pay a personal visit to the intermediary’s facility, regardless of its location or the difficulty of travel, to get a firsthand sense of its operation and the professionalism of the lawyers and nonlawyers it is procuring.

ABA Formal Op. 08-541, *supra* note 6.

122. Peterson, *supra* note 10, at 22.

123. Sheth & Koppel, *supra* note 24.

124. Kay, *supra* note 4.

125. See generally VAGADIA, *supra* note 8, at 134; Alistair Maughan et al., *Outsourcing to India: Dealing with Data Theft and Misuse*, LEGAL UPDATES & NEWS (Morrison & Foerster, Worldwide), Nov. 2006, <http://www.mofo.com/news/updates/files/update02268.html>.

126. Maughan et al., *supra* note 125.

127. *Id.*

services overseas will consider India as their optimal choice.”¹²⁸ While this proposed legislation is currently far from the very secure EU Data Protection Act model, the Indian government has been successful in enacting a comprehensive set of e-commerce regulations in the Information Technology Act of 2000.¹²⁹ The “Act addresses computer crimes, including hacking, damage to computer source code, and breach of confidentiality provisions,”¹³⁰ the last of which—protecting breach of confidentiality provisions—is the most important to potential U.S. outsourcers. Some U.S. outsourcers are also taking privacy protection into their own hands by ensuring that international LPO providers do not store client data onsite.¹³¹ Rather, LPO provider employees work directly on their clients’ servers through a secure Internet connection to ensure maximum data protection.¹³²

Because of the obvious variation in quality and security that the Indian government and certain Indian LPO providers can offer, the ABA would do its constituents a greater service if they more clearly pointed out the delineations between security levels and the dangers of outsourcing to a country that has vastly different confidentiality views and laws than the United States. Again, encouraging U.S. companies to include detailed confidentiality agreements in their outsourcing agreements is a must, but such companies must also be kept apprised of both the legal and physical security hazards of sending their clients’ confidential information overseas to save a buck.

2. *Terrorism Threat*

a. *Effects of the Recent Mumbai Attacks*

U.S. lawyers and clients are increasingly concerned with the terrorism threat in India, particularly with the November 2008 attacks in Mumbai, where many of the LPO providers are based.¹³³ While LPO providers like Pangea3 were quick to e-mail their clients to tell them that Pangea3’s employees were safe and returning to work (i.e. that clients’ legal documents would still come in on time), the reality of the terrorist attacks was that it was a very close call for many LPO providers whose offices were near the luxury hotels and other targeted sites in Mumbai.¹³⁴ Ajay Raju, a partner at Reed Smith who handles Indian business issues, noted with respect to the November 2008 terrorist attacks: “This will have a deep financial impact in the short-term.”¹³⁵ As U.S. lawyers and clients began backing up computer files they shared with the Indian LPO providers in

128. VAGADIA, *supra* note 8, at 134.

129. *Id.*

130. *Id.*

131. Dolan & Thickett, *supra* note 16.

132. *Id.*

133. Kay, *supra* note 4.

134. Tom Ramstack, *Legal Outsourcing to India Takes a Hit*, WASH. TIMES, Dec. 8, 2008, at B01.

135. *Id.*

the immediate wake of the Mumbai attacks, many were forced to consider the brutal reality that if their LPO vendors loses priority documents in a terrorist raid, “the American lawyers must answer for it to their clients and judges.”¹³⁶ And while judges are likely to be more understanding of “a terrorist ruined our brief” than “the dog ate my homework,” serious concerns for the security of documents and the ultimate success of a case still linger in the forefront of many lawyers’ minds.

Moreover, from a long-term perspective, in the aftermath of a 9/11-like terrorist strike, U.S. lawyers and clients are concerned about whether “growing political tensions will curtail the country’s thriving outsourcing industry.”¹³⁷ “Much like the way business became a secondary consideration in the United States after the Sept[ember] 11, 2001 terrorist attacks, India is focusing its resources on [national] security,”¹³⁸ and not on the major concerns of U.S. outsourcers—increasing the quality of Indian legal education, a more uniform legal system, and more stringent client information laws. While these terrorist attacks were international news for weeks, apprising most U.S. businesspersons of the ongoing conflicts in India, the ABA should further highlight the serious repercussions of the attacks on Indian LPO providers and the legal sourcing industry in general, the projected possibility of retaliatory future attacks, and how U.S. outsourcers can protect their data and their LPO vendor employees from falling victim to senseless terrorist violence.

b. Terrorism and Force Majeure Clauses

The November 2008 terrorist attacks in India not only raised national security and geopolitical issues, but they have also drawn attention to the issue of force majeure language in outsourcing agreements.¹³⁹

Force Majeure is a clause in contracts that allows both parties to walk out of the contract when an extraordinary event or circumstance beyond the control of the parties happen[s]. During events such as terrorist attacks, business may be disrupted. Does such disruption allow parties to a contract to relieve themselves from their contractual obligations? Can the parties invoke the doctrine of Force Majeure after a terrorist attack in order to extricate themselves from a transaction?¹⁴⁰

The idea of including terrorism as a force majeure-style triggering event that will absolve both parties from their contractual obligations raises two main issues: (1) how to define terrorism; and, (2) is terrorism, particularly in India, still an unexpected and unavoidable event?

Examples of a typical force majeure event include “war, strike, riot,

136. *Id.*

137. *Id.*

138. *Id.*

139. Shantanu Surpure, *Force Majeure and Terrorism*, REUTERS, Jan. 9, 2009, <http://in.reuters.com/article/indiaDeals/idINIndia-37354520090109>.

140. *Id.*

crime, or act of God (e.g. flooding, earthquake, volcano)”¹⁴¹ that prevents either party from fulfilling their contractual obligations. Although some have deemed terrorist attacks an “[a]ct of [w]ar,” war is more commonly construed as occurring between sovereign entities and not as senseless violent acts by terrorist groups.¹⁴² Importantly, neither the United States nor India was at war during the September 11th attacks or the most recent 2008 Mumbai attacks, although the United States has been engaged in a quasi-“War on Terror” since 2001.¹⁴³ “Quasi” is used because Congress has not officially declared war as required by the United States Constitution.¹⁴⁴ That neither the United States in 2001 nor India in 2008 was engaged in active war is key in the force majeure context because many contracts were surely affected by the violence and subsequent political turmoil, yet the muddled area surrounding terrorism as a force majeure event likely left many individuals without non-performance recourse. Thus, as more and more companies outsource work to the growing LPO providers in India,¹⁴⁵ U.S. lawyers must find a way to construct outsourcing agreements that deal with the unstable political landscape in India, including frequent terrorist attacks.

The main problem with including “terrorism” as a force majeure event is the breadth of activities that are included in the term.¹⁴⁶ Airplane hijackings, suicide bombings, chemical warfare, and random street violence have all been characterized as acts of terrorism. Although there are various organizations or sources, such as the International Convention for the Suppression of the Financing of Terrorism, the Insurance Services Offices, Inc., and Black’s Law Dictionary, that define “terrorism” with varying degrees of complexity,¹⁴⁷ each fails to adequately encapsulate the boundaries of “terror” in the reality of ever-inventive terrorists. Thus, given the prevalence of “terrorist” acts in India, a popular outsourcing destination, the ABA would significantly help U.S. lawyers if it established a common definition for “terrorism,” which was neither over-inclusive nor under-inclusive, to aid outsourcing agreement drafters.

From a more philosophical angle, the idea of “terrorism” as a force majeure event raises the question of whether “terrorism” is truly unexpected and beyond the control of the contracting parties, a required element of force majeure.¹⁴⁸ “What is viewed as beyond the party’s control

141. *Id.*

142. *Id.* Conversely, for insurance policies, “‘civil disorder,’ ‘riots’ and ‘acts of war’ are not considered terrorism, excluding them from cover.” *Id.*

143. *Id.*

144. U.S. CONST. art. I, § 8, cl. 11.

145. About seventy LPO providers opened offices in India in just the last six months of 2008. Ramstack, *supra* note 130.

146. “When introducing terror into the world of excuses for non-performance, we open a door, but we do not necessarily know what is behind it.” Eivind Eriksen, *Terrorism and Force Majeure in International Contracts*, 16 BOND L. REV. 167, 187 (2004).

147. *Id.* at 188-89.

148. “The elements of Force Majeure are: a) It must proceed from a cause not brought about by the defaulting party’s default; b) The cause must be *inevitable and unforeseeable*;

will in most cases be judged 'on the basis of objective criteria.'"¹⁴⁹ From an objective basis, most would agree that terrorist acts are beyond the contracting parties' control; however, particularly in high-risk areas like India, are such acts really unforeseeable? The idea of unforeseeability in the force majeure context rests on the idea that the impediments to contract performance must be truly unusual and remote.¹⁵⁰ But, the "unfortunate new reality post 9/11 and 26/11 [the November 2008 attacks on Mumbai] is that terrorism is a very real threat and may unfortunately, no longer be considered an unforeseen possibility, thereby making it more difficult for parties to claim [f]orce [m]ajeure."¹⁵¹ How this idea will ultimately be applied is uncertain—earthquakes in California are likely foreseeable given the location on a major fault line and the fact that people can arguably prevent most business disruption with the existence and use of earthquake-proof buildings, etc., yet these earthquakes are still force majeure events.¹⁵² On the other hand, terrorist attacks are largely beyond the contracting parties' control yet likely foreseeable as a possibility in unstable areas like India. How should outsourcing contracts deal with this dichotomy of force majeure engagement? They could either amend the standard force majeure language to include "acts of terrorism" as a triggering event that would exclude party performance or they could not address the growing problem of terrorism, essentially rolling the dice that such violence would not happen to the contracting parties, and potentially face the challenging reality of performing their business obligations when their country has been thrown into upheaval by terrorist attacks.

Given the complexity and uncertainty of the issue surrounding the possible inclusion of "terrorism" as a force majeure event in outsourcing contracts, it would be invaluable to American lawyers if the ABA stepped in and provided some helpful guidelines. For example, a standardized definition of "terrorism" is long overdue and would help American lawyers have a better understanding of what sorts of triggering events would excuse LPO non-performance. American lawyers could also use an overview of the fundamental risks associated with "terrorism" in India—obviously the Mumbai attacks were well publicized, but was that just an isolated event or are there others? Moreover, examples of clauses that concentrate on the type of terrorist acts that would affect LPO businesses, as well as the more random acts of violence that affect the Indian geopolitical landscape, would be helpful for U.S. outsourcers.

and c) The cause must make execution of the contract wholly impossible." Surpure, *supra* note 139 (emphasis added).

149. Eriksen, *supra* note 146, at 192.

150. *Id.* at 193.

151. Surpure, *supra* note 139.

152. *Id.*

V. IS OUTSOURCING EVER A GOOD IDEA?

While this article encourages the ABA to provide lawyers with more guidance and information regarding the downside of sending legal work offshore, the reality of the extraordinary cost savings that Indian LPO vendors provide¹⁵³ cannot be ignored. Therefore, the ultimate answer to balancing the cost savings of Indian LPO providers with the legal, ethical, and political issues that surround sending confidential client data to India may lie in decreasing the complexity of the work that is outsourced and focusing more on the basic tasks that were originally assigned to U.S. contract attorneys—document reviews.

Document review is part of the discovery phase of litigation and its primary purpose at the first level is to determine whether documents are “‘responsive’ or ‘non-responsive’ as they pertain to a specific legal case or issue.”¹⁵⁴ A typical document review involves millions of documents (paper or, increasingly, electronic) that are poured over by teams of U.S. law firm associates, contract attorneys, and paralegals to determine whether or not documents are: “1) relevant to the case at hand, 2) confidential, 3) privileged/protected, and 4) ‘key,’ or ‘hot.’”¹⁵⁵ Because of the sheer number of documents to review, particularly in the age of increasing access to personal emails and other superfluous documents thrown in with those extremely relevant to the litigation at hand, it has been estimated that document review encompasses 58% to 90% of total litigation expenses for Fortune 1000 companies.¹⁵⁶

The attraction of India as a place to outsource document review comes from both the relative simplicity of the work¹⁵⁷ and the low-cost labor. In fact, while average domestic rates for associate document reviewers run from \$200 to \$300 per hour, international document review typically runs about \$25 per hour.¹⁵⁸ This cost savings is hard to beat, particularly where the simplicity of the work lends itself to outsourcing more than a complex appellate brief draft. For example, when a small company, Bluecurrent, was involved in litigation with a huge company, Dell, Bluecurrent’s legal team from DiNovo Price recommended offshoring their document review to save money.¹⁵⁹ They did, and ultimately, “using offshore document review allowed Bluecurrent to litigate against one of the world’s largest companies for 18 months until a satisfactory resolution

153. Brook, *supra* note 22.

154. Dario Olivas & Michael Dolan, *Legal Process Outsourcing of First Level Document Review*, SOURCINGMAG.COM, <http://www.sourcingmag.com/content/c060918a.asp> (last visited Oct. 31, 2009).

155. *Id.*

156. Dolan & Thickett, *supra* note 16.

157. “While high-level work will most likely remain in the U.S., companies looking to keep litigation costs in check and mid-market firms seeking to take on the spillover as a result of the financial crisis litigation are evaluating offshoring as potential opportunity.”
Id.

158. *Id.*

159. *Id.*

could be reached.”¹⁶⁰ With the cost savings that LPO document review provided, Bluecurrent was able to settle the case and spend an estimated “one-fifth to one-tenth of what it would have cost” to use U.S. lawyers for their document review.¹⁶¹

Because of the extraordinary cost savings involved with such simple work, the ABA should consider highlighting document review as the perfect task to outsource to India. While many of the offshoring concerns remain—potential effects of terrorism and privacy concerns—document review is simple enough that even poorly trained lawyers can do it and it lends itself to being easily measured by Service Level Agreements (a certain number of documents to be reviewed and classified per hour). Thus, instead of a blanket approval of outsourcing legal work to India with generic ethical restrictions, the ABA should focus more on recommending work that can be realistically performed, benchmarked, and safely returned to U.S. lawyers and clients.

CONCLUSION

Because of the increasing need for low-cost legal processing solutions in a tumultuous economic time, outsourcing legal work to India will surely continue to grow. While many U.S. lawyers and their clients were concerned with the ethics and legality of outsourcing legal work, the ABA allayed such fears with its mostly unqualified endorsement of outsourcing legal work abroad.¹⁶² Though the ABA did establish certain general ground rules for offshoring legal work—that a U.S. lawyer remain ultimately responsible for the outsourced work, supervise the outsourced work, disclose the use of LPO providers to the client and obtain consent for release of confidential information, and charge reasonable fees¹⁶³—it failed to lay the proper groundwork for American lawyers to outsource legal work safely and effectively.

First, as the spokesperson for member lawyers in America, the ABA should be more concerned with the U.S. legal jobs that will be lost via its whole-hearted approval of outsourcing legal work. Particularly given the hardships that Americans are facing in light of the current recession, recommending that more jobs be shipped overseas¹⁶⁴ not only hurts the lawyers whose jobs are lost, but also the U.S. economy as a whole—potentially negating, in a broad sense, the very cost savings that were sought by offshoring in the first place.

Second, the ABA should provide potential outsourcers with a more realistic view of what legal training and practice is really like in India. Sorting through all the hype about each LPO provider having “the best

160. *Id.*

161. *Id.*

162. ABA Formal Op. 08-451, *supra* note 6.

163. *Id.*

164. An estimated 79,000 legal jobs will move to India by 2015. Sheth & Koppel, *supra* note 24.

and brightest Indian lawyers” can be difficult for a U.S. attorney who is unaware of the extraordinary variance amongst the over 500 law schools in India or the lack of standardization of, for example, ethics rules for practicing lawyers.¹⁶⁵ While the ABA’s Ethics Opinion does point to general recommendations of qualities for which a U.S. attorney seeking to outsource legal work should look (i.e. legal knowledge, skill, and thoroughness¹⁶⁶), it fails to highlight specific degrees for which to look (like IGNOU’s new LPO training program¹⁶⁷) or outline probing questions to ask LPO providers regarding the quality of law schools from which the LPO vendors’ attorneys graduate and the ethics standards to which they subscribe. Providing more of a roadmap to the Indian legal training system and rules for practicing lawyers would allow the ABA to better serve its constituents (U.S. lawyers) by protecting them from the wrath of unhappy clients and judges if they choose sub-par LPO providers.

Moreover, the ABA would do U.S. lawyers a greater service were they to highlight the many important distinctions between legal systems of the United States and India. For example, the ABA should recommend that all U.S. outsourcers provide for ADR governed by U.S. law as the sole legal recourse available in the event of a breach to avoid the court backlogs¹⁶⁸ and frequent opinion reverses that plague the Indian appellate courts.¹⁶⁹ The ABA must also bring to American outsourcers’ attention the fact that foreign judgments can be difficult to enforce in India,¹⁷⁰ and in the absence of precise contractual language, Indian courts will apply the law that is most closely connected to the transaction,¹⁷¹ which could be undesirable Indian law.

Another way the ABA could provide much more guidance to U.S. lawyers is by crafting appropriate Service Levels (or model benchmarks) for complex and often subjective legal work. Given that success in the legal profession is not always measured in terms of dollars awarded or cases won, it is difficult for lawyers to craft appropriate levels of performance benchmarks for Indian LPO providers. Accordingly, since the ABA endorses outsourcing to India, it should also provide U.S. lawyers with helpful matrices for measuring the quality of outsourced work.

Finally, outsourcing legal work to India raises a number of privacy and safety concerns. Client confidentiality is of paramount importance in managing a client’s case, yet sending such information thousands of miles away to India, a country with comparatively lax privacy laws,¹⁷² can be dangerous. And while the ABA does recommend that U.S. lawyers seek

165. D’Allaird, *supra* note 34, at 6-8.

166. ABA Formal Op. 08-451, *supra* note 6.

167. IGNOU Launches PG Diploma in LPO, *supra* note 88.

168. Peterson, *supra* note 10, at 24; Prasad & Balan, *supra* note 17, at 49.

169. Prasad & Balan, *supra* note 17, at 50.

170. Indian courts have the option of refusing to enforce a foreign judgment if it is contrary to Indian public policy. VAGADIA, *supra* note 8, at 13.

171. *Id.* at 40.

172. Peterson, *supra* note 10, at 24.

client approval before transmitting such confidential information, the ABA would better serve American lawyers in regard to their clients if they highlighted the hazards of sending private information overseas and offer suggestions for reducing risks, including client confidentiality agreements, storing client information on secure U.S. servers, etc. Moreover, the November 2008 terrorist attacks on Mumbai have justified a number of U.S. lawyer and client concerns regarding the safety of LPO provider employees and their work as well as how to “wire around” the economic consequences of these events via force majeure clauses. This is another area where the ABA could make great strides in assisting U.S. lawyers by providing a definition of “terrorism” that would help to craft tighter force majeure clauses.

Because of the legal, ethical, and security uncertainties surrounding outsourcing legal work to India, the ABA would better serve its U.S. lawyer constituents by qualifying its outsourcing recommendation through highlighting first level document review as the ideal legal work to be outsourced. Document review is simple, can be measured easily, and provides some of the greatest cost advantages.¹⁷³ Therefore, instead of issuing a rather unqualified endorsement of Legal Process Outsourcing without consideration of its many pitfalls, the ABA should provide greater and more substantive information and recommendations with regard to outsourcing to India in general and limit its recommendations to outsourcing first level document review. Consideration by the ABA drafting committee of broader concerns, such as those outlined in this Comment, should be reflected by modification and enhancement of the ABA Ethics Opinion on the emerging issues surrounding the “hot” topic of Legal Process Outsourcing to India.

173. Since fifty-eight percent to ninety percent of total litigation expenses for major companies comes from document review and Indian outsourcers charge \$25 per hour compared to U.S. associates' \$200 to \$300 per hour, document review is ripe for the outsourcing. Dolan & Thickett, *supra* note 16.