

1-1-2011

Nearshore Alternative: Latin America's Potential in the Offshore Legal Process Outsourcing Marketplace

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Recommended Citation

Kara D. Romagnino, *Nearshore Alternative: Latin America's Potential in the Offshore Legal Process Outsourcing Marketplace*, 42 U. Miami Inter-Am. L. Rev. 367 (2011)

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Nearshore Alternative: Latin America's Potential in the Offshore Legal Process Outsourcing Marketplace

Kara D. Romagnino*

INTRODUCTION	367
I. ECONOMICS AND ETHICS OF OFFSHORE LEGAL PROCESS	
OUTSOURCING	371
A. <i>The Evolutionary Chain of Outsourcing</i>	371
B. <i>Ethical Landmines Surrounding Offshore Legal Process Outsourcing</i>	380
II. OFFSHORE LEGAL AND KNOWLEDGE PROCESS	
OUTSOURCING IN INDIA: WHAT MAKES IT WORK?	386
A. <i>Advantages of Offshore Legal Process Outsourcing in India</i>	386
B. <i>Disadvantages of Offshore Legal Process Outsourcing in India</i>	388
III. LATIN AMERICA: A REGION RIPE FOR ENTRY	392
A. <i>What Nations Have What it Takes to Enter the Offshore Legal Process Outsourcing Marketplace?</i>	393
B. <i>Analysis of the Potential Barriers to Latin American Entry into the Offshore Legal Process Outsourcing Marketplace</i>	403
IV. RECOMMENDATION: INCREASED ENGLISH FLUENCY IS LATIN AMERICA'S TICKET INTO THE OFFSHORE LEGAL PROCESS OUTSOURCING MARKETPLACE	411
CONCLUSION	412

INTRODUCTION

*“[A] firm will tend to expand until the costs of organising an
extra transaction within the firm become equal to the costs of*

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carrying out the same transaction by means of an exchange on the open market or the costs of organising in another firm.”¹

Ronald Coase’s theory of transaction costs, which answers why the market is organized into larger firms, posits that individual entrepreneurs arrange themselves into larger collectives to effectively spread the costs of production.² In short, production costs are likely to be higher when business is conducted in-house away from the marketplace.³ Accordingly, the decision to outsource a transaction rather than complete the process internally is made when the savings attained through the market transaction outweigh the benefit of maintaining control of the function.⁴ Greater production costs may be worthwhile if, in the long run, a firm can save even more money by avoiding other arms-length transaction costs.⁵

Corporations across the globe have for years applied this Coasian balancing test to determine whether certain functions could be more effectively and efficiently outsourced to a different company across the street or across the globe. For Latin America, that meant the introduction of major international players into the region, including General Motors, Microsoft, IBM and Exxon. The recent economic downturn has driven legal departments and, to a lesser extent, law firms to consider the benefits as well.⁶ Simply put, outsourcing involves contracting with a domestic or foreign third-party supplier to undertake a certain aspect of a company’s activities, while offshoring specifically refers to the out-

1. R.H. Coase, *The Nature of the Firm*, 4(16) *ECONOMICA* 386, 395 (1937), available at <http://www.sonoma.edu/users/e/eyler/426/coase1.pdf>.

2. Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 *FORDHAM L. REV.* 2137, 2142 (2010).

3. George S. Geis, *Business Outsourcing and the Agency Cost Problem*, 82 *NOTRE DAME L. REV.* 955, 968 (2007).

4. Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, *ARIZ. ST. L.J.* (forthcoming 2011) (manuscript at 23), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705505.

5. Geis, 82 *NOTRE DAME L. REV.* at 968 (noting “Coase was a little vague on the exact nature of these other costs,” Geis outlined some of the cost possibilities discussed by scholars, including the monetary cost of forming an agreement and Oliver Williamson’s theory of relation-specific investments – “assets that have high value to a specific user but lower value to everyone else.”).

6. See Burke Robertson, *ARIZ. ST. L.J.* (forthcoming 2011) (manuscript at 13) (“[I]t is corporations in need of legal services – rather than the law firms that have traditionally provided that service – that so far have taken the lead in sending work offshore.”).

sourcing of an organization's functions to another country.⁷ By relocating its activities abroad, offshoring allows the business to capture some efficiency, often through lower labor costs, in order to gain a competitive edge or perhaps to obtain assistance in an area where the business lacks expertise.⁸ The principle justification is that, by hiring employees overseas at lower costs, companies can increase productivity, and in turn lower the price of goods and make them more affordable in the marketplace.⁹ Today, the United States leads the world in offshoring, followed by the United Kingdom, Germany, France and other western European countries.¹⁰ According to the most recent A.T. Kearney Global Services Location Index (GSLI), the most desirable locations for offshoring are India, China, Malaysia, Egypt and Indonesia, principally because of their large talent pools and cost advantages.¹¹ However, there are regional favorites in certain locales. For example, Brazil dominates the industry in South America.¹²

The outsourcing industry has for years been dominated by service centers in India. Recently, the country has led the charge to more customized services in the Knowledge Process Outsourcing (KPO) industry, which requires specialized knowledge and

7. Usha Antharvedi Sr., *Legal Process Outsourcing: Trends and Perspectives* (Osmania University working paper, Jan. 18, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1085128. See also Michael A. Zuckerman, 94 CORNELL L. REV. 165, 168 n. 19 (2008), available at <http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Zuckerman.pdf> (noting that offshoring, which the author defines as "a form of outsourcing in which an entity relocates operations to another country," has been referred to as "offshore outsourcing."). To avoid confusion, the author here will refer to "offshoring" or "offshore Legal Process Outsourcing (LPO)" when discussing foreign outsourcing services.

8. Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT'L L. 401, 403 (2007).

9. Gary C. Clendenin, *Allaying the Outsourcing Tempest: A Candid Look at Outsourcing Vis-à-vis the Future of American Jobs*, 14 U. MIAMI BUS. L. REV. 295, 299-300 (2006).

10. Harry Rubin, *Supply-Side/Manufacturing Outsourcing: Strategies and Negotiations*, 38 GEO. J. INT'L L. 713, 714 (2007).

11. *Offshoring Opportunities Amid Economic Turbulence*, A.T. Kearney (2011), <http://www.atkearney.com/index.php/Publications/offshoring-opportunities-amid-economic-turbulence-the-at-kearney-global-services-location-index-gsli-2011.html> (noting that India, China and Malaysia have been the top three nations on the GSLI since its inception in 2004). According to A.T. Kearney, the GSLI survey looks at "corporate input, current remote services activity and government initiatives to promote the sector. [The countries] were evaluated against 39 measurements across three major categories: financial attractiveness, people skills and availability, and business environment." *Id.*

12. Rubin, GEO. J. INT'L L. at 714.

skills rather than merely a large pool of workers.¹³ A subset of this trend is the offshore Legal Process Outsourcing (LPO) sector, which has been growing in recent years.¹⁴ Revenue among India's offshore LPO firms was expected to increase to \$440 million in 2010, up 38 percent from two years prior, and is predicted to surpass the \$1 billion mark by 2014.¹⁵

While India continues to be the largest offshore KPO provider, the industry is gaining strength in other offshore destinations. In recent years, certain legal processes and services have been offshored to professionals not just in India, but New Zealand, South Korea, and other countries where the cost of labor is significantly lower.¹⁶ In fact, Evalueserve – a global research and analytics firm – predicts that India's market share in the KPO sector will fall to just 59 percent by 2013-14, down from more than 70 percent in 2006.¹⁷ While this is still a majority percentage of the market, it leaves the door open for other countries to compete. Thus, despite the emphasis on India as the leading global offshoring center, inflation and increasing costs linked to offshoring in that region have made nearshoring to Latin America a strong alternative.¹⁸ This, coupled with other advantages – including the growing infrastructure and proximity to the United States – could tip the Coasian scale away from India and toward nations in the Western Hemisphere.

This Article considers whether nearshoring legal services is a viable alternative or, at the very least, whether Latin America could serve as a complement to India's offshore LPO industry. Part I will give an overview of the offshore outsourcing phenomenon, including the emergence of offshore LPO as employed by both corporations and law firms in the United States and United King-

13. Courtney I. Schultz, *Legal Offshoring: A Cost-Benefit Analysis*, 35 J. CORP. L. 639, 642 (2010).

14. *Id.* at 643.

15. Heather Timmons, *Outsourcing to India Draws Western Lawyers*, NEW YORK TIMES, Aug. 4, 2010 at B1, available at http://www.nytimes.com/2010/08/05/business/global/05legal.html?_r=1&pagewanted=1.

16. Alison M. Kadzik, *The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 GEO. J. LEGAL ETHICS 731 (2006).

17. *Recession Sets KPOs Back by Three Years*, THE TIMES OF INDIA (Sept. 1, 2010, 5:23 PM), <http://timesofindia.indiatimes.com/tech/news/outsourcing/Recession-sets-KPOs-back-by-3-years/articleshow/6474826.cms>.

18. See e.g. Trevor W. Nagel & Elizabeth M. Kelley, *The Impact of Globalization on Structuring, Implementing and Advising on Sourcing Arrangements*, 38 GEO. J. INT'L L. 619 n. 11 (2007) (describing "nearshoring" as moving functions to "countries that are quite cheap and very close rather than very cheap and far away").

dom. It also gives an overview of some of the major ethical implications of offshore LPO.

Part II will evaluate India's market control in the offshoring industry generally as well as its role in the offshore LPO sector specifically. It will describe some of the reasons why India is a popular destination for offshore LPO, including its large pool of English-speaking workers and the nation's predication on the common law system. The section will continue by considering some of the India's shortcomings in the offshore LPO field.

Part III will compare Latin American countries to assess whether they can compete with India in the global offshore LPO market. It will look at the various components that make offshoring work and will evaluate which Latin American nations have the best potential for entry into the offshore LPO marketplace. The section will conclude with a discussion of the unique issues posed by offshoring LPO to Latin America, including the use of civil law in the region, and evaluate whether these factors do in fact hinder the region as a nearshore alternative to India.

Part IV will provide recommendations as to what Latin American countries must do in order to become competitive offshore LPO destinations. It will also encourage investigation and research into additional factors that could contribute to this analysis.

I. ECONOMICS AND ETHICS OF LEGAL PROCESS OUTSOURCING

A. *The Evolutionary Chain of Outsourcing*

1. Business Process Outsourcing

Availability of cost effective, high-speed Internet combined with other communications tools has empowered foreign workers to provide services that do not necessarily require direct contact.¹⁹ As a consequence, offshore Business Process Outsourcing (BPO) – the outsourcing of business processes to a foreign third party – has successfully changed the way business takes place.²⁰ This broad

19. DAVID A. STEIGER, *THE GLOBALIZED LAWYER: SECRETS TO MANAGING OUTSOURCING, JOINT VENTURES, AND OTHER CROSS-BORDER TRANSACTIONS* 3 (A.B.A. 2008) (citing Office of Senator Joseph I. Lieberman, *Offshore Outsourcing and America's Competitive Edge: Losing Out in the High Technology R&D and Services Sectors*, May 11, 2004, at 15).

20. Aaron R. Harmon, *The Ethics of Legal Process Outsourcing: Is the Practice of Law a "Noble Profession," or is it Just Another Business?*, 13 J. TECH. L. & POL'Y 41, 51 (2008).

category of processes is service-oriented rather than solutions-oriented, meaning the tasks involved are routine, non-revenue generating functions that do not require much independent judgment.²¹ These include price sensitive, commoditized services like call centers and collections work as well as the actual handling of business processes like accounts payable work, insurance claims and customer service.²² Not surprisingly, the developments that drive globalization, including advances in transportation and technology, also support offshoring a variety of business processes, resulting in the relocation of services such as customer call centers, data processing activities, medical transcription services, software design activities, accounting services, and interpretation of x-rays.²³ One estimate is that as many as 3.3 million white-collar job functions could be shipped abroad by 2015.²⁴

2. Knowledge Process Outsourcing

Over time, some offshore BPO has shifted from labor-intensive outsourcing like customer service, debt collections and voice and e-mail processing to more value-added, higher-end processes involving more research and analytical skills.²⁵ This shift has facilitated the rise of a narrower category of outsourcing known as Knowledge Process Outsourcing (KPO).²⁶ The fundamental difference between the two industries is that KPO services are customized and require deeper experience, skills and domain knowledge in particular sectors than do BPO services.²⁷ These include services such as market research, Web development, clinical research, business research analytics, engineering services, and data acquisition as well as intellectual property and patent research, legal research and legal process services.²⁸ The shift from more BPO to KPO is not only reflected in the services, but in

21. *Id.*

22. STEIGER at 3.

23. Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT'L L. 401, 403 (2007).

24. *Id.*

25. Courtney I. Schultz, *Legal Offshoring: A Cost-Benefit Analysis*, 35 J. CORP. L. 639, 641-42 (2010).

26. *Id.* at 642.

27. *Recession Sets KPOs Back by Three Years*, THE TIMES OF INDIA (Sept. 1, 2010, 5:23 PM), <http://timesofindia.indiatimes.com/tech/news/outsourcing/Recession-sets-KPOs-back-by-3-years/articleshow/6474826.cms> (quoting Evalueserve Chairman Dr Alok Aggarwal).

28. Diksha Dutta, *Going Up the Value Chain*, FINANCIAL EXPRESS (INDIA) (May 10, 2010), <http://www.financialexpress.com/news/going-up-the-value-chain/616287/>.

the billing rates as well.²⁹ For instance, a 2005 survey showed that billing rates for traditional human resources outsourcing averaged about \$15 per hour, while the average for a wide range of KPO activities was about \$45 per hour and rising that same year.³⁰

Although comparatively new to the outsourcing world, KPO was predicted by globalization expert David A. Steiger as early as 2004 to “rule the future,” with revenues expected to grow to \$17 billion by the end of the decade.³¹ While this turned out to be a lofty prediction in terms of timing, it was not far from the mark in accuracy: In accounting for the “Great Recession,” international KPO service provider Evalueserve recently revised its estimate to predict that the \$17 billion goal will be reached by 2013-14.³² Similarly, as of 2010, research giant Gartner valued the offshore KPO industry at nearly \$12 billion and calculated an expected growth rate of forty percent in 2010, compared to ten to fifteen percent in 2009.³³ Overall, there seems to be high growth potential for the value-added KPO sector that will facilitate the growth of analytic sub-sectors such as LPO.

29. Sarosh Kuruvilla & Aruna Ranganathan, *Economic Development Strategies and Macro- and Micro-Level Human Resources Policies: The Case of India's "Outsourcing" Industry*, 62 INDUS. & LAB. REL. REV. 39, 48 (2008).

30. *Id.*; See also Prabhakar Deshpande, *KPO Leads Outsourcing Growth*, Economic Times (Apr. 8, 2005, 3:48 AM), <http://economictimes.indiatimes.com/article/show/1072029.cms> (citing Nasscom's 2005 Strategic Review, which stated KPO billing rates were \$30-\$45 per hour compared to \$10-\$14 for BPO services).

31. DAVID A. STEIGER, *THE GLOBALIZED LAWYER: SECRETS TO MANAGING OUTSOURCING, JOINT VENTURES, AND OTHER CROSS-BORDER TRANSACTIONS* 3 (A.B.A. 2008); See also Prabhakar Deshpande, *KPO Leads Outsourcing Growth*, Economic Times (Apr. 8, 2005, 3:48 AM), <http://economictimes.indiatimes.com/articleshow/1072029.cms> (citing Nasscom's 2005 Strategic Review, which predicted the KPO sector in India to be worth \$15.5 billion by 2010, the author noted “the BPO industry itself was expected to be about \$20bn by 2008, hence a very significant portion of the sector-in excess of 50% is now projected to be knowledge based.”).

32. *Recession Sets KPOs Back by Three Years*, THE TIMES OF INDIA (Sept. 1, 2010, 5:23 PM), <http://timesofindia.indiatimes.com/tech/news/outsourcing/Recession-sets-KPOs-back-by-3-years/articleshow/6474826.cms>. In discussing the impact of the “Great Recession,” the article went on to quote Evalueserve Chairman Dr. Alok Aggarwal: “While it may seem counterintuitive, recessionary times actually meant slower overall growth for offshoring knowledge services, since many firms were forced to shift their focus to survival mode.” Another possible explanation is that outsourcing contracts soared during the last half of 2007 and first half of 2008. Therefore, the dip in outsourcing activity in 2009 may in fact be attributable to a “return to normal levels of activity from a peak in early 2008.” John F. Delaney & Laurie S. Hane, *Outsourcing and the Global Recession: Trends, Opportunities and Challenges*, 981 PLIPAT 173, 204 (Sept. – Nov. 2009).

33. Dutta, *Going Up the Value Chain*.

3. Legal Process Outsourcing

i. The Basics of Legal Process Outsourcing

Included in the market research and analytics sectors of KPO is the emerging Legal Process Outsourcing (LPO) industry, which is the fastest-growing sub-sector of KPO.³⁴ Offshore LPO includes work that was traditionally completed by paralegals as well as work that was historically left to licensed attorneys.³⁵ For instance, offshore LPO initially involved mostly back-office support services, including library storage and services like data processing and copying.³⁶ More recently, foreign lawyers and LPO providers have been hired to edit and make grammatical and syntax corrections to legal filings and contracts submitted by American law firms and corporations.³⁷ But it is the recent shift to offshoring legal and law-related services themselves that has garnered much attention.³⁸ These include everything from patent application drafting, legal research and pre-litigation documentation to analyzing documents and writing software licensing and other contract agreements.³⁹ As a partner in one Indian law firm said, "The thought of western companies . . . is that if I can outsource the lower end of the work successfully, why not outsource more complicated work as well?"⁴⁰

Logistically, LPO service providers can be categorized into

34. *LPO and the Great Recession*, IP FRONTLINE (Apr. 27, 2010), <http://www.ipfrontline.com/depts/article.aspx?id=24227&deptid=3>.

35. Courtney I. Schultz, *Legal Offshoring: A Cost-Benefit Analysis*, 35 J. CORP. L. 639, 642-43 (2010).

36. Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT'L LAW. 401, 404 (2007).

37. Mini Joseph Tejaswi, *Indian Lawyers a Model in English for U.S. Firms*, TIMES OF INDIA (July 26, 2010, 2:03 AM), <http://timesofindia.indiatimes.com/india/Indian-lawyers-a-model-in-English-for-US-firms/articleshow/6216775.cms>. See also Charu Bahri, *Conjunction Junction*, A.B.A. J. (July 31, 2010, 11:11 PM), http://www.abajournal.com/magazine/article/conjunction_junction/ (quoting lawyer Russell Smith, who helped found Indian LPO SDD Global Solutions, "Lawyers at some U.S. firms do not have time to conduct or participate in similar training . . . and are either too busy or under too much cost pressure to take the time to do a perfect or near-perfect job.' Not to mention that 'high-quality, effective English writing has been out of fashion in the U.S. for decades'").

38. Daly & Silver, 38 GEO. J. INT'L LAW. At 404.

39. *Take This!: After BPO and KPO, It's LPO*, TIMES OF INDIA (Nov. 5, 2005, 1:16 AM), <http://timesofindia.indiatimes.com/india/Take-this-After-BPO-and-KPO-its-LPO/articleshow/1285235.cms>.

40. DAVID A. STEIGER, *THE GLOBALIZED LAWYER: SECRETS TO MANAGING OUTSOURCING, JOINT VENTURES, AND OTHER CROSS-BORDER TRANSACTIONS* 3 (A.B.A. 2008) (quoting Ramesh K.V., a partner with Kochhar and Co. in Mumbai).

three forms – captive centers, third-party multi-service vendors, and third-party niche vendors – the latter two of which can be operated either domestically or offshore. The first model involves U.S. entities that have subsidiaries or departments in foreign countries.⁴¹ The second LPO category – multi-service vendors – includes vendors like Integreon, R.R. Donnelley-owned Office Tiger, and Evalueserve that provide services to multiple clients but that do not specialize solely in legal services.⁴² This sort of specialization is left to vendors in the third category – third-party niche vendors – some of which provide a variety of legal services and others that focus exclusively on a certain area of law.⁴³ Examples of third-party niche vendors include Pangea3, Atlas Legal Research, Mindcrest, IP Pro, PatentMetrix, UnitedLex and Lexadigm, the latter of which is widely cited for having prepared a brief that was submitted to the U.S. Supreme Court.⁴⁴

Although the topic of offshoring legal services is relatively new to the table, there is evidence that it is gaining speed. A study conducted in 2005 found the number of LPOs increased by more than 300 percent from March 2005 to October 2006.⁴⁵ Further, more than three million U.S. legal jobs were offshored from 2001 to 2005,⁴⁶ pushing India's offshore LPO industry to reach \$225 million in revenues in 2008.⁴⁷ The industry also received a boost when the American Bar Association (ABA) published its Formal Ethics Opinion 08-451 in August 2008.⁴⁸ This widely pub-

41. Courtney I. Schultz, *Legal Offshoring: A Cost-Benefit Analysis*, 35 J. CORP. L. 639, 643 (2010).

42. Schultz, 35 J. CORP. L. at 643.

43. *Id.*

44. Krishnan, 48 WM. & MARY L. REV. at 2203.

45. Joshua A. Bachrach, *Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(H)*, 21 GEO. J. LEGAL ETHICS 631, 631 (2008) (citing a study conducted by Prism Legal Consulting).

46. Lee A. Patterson, III, *Outsourcing of Legal Services: A Brief Survey of the Practice and the Minimal Impact of Protectionist Legislation*, 7 RICH. J. GLOBAL L. & BUS. 177, 182 (2008) (citing Alison M. Kadzik, *Current Development, The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 GEO. J. LEGAL ETHICS 731, 731 (2006)).

47. Dileep Athavale, *Concerns About Data Security, Quality Curbing Growth*, TIMES OF INDIA (June 16, 2009, 6:17 AM), <http://timesofindia.indiatimes.com/Pune/Concerns-about-data-security-quality-curbing-growth/articleshow/4660385.cms>.

48. *LPO and the Great Recession*, IP FRONTLINE (Apr. 27, 2010), <http://www.ipfrontline.com/depts/article.aspx?id=24227&deptid=3>. See A.B.A. Formal Opinion 08-451 (Aug. 5, 2008), <http://www.aapipara.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf>. The A.B.A. Ethics Opinion outlined ethical obligations of lawyers and law firms that outsourced legal work. Although it concluded that U.S. lawyers and firms are free to outsource legal services both domestically and abroad, they must

lized opinion of the ABA Standing Committee on Ethics and Professional Responsibility, which called the outsourcing trend “a salutary one for our globalized economy,” resulted in more than 33,000 media and other websites reporting or commenting on it, thereby creating substantially more awareness of the offshore LPO industry.⁴⁹ Nevertheless, legal outsourcing is still relatively small. Of the \$180 billion Americans spend on lawyers each year, only about \$1 billion goes to outsourcers.⁵⁰ To some, this trend toward outsourcing reflects the understanding that economic and social shifts can and should impact the legal profession just as it does any other market player.⁵¹ Others, however, posit that the shift from the “gentleman’s profession” to a function of the external market is a step in the wrong direction toward the end of the legal profession as we know it.⁵² In either case, the outsourcing of legal services appears to be more than a fleeting fad; instead, as Professor William Henderson of the Indiana University School of Law notes, “[t]his is the beginning of a wave that’s only going to

“adhere to ethics rules requiring competence, supervision, protection of confidential information, reasonable fees and not assisting unauthorized practice of law.” Press Release, ABA Ethics Committee Issues Opinion Detailing Lawyer Responsibilities When Outsourcing Legal Work Domestically or Internationally (Aug. 25, 2008) http://apps.americanbar.org/abanet/media/release/news_release.cfm?releaseid=435.

49. *LPO and the Great Recession*, IP FRONTLINE (Apr. 27, 2010), <http://www.ipfrontline.com/depts/article.aspx?id=24227&deptid=3>.

50. *Offshoring Your Lawyer*, ECONOMIST (Dec. 16, 2010), <http://www.economist.com/node/17733545>.

51. See RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 2-3* (Oxford Univ. Press 2010). In his oft-cited book, Susskind argues that the development of the legal profession rests on lawyers, policy makers and clients “to think more creatively, imaginatively and entrepreneurially about the way in which lawyers can and should contribute to our rapidly changing economy and society.” *Id.* at 2. In short:

[t]he market . . . will determine that the legal world is inefficiently resourced (under-resourced in the consumer sector and over-resourced at the high end); it will increasingly drive out excessive and unnecessary friction and, in turn, we will indeed witness the end of outdated legal practice and the end of outdated lawyers.

Id. at 3.

52. MIKE FEATHERSTONE (EDITOR), *GLOBAL CULTURE: NATIONALISM, GLOBALIZATION AND MODERNITY*; Yves Dezalay, *The Big Bang and the Law: The Internationalization and Restructuration of the Legal Field* (Sage Publications, Inc., 1997) (“In putting themselves at the service of the market, and becoming entrepreneurial service providers who are more interested in economic return than justice, aren’t these new mercenaries (‘hired guns’) in the employ of capital squandering the stock of legitimacy and credibility built up by their ‘gentleman lawyer’ predecessors? In a word, doesn’t the surrender of certain royal prerogatives in favour of the market mean that the lawyers are themselves paradoxically proclaiming the ‘end of law?’”).

get bigger in the years to come.”⁵³

ii. *Corporations and Offshore Legal Process Outsourcing*

Corporations have led the charge for offshore LPO services.⁵⁴ One of the first American companies to establish a LPO captive center was General Electric, which established an in-house legal office in India in 2001.⁵⁵ Other companies such as DuPont, Cisco Systems and Microsoft have offshored certain legal work, including patent applications and intellectual property prosecution.⁵⁶ Today, businesses continue to provide the vast majority of offshored LPO work, which in turn allows them to reduce the time and monetary costs of handling routine legal matters internally.⁵⁷ For instance, Rio Tinto, a multi-national mining and processing company, inked a deal with outsourcer CPA Global in 2009 that was projected to save the company twenty percent annually in legal costs.⁵⁸ Rio Tinto’s then-managing attorney, Leah Cooper, said the deal would free up the company’s internal team “to get involved in some of the more complex and challenging legal matters, which in the past might have been sent to outside counsel at significant cost.”⁵⁹ American Express, GE, Sony, Yahoo! and Net-

53. Ameet Sachdev, *Outsourcing Gaining Standing in Legal Profession*, CHICAGO TRIBUNE (Dec. 28, 2010), <http://www.chicagotribune.com/business/ct-biz-1228-outlook-legal-20101228,0,7710253.story>.

54. *LPO and the Great Recession*, IP FRONTLINE (Apr. 27, 2010), <http://www.ipfrontline.com/depts/article.aspx?id=24227&deptid=3> (“More than 90% of the LPO work is either being directly outsourced by Corporate Counsels or on behalf of Corporate Counsels (by their preferred law firms). So far, law firms have been hesitant to offshore outsourcing.”).

55. Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2201 (2007) (“By establishing an in-house legal office in India, staffed by Indian lawyers to handle issues relating to its plastics and consumer finance divisions, GE reportedly has saved over two million dollars.”). Krishnan also highlights a fourth way American business have participated in offshore LPO, which is to directly hire Indian law firms to perform their services. According to Krishnan, American corporations are offshoring litigation-related and transactional matters as well as intellectual property work like patent applications. *Id.* at 2202.

56. Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT’L L. 401, 415 (2007).

57. *LPO and the Great Recession*, IP FRONTLINE (Apr. 27, 2010), <http://www.ipfrontline.com/depts/article.aspx?id=24227&deptid=3>.

58. *Rio Tinto Signs Legal Services Outsourcing Agreement with CPA Global*, CPA GLOBAL (June 18, 2009), http://www.cpaglobal.com/media_centre/press_releases/0145/rio_tinto_signs_legal_services.

59. *Id.* Interestingly, and as possible evidence of the future growth of the offshore LPO industry, Cooper left Rio Tinto in May 2010 to become Strategy Director at CPA

flix have likewise started using Thompson Reuters-owned Pangea3 for basic legal tasks.⁶⁰

iii. Law Firms and Offshore Legal Process Outsourcing

In addition to the various corporations that offshore certain legal functions, numerous British and American law firms have turned to offshoring to handle some of their legal services as well.⁶¹ Dallas-based law firm Bickel & Brewer, which opened a captive facility in India in 1995, is often cited as the first firm to offshore legal services.⁶² This subsidiary business now performs all document imaging and abstracting for Bickel & Brewer's largest cases.⁶³ Around this same time, Baker & McKenzie began talks about whether it made economic sense to begin offshoring legal services to one of its many offices abroad.⁶⁴ After reconsidering the issue in 2000, the firm focused on its long-established outpost in Manila, which first opened in 1963 and now provides back-office IT and computer maintenance work as well as word-processing and clerical tasks for the firm's sixty-eight international

Global. See *Rio outsourcing six months on: Richard Susskind and Leah Cooper discuss the lessons learned*, Legal Week (Mar. 16, 2010, 5:04 PM), <http://www.legalweek.com/legal-week/analysis/1596677/rio-tinto-outsourcing-deal-months>.

60. *Offshoring Your Lawyer*, ECONOMIST (Dec. 16, 2010), <http://www.economist.com/node/17733545>.

61. Jayanth K. Krishnan, *Outsourcing and the Globalizing Legal Profession*, 48 WM. & MARY L. REV. 2189, 2201 (2007).

62. See Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT'L L. 401, 407 (2007); Dileep Athavale, *Concerns About Data Security, Quality Curbing Growth*, TIMES OF INDIA (June 16, 2006, 6:17 AM), <http://timesofindia.indiatimes.com/city/pune/Concerns-about-data-security-quality-curbing-growth/articleshow/4660385.cms>. Note, however, that domestic outsourcing of legal services has been occurring for quite some time. In the 1980s, Dallas-based law firm Simpson & Gaule began offering commodity legal services like document review, imaging, legal research, coding and scanning to law firms and legal departments at rates far below those charged by traditional law firms. Brandon Robers, *The Firm is Flat: Ethical Implications of Legal Offshoring*, 23 GEO. J. LEGAL ETHICS 799, 802 (2010). Through contracting legal services alone, Simpson & Gaule billed \$1.5 million in 1991. Charles B. Camp, *Settling for Less: Lawyers See Wealth, Job Security Slip at Top Firms*, DALLAS MORNING NEWS, Sept. 13, 1992, at 1A. By the mid 1990s, contract attorneys were routinely used to perform work without incurring the administrative expenses of permanent employees. Robers at 801.

63. Brandon Robers, *The Firm is Flat: Ethical Implications of Legal Offshoring*, 23 GEO. J. LEGAL ETHICS 799, 802 (2010).

64. Michael Arndt, *The Cost-Killer in Manila*, BUSINESSWEEK (Jan. 30, 2006), http://www.businessweek.com/magazine/content/06_05/b3969418.htm.

offices.⁶⁵ Just by offshoring its desktop publishing, Baker & McKenzie saved half a million dollars in 2005, becoming a major contributor to the firm's profits and leading to a mere one percent cost increase that same year.⁶⁶ More recently, British law firm CMS Cameron McKenna signed a deal with LPO giant Integreon in 2010 worth \$852 million over ten years.⁶⁷ What was touted as the "largest legal outsourcing deal ever," CMS announced it would begin shipping "middle office" duties overseas.⁶⁸ Likewise, Los Angeles-based Integreon – which has outsourcing centers in India, the Philippines and South Africa – previously handled support services for Clifford Chance and DLA Piper.⁶⁹

Nevertheless, law firms have been particularly hesitant to discuss offshore LPO.⁷⁰ A recent survey conducted by Fronterion, a Chicago-based outsourcing consulting firm, received a mere seventeen percent return rate from the nation's top law firms.⁷¹ One proffered explanation for this reluctance to discuss outsourcing habits is the concern over ethical implications connected with the practice.⁷² Others point to the risk that competitors will follow suit, thereby diminishing the gains of outsourcing in the first place.⁷³ A third justification for the hesitancy to disclose outsourcing habits is attributed to public perception and the fear of being punished in the marketplace for sending work out of the United States, particularly in a time of recession.⁷⁴

65. *Id.*; See also *Firm Facts*, BAKER & MCKENZIE (last updated Oct. 2010), <http://www.bakermckenzie.com/firmfacts/>.

66. Arndt, *The Cost-Killer in Manila* (quoting John Conroy, Jr., who served as Chairman of the Executive Committee of Baker & McKenzie from October 2004 until November 2010 when he returned to practice in the firm's Chicago office and took the role of Head of Global Strategic Initiatives, See <http://www.bakermckenzie.com/Baker-McKenzie-Announces-Leadership-Changes-11-01-2010/>).

67. Anthony Lin, *CMS Cameron McKenna Inks Major Outsourcing Deal*, *AMLAW DAILY* (May 18, 2010, 11:42 AM), <http://amlawdaily.typepad.com/amlawdaily/2010/05/integreon.html>.

68. *Id.*

69. *Id.*

70. *LPO and the Great Recession*, *IP FRONTLINE* (Apr. 27, 2010), <http://www.ipfrontline.com/depts/article.aspx?id=24227&deptid=3>.

71. Debra Cassens Weiss, *Are Top U.S. Law Firms Outsourcing Some Legal Work? 83% Won't Say*, *A.B.A.J.* July 7, 2010, 4:30 AM), http://www.abajournal.com/news/article/are_top_us_law_firms_outsourcing_their_work_83_wont_say/.

72. *Id.*; See *infra* Part I.B.

73. Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, *ARIZ. ST. L.J.* (forthcoming 2011) (manuscript at 14), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705505.

74. *Id.*

B. Ethical Landmines Surrounding Offshore Legal Process Outsourcing

The ethical issues pertaining to offshore LPO have garnered much legal commentary and scholarly evaluation.⁷⁵ Likewise, ethical concerns pertaining to offshore LPO have been addressed by the American Bar Association as well as a variety of state bar association opinions.⁷⁶ This is not surprising since, as David A. Steiger points out, “[w]hile it is important to avoid the urge to impose United States’ means and methods on other cultures in ways that do not make good business sense, you cannot leave your ethical standards behind when doing business overseas.”⁷⁷ Accordingly, because others have thoughtfully explored the issue, the following is meant as a cursory overview that merely touches on some of the major ethical issues faced by law firms and corporations that decide to engage in offshore LPO.

1. Unauthorized Practice of Law

Until recently, the impact of multi-jurisdictional practice on the unauthorized practice of law remained low on the ethical radar.⁷⁸ However, state and county ethics opinions on offshore LPO have addressed the issue, and the ABA, in its formal ethics opinion on offshore LPO, warned attorneys to be careful not to facilitate the unauthorized practice of law.⁷⁹ Thus, attorneys must

75. See e.g. Brandon Robers, *The Firm is Flat: Ethical Implications of Legal Offshoring*, 23 GEO. J. LEGAL ETHICS 799 (2010); James I. Ham, *Ethical Considerations Relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States*, 27 PENN ST. INT’L L. REV. 323 (2008); Joshua A. Bachrach, *Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(H)*, 21 GEO. J. LEGAL ETHICS 631 (2008); Alison M. Kadzik, *The Current Trend to Outsource Legal Work Abroad and the Ethical Issues Related to Such Practices*, 19 GEO. J. LEGAL ETHICS 731 (2006); Darya V. Pollak, *“I’m Calling my Lawyer . . . In India!”: Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT’L L. & FOREIGN AFF. 99 (2006).

76. Mark L. Tuft, *Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-Examining Current Ethical Standards*, 43 AKRON L. REV. 825, 826 (2010) (examining ABA Formal Opinion 08-451 as well as state bar opinions from New York, California, Colorado, Florida, North Carolina and Ohio).

77. DAVID A. STEIGER, *THE GLOBALIZED LAWYER: SECRETS TO MANAGING OUTSOURCING, JOINT VENTURES AND OTHER CROSS-BORDER TRANSACTIONS* 92 (ABA Publishing 2008).

78. Darya V. Pollak, *“I’m Calling my Lawyer . . . In India!”: Ethical Issues in International Legal Outsourcing*, 11 UCLA J. INT’L L. & FOREIGN AFF. 99, 119 (2006).

79. A.B.A. Formal Opinion 08-451 (Aug. 5, 2008), <http://www.aapipara.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf> (“[I]f the activities of a lawyer, nonlawyer or intermediary employed in an outsourcing capacity are held to be the

be cautious as to what constitutes the “practice of law” and what safeguards and procedures should be implemented to comply with the Model Rules. In this vein, the development of the unauthorized practice of law in California is instructive.

In 1998, the California Supreme Court brought the issue of the unauthorized practice of law to the forefront in the state. That year, in *Birbrower, Montalbano, Condon & Frank v. Superior Court*, the court considered a provision of the California Bar Act that prohibited the practice of law in California unless the person is an active member of the State Bar.⁸⁰ In interpreting the language of the statute, the court rejected the New York lawyers’ argument that the provision of the California Bar Act does not apply to out-of-state attorneys, instead holding “the practice of law ‘in California’ entails sufficient contact with the California client to render the nature of the legal service a clear legal representation.”⁸¹ Consequently, the court held a New York law firm violated California law when it performed a substantial amount of work for a California corporation within the Golden State’s borders, specifically because neither of the attorneys who represented the corporation was licensed to practice in the state.⁸²

The *Birbrower* decision, although related to direct out-of-state representation of a client, has implications for offshore outsourcing. Although the court stated “[m]ere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law ‘in California,’” nevertheless, the proper inquiry “is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.”⁸³ Despite the seemingly strict contours of the California Superior Court’s inter-

unauthorized practice of law, and the outsourcing lawyer facilitated that violation of law by action or inaction, the outsourcing lawyer will have violated Rule 5.5(a).”).

80. CAL. BUS. & PROF. CODE § 6125 (West 1990).

81. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998).

82. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 3 (Cal. 1998). *Birbrower* went on to state the New York attorneys practiced law in California in violation of CAL. BUS. & PROF. CODE § 6125 (1995) when they (1) “traveled to California [over a two-year period] to discuss with [the client] and others various matters pertaining to the dispute”; (2) “discussed strategy for resolving the dispute and advised [the client] on this strategy”; (3) “met with [the client] for the stated purpose of helping to reach a settlement agreement and to discuss the agreement that was eventually proposed”; and (4) “traveled to California to initiate arbitration proceedings before the matter was settled.” *Id.* at 7.

83. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998).

pretation of the practice of law within the state, both the Los Angeles County Bar Association (LACBA) and San Diego County Bar Association (SDCBA) issued ethics opinions on offshore outsourcing. The LACBA concluded in 2006 that an attorney in a civil case who charges an hourly rate may contract with an out-of-state attorney to draft a brief without violating state law so long as the supervising attorney reviews the work, remains responsible for the final product, and does not charge an unconscionable fee.⁸⁴ Additionally, client confidences must be protected and there must not be a conflict of interest between the client and contracting entity.⁸⁵ Finally, the attorney may be required to inform the client of the fact that the work was outsourced to an out-of-state or out-of-country company.⁸⁶ The SDCBA's ethics opinion on offshore outsourcing paralleled the LACBA, noting that "outsourcing does not dilute the attorney's professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged."⁸⁷ Similar to California's approach, the ABA as well as states like Florida and New York have issued ethics opinions to the effect that offshore LPO is permissible so long as attorneys supervise the offshore companies properly and abide by all other required ethical standards.⁸⁸

84. Los Angeles Cnty. B. Assoc. Prof's Responsibility & Ethics Comm., Op. No. 518 (2006), available at http://www.lacba.org/Files/Main%20Folder/Documents/%20Ethics%20%20Opinions/Files/Ethics_Opinion_518.pdf.

85. *Id.*

86. *Id.*

87. San Diego Cnty. B. Assoc., Ethics Op. 2007-1 (2007), available at <http://www.sdcba.org/index.cfm?Pg=ethicsopinion07-1> ("[T]he attorney does not aid in the unauthorized practice of law where he retains supervisory control over and responsibility for those tasks constituting the practice of law. The authorities make it clear that under no circumstances may the non-California attorney 'tail' wag the California attorney 'dog.'"). It should be noted that while the LACBA states the abdication of a non-delegable duty may result in a finding that the attorney assisted the offshore LPO in the unauthorized practice of law, the SDCBA expressly rejects this contention. *Id.*

88. A.B.A. Formal Opinion 08-451 (Aug. 5, 2008), available at <http://www.aapipara.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf> ("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."); Fla. B. Prof'l Ethics, Op. 07-2 (2008), available at <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+07-2?opendocument> ("In sum, a lawyer is not prohibited from engaging the services of an overseas provider, as long as the lawyer adequately addresses the above ethical obligations."); N.Y. B. Assoc. Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www.abcnyc.org/Ethics/eth2006.htm> ("A New York lawyer may ethically outsource legal support services overseas to a non-lawyer, if the New York lawyer (a) rigorously supervises the non-lawyer, so as to avoid aiding the non-lawyer in the

2. Supervision

The primary ethical challenge addressed by the ABA in its formal ethics opinion on offshore LPO was that lawyers remain accountable to their clients as required by Rule 1.1 of the Model Rules of Professional Conduct.⁸⁹ In short, the lawyer retains Rule 1.1 obligations and therefore must ensure the offshore LPO provider provides competent representation with the requisite skill and diligence.⁹⁰ As part of this obligation, Rule 5.1(b) requires lawyers with direct supervisory authority over another lawyer to make reasonable efforts to ensure the other lawyer conforms to the rules of Professional Conduct.⁹¹ Likewise, Rule 5.3 requires lawyers with managerial responsibility to not only take reasonable steps to ensure the non-lawyer assistant's conduct is compatible with the obligations of the supervising lawyer, but also that reasonable efforts were made to verify the work actually meets these obligations.⁹² The ABA has expressly found that these rules apply whether the other lawyer or non-lawyer is directly affiliated with the supervising lawyer's firm or not.⁹³ As such, a U.S. attorney may violate her duty to supervise by delegating certain non-delegable tasks or by delegating certain tasks in an improper manner.⁹⁴ Although it is true that the Rules "are not designed to be a basis for civil liability," this supervisory function is still imperative since courts look to the Rules as evidence of the standard of care in cases involving malpractice and breach of fiduciary duty.⁹⁵ Thus, in order to avoid supervisory problems, U.S. lawyers

unauthorized practice of law and to ensure that the non-lawyer's work contributes to the lawyer's competent representation of the client; (b) preserves the client's confidences and secrets when outsourcing; (c) avoids conflicts of interest when outsourcing; (d) bills for outsourcing appropriately; and (e) when necessary, obtains advance client consent to outsourcing.").

89. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2007) states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

90. Martha A. Mazzone, *Ethics Rules Require Close Supervision of Offshore Legal Process Outsourcing*, 55 B. B.J. 25, 26 (2011).

91. MODEL RULES OF PROF'L CONDUCT R. 5.1 (2007).

92. MODEL RULES OF PROF'L CONDUCT R. 5.3 (2007).

93. A.B.A. Formal Opinion 08-451 (Aug. 5, 2008), <http://www.aapipara.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf>.

94. Joshua A. Bachrach, *Offshore Legal Outsourcing and Risk Management: Proposing Prospective Limitation of Liability Agreements Under Model Rule 1.8(H)*, 21 GEO. J. LEGAL ETHICS 631, 642 (2008).

95. MODEL RULES OF PROF'L CONDUCT PREAMBLE AND SCOPE (2007) (citing e.g. *Sealed Party v. Sealed Party*, 2006 WL 1207732 (S.D. Tex. May 4, 2006) (Texas and federal courts "regularly" refer to Texas rules to help define standards of lawyer

and law firms must meet the heavy burden of these supervisory and accountability requirements by taking affirmative steps to ensure model practices are followed when offshoring any portion of a project to an overseas LPO.⁹⁶

The supervisory responsibility under the Model Rules is particularly onerous when considering offshore LPO in India. When lawyers working abroad on outsourced projects are segregated from clients and colleagues, they do not receive the same training and supervision as those working in-house or at the very least in the same country.⁹⁷ By offshoring legal services a half a world away, law firms may be putting themselves in a difficult ethical position since the time zone difference between the U.S. and India would require that attorneys video conference or phone one another in the dead of the night or, alternatively, to maintain a permanent associate or other legal advisor in the country to oversee each of the outsourced projects. All told, this adds up to higher transaction costs for doing business in India.

3. Confidentiality and Attorney Client Privilege

A lawyer's duty of confidentiality is a fundamental principal that "contributes to the trust that is the hallmark of the client-lawyer relationship."⁹⁸ Because of this duty, Model Rule 1.6 states a lawyer "shall not reveal information relating to representation of a client unless the client gives informed consent."⁹⁹ Although an outsourced lawyer may not have direct client contact, this Rule may still give rise to a duty on behalf of a contract attorney or legal services provider to avoid any breach of confidence.¹⁰⁰ The confidentiality dilemma is mitigated to some extent by restrictions on LPO employees' access to information.¹⁰¹ Nevertheless, signifi-

conduct in tort cases; citing cases involving rules on fees, withdrawal, aggregate settlements, and delivery of client funds); *RTC Mortgage Trust 1994 N-1 v. Fid. Nat'l Title Ins. Co.*, 58 F. Supp. 2d 503 (D.N.J. 1999) (court considered violation of Rule 1.7 as evidence of lawyer's malpractice); *Griffith v. Taylor*, 937 P.2d 297 (Alaska 1997) (although violation of ethics rules may not constitute legal malpractice, rules are evidence of scope of lawyer's duties to client); *Slovensky v. Friedman*, 142 Cal. App. 4th 1518 (Ct. App. 2006) (lawyer's fiduciary duty determined as matter of law based upon ethics rules together with statutes and general principles relating to other fiduciary relationships)).

96. Robers, *supra* note 67, at 807-09.

97. Daly & Silver, *supra* note 9, at 419.

98. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2007).

99. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007).

100. Pollak, *supra* note 79, at 123.

101. Robertson, *supra* note 5, at 38 (noting that outsourcing giant Evalueserve attempts to protect confidential information by disabling USB ports from employee

cant costs may be incurred to ensure privacy in compliance with the Rules. There may also be transaction costs relating to the potential duty on the part of a supervising lawyer or firm to disclose to the client that an outsourced firm will render certain services in order to satisfy the “informed consent” element of the Rule.¹⁰² Finally, the supervising attorneys and law firms must ensure the telecommunications systems employed by the offshore LPO are secure in order to protect client confidentiality.¹⁰³ This may include the use of encrypted storage and restricted access, added expenses that ultimately cut into the cost saving benefits of offshoring.¹⁰⁴

4. Conflicts of Interest

The ABA’s conflict of interest rules seek to maintain a lawyer’s loyalty and independent judgment in relation to each client.¹⁰⁵ They state a lawyer cannot represent a client if the representation involves a concurrent conflict of interest, meaning one client is directly adverse to another or there is a significant risk that the representation of a client will be materially limited by the lawyer’s responsibilities to another client.¹⁰⁶ In considering these obligations, unique issues are raised with regard to offshore LPO, particularly with third-party multi-service and niche vendors that serve numerous clients at any given time. In order to ensure conflicts are not created, lawyers must implement reasonable, precautionary measures in order to avoid potential conflicts.¹⁰⁷ One such measure would be for law firms and offshore LPOs to maintain accurate records of all matters for which work is out-

computers, color coding its documents and prohibiting employees from taking documents out of the office). Likewise, Florida-based law firm Tucker & Ludin, which sends legal and clerical work to El Salvador company The Office Gurus, addresses the confidentiality issue by not installing printers in the rooms where the foreign assistants work as well as restricting access to these rooms and utilizing computer software that logs who has accessed the files within the system. Interview with Eric E. Ludin, Named Partner, Tucker & Ludin (Feb. 24, 2011).

102. See generally ABA Standing Comm. On Ethics & Prof’l Responsibility, *supra* note 49, at 5 (“[W]here the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client’s informed consent.”).

103. Mazzone, *supra* note 91, at 29.

104. Schultz, *supra* note 14, at 656-57.

105. Kadzik, *supra* note 17, at 734.

106. MODEL RULES OF PROF’L CONDUCT R. 1.7 (2007).

107. Brandon James Fischer, *Outsourcing Legal Services, In-Sourcing Ethical Issues: An Examination of the Ethical Considerations Arising from the Practice of Outsourcing Legal Services Abroad*, 16 SW. J. INT’L L. 451, 465 (2010).

sourced and the particular overseas employee who worked on each matter.¹⁰⁸ Additionally, law firms should inquire into the outsourcing company's conflict of interest and record-keeping procedures to ensure that this issue is taken seriously within the LPO.¹⁰⁹ Failure to discover a conflict "due to the absence of precautionary measures does not excuse the lawyer's ethical obligations[s]" under the Model Rules and could lead to a determination that the lawyer or law firm facilitated the unauthorized practice of law.¹¹⁰

II. OFFSHORE LEGAL AND KNOWLEDGE PROCESS OUTSOURCING IN INDIA: WHAT MAKES IT WORK?

As noted previously, Bickel & Brewer is often cited as being the first U.S. law firm to offshore legal services to India.¹¹¹ The industry has mushroomed since then, particularly in the last five years, with more than 140 legal outsourcing companies in operation in India by the end of 2009, up from forty in 2005.¹¹² This substantial growth has increased India's LPO revenue by thirty-eight percent since 2008 to an expected \$440 million by the end of 2010.¹¹³ Nevertheless, while India leads the global offshore LPO industry, there are a host of both advantages and disadvantages of sending such work to this part of the world that need to be considered when determining the viability of whether Latin America could step in as a competitor or complement to India in the offshore LPO marketplace.

A. *Advantages of Offshore Legal Process Outsourcing in India*

India is the frontrunner in legal process offshoring for a number of reasons. Most notably, wage rates in India can be up to "seventy-five percent lower than those in the U.S."¹¹⁴ Thus, even

108. *Id.* at 735. This could be accomplished through computer software that logs each time a file is accessed and what changes were made during that time, as is used by Florida law firm Tucker & Ludin with its offshore provider, The Office Gurus. See *infra* Part III.A.5.

109. Ham, *supra* note 76, at 333.

110. Fischer, *supra* note 108, at 465-66. See also ABA Standing Comm. On Ethics & Prof'l Responsibility, *supra* note 80.

111. See *Supra* Part I.A.3.iii.

112. Heather Timmons, *Outsourcing to India Draws Western Lawyers*, N.Y. TIMES (Aug. 4, 2010), <http://www.nytimes.com/2010/08/05/business/global/05legal.html>.

113. *Id.*

114. Bachrach, *supra* note 46, at 634.

factoring in the increased telecommunication, management and travel costs, businesses can still realize significant savings from their onshore costs by sending work to India.¹¹⁵ For instance, filing a complicated patent application can cost between \$8,000 and \$10,000 in the Midwest and up to \$12,000 in Silicon Valley, but the same application costs between \$5,000 and \$6,000 when sent to India.¹¹⁶ That is a savings of about \$1 million a year stretched over an average of 250 patent applications.¹¹⁷ Likewise, an Indian attorney may charge just \$20 an hour for the same legal research for which an American attorney would be paid \$200 an hour.¹¹⁸

The significant cost savings of offshoring legal services to India is due in large part to the country's well-equipped workforce. India churns out millions of college-educated students each year—creating a giant pool of educated workers who can provide legal services for a fraction of the cost that the same tasks would amount to in the U.S.¹¹⁹ Specifically, about 300,000 students enroll in Indian law schools annually, thus offering businesses abroad access to a huge workforce educated in British common law, the same legal system used in the U.S.¹²⁰ This results in a workforce with an initial degree of understanding with the basic complexities of the legal system necessary to undertake certain functions like contract work and legal research and analysis. Furthermore, India's official language is English¹²¹ and, consequently, the country has the world's second largest group of English-speaking lawyers.¹²² Accordingly, all court proceedings are rendered in English.¹²³ This factors significantly into the transaction costs and makes India more attractive as an offshore LPO destination for American and British corporations and law firms.

Another reason why India is such a high-commodity locale for offshore LPOs is the time zone difference. Mumbai, one of India's leading outsourcing centers, is ten and a half hours ahead of New

115. Brad L. Peterson, *When and Why Companies Outsourcing and Offshore*, 945 *PLI/PAT* 11, 21 (2008).

116. Krishnan, *supra* note 45, at 2206.

117. *Id.*

118. Patterson, *supra* note 47, at 186.

119. Krishnan, *supra* note 45, at 2210.

120. Bachrach, *supra* note 46, at 634.

121. Robers, *supra* note 67, at 807.

122. Bachrach, *supra* note 46, at 634.

123. Robers, *supra* note 67, at 807-08 (arguing that, although offshoring legal services presents ethical challenges, those challenges are similar enough to those encountered in domestic outsourcing as to not require separate ethical standards for legal practitioners).

York and thirteen and a half hours ahead of Los Angeles.¹²⁴ Thus, from a half a world away, LPO providers in India can literally pick up the work where American lawyers leave off at the end of the day, resulting in round-the-clock business hours that translate into cost savings.¹²⁵

There are several other important reasons why India is the leader in outsourcing in general. For one thing, India offers tax incentives to businesses that outsource services to the country, including “multiple-year tax holidays as well as exemptions from import and export duties.”¹²⁶ Additionally, India has a significant technological advantage as a result of the dot-com boom.¹²⁷ This has allowed the country to adapt quickly to industry changes and to offer KPO services to a variety of industries.¹²⁸

B. Disadvantages of Offshore Legal Process Outsourcing in India

Although India touts a large, highly educated workforce, strong technological systems and understanding of the English language and American rule of law, the country is also host to several variables that hinder its value as an offshore LPO provider.

1. India Bar Council and Pending Litigation

A recent statement from the Ministry of Law and Justice and a pending lawsuit have the potential to snare the offshore LPO industry in India. In September 2010, the Ministry reiterated the Bar Council of India’s stance not to permit foreign lawyers and firms into the country.¹²⁹ This prohibition on foreign lawyers prac-

124. The World Clock—Time Zone Converter, TIME AND DATE AS, <http://www.timeanddate.com/worldclock/converter.html> (last visited March 20, 2011).

125. Patterson, *supra* note 47, at 186.

126. Bachrach, *supra* note 46, at 634.

127. Courtney I. Schultz, *Legal Offshoring: A Cost-Benefit Analysis*, 35 J. CORP. L. 639, 646 (2010); See also THOMAS L. FRIEDMAN, THE WORLD IS FLAT 133 (“India didn’t benefit only from the dot-com boom; it benefited even more from the dot-com bust” because “[t]he boom laid the cable that connected India to the world, and the bust made the cost of using it virtually free and also vastly increased the number of American companies that would want to use that fiber-optic cable to outsource knowledge work to India”).

128. Schultz, 35 J. CORP. L. at 646.

129. *Law Ministry Says It Again – No Entry of Foreign Law Firms*, BAR & BENCH (Sept. 28, 2010), <http://www.barandbench.com/brief/2/1024/law-ministry-says-it-again-no-entry-of-foreign-law-firms->. Professor Jayanth K. Krishnan’s thought-provoking analysis of how foreign law firms could gradually enter India provides clarity on this issue: “First, even if a foreign firm sought to enter India and hire only Indian lawyers, under India’s current system, this would still be prohibited. Second

ticing law or setting up offices in India was upheld by the Mumbai High Court in a ruling that stated international law firms Ashurst, Chadbourne & Parke, and White & Case should not have been licensed by India's central bank to open offices.¹³⁰ The Ministry's prohibition on foreign lawyers practicing in India is directly tied to the practice of offshore LPO since a pending lawsuit could curb the current ability of foreign attorneys to travel to India on a temporary basis to offer legal advice.¹³¹ In May, 2010, a group of lawyers from the Indian state of Tamil Nadu sought government action against thirty-one foreign law firms operating in India – including Shearman & Sterling, Allen & Overy, Clifford Chance, White & Case – as well as leading LPO provider Integreon.¹³² According to the petition for writ, the Association of Indian Law-

. . . there are special circumstances where foreign lawyers have been allowed to come in and litigate a case on behalf of a client (who usually is from that lawyer's country), but this requires obtaining special permission from the Indian judiciary, and it is not a frequent occurrence. Third, India does host international arbitration forums where foreign lawyers represent their clients. However, because the law being adjudicated is considered foreign – not Indian – law, this activity is not considered 'practicing law' in India." Jayanth K. Krishnan, *Globetrotting Law Firms*, 23 GEO. J. LEGAL ETHICS 57, 59 n.9 (2010).

130. Kian Ganz, *India Legal Market to Stay Closed Until 2015*, *Edwards Angell Partner Says*, BLOOMBERG (Nov. 10, 2010, 12:23 AM), <http://www.bloomberg.com/news/2010-11-10/india-legal-market-to-stay-closed-until-2015-edwards-angell-partner-says.html>. See also *Lawyers Collective v. Ashurst*, W.P. No. 1526/1995 (Dec. 16, 2009), available at <http://barandbench.com/userfiles/files/File/Lawyers%20Collective%20foreign%20firms%20Bbay%20HC.pdf>. Despite this, the ABA continues to allow lawyers licensed outside the U.S. to maintain offices in the States and advise U.S.-based clients without the need to complete specialized training, so long as the foreign attorney is registered with the proper local authority. Karen Sloan, *ABA Seeks Obama's Help in Fight for Reciprocity with India*, NAT'L LAW J. (Nov. 11, 2010), <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202474706157>.

Because of this, the ABA sought President Obama's help in obtaining reciprocity with India, a request that was dropped from the President's agenda when he traveled to India in November, 2010. See Brian Baxter, *Obama Drops Legal Reform from India Agenda*, AMLAW DAILY (Nov. 11, 2010, 1:20 PM), <http://amlawdaily.typepad.com/amlawdaily/2010/11/obama-india.html>.

131. Sloan, *ABA Seeks Obama's Help in Fight for Reciprocity with India*; See also A.K. Balaji v. *Union of India*, W.P. No. 5614 of 2010 (Chennai High Court, filed March 18, 2010).

132. Anthony Lin, *Indian Lawyers Group Seeks to Prohibit Activities of Foreign Law Firms*, AM. LAWYER (Mar. 26, 2010), <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202446805344>. On Integreon's inclusion as the only LPO provider in the lawsuit, Integreon Vice President of Legal Services Mark Ross said, "My view on the petition is that our inclusion is entirely without merit and I mention that we don't practice law in any jurisdiction and particularly in India we don't represent Indian clients, we don't represent Indian corporations and we don't represent Indian law firms." *Global LPO Conference: Stakeholders Views and Foreign Law Firms*, Bar & Bench (Nov. 15, 2010), <http://barandbench.com/brief/2/1106/global-lpo-conference-stakeholders-views-and-foreign-law-firms->

yers filed suit against the foreign firms for illegally practicing law “out of five-star hotels and business centers.”¹³³ The writ petition also alleged that most foreign law firms that exist in India not only have their back end offices there but provide legal services in India as well.¹³⁴ In retort, the senior advocate on behalf of the foreign firms argued to the Chennai High Court in August, 2010, that the foreign firms did not practice Indian law and only advised on foreign legal issues with respect to foreign investment – actions that are not illegal under Indian law.¹³⁵ Nevertheless, as of the publication of this article, the case was pending review with the High Court Bench to determine whether the foreign law firms’ actions were in violation of the Advocates Act and other immigration laws as the Association of Indian Lawyers claimed.¹³⁶

While some see these developments as a wake-up call for LPO providers, others argue the Mumbai High Court’s ruling and the present pending litigation will not impact LPO practices in India.¹³⁷ Instead, because LPOs do not practice law per se, the rulings will only affect law firm offices that practice law in India under the guise of a LPO.¹³⁸ Additionally, some are calling for the Chennai High Court to take the opportunity presented by the pending litigation to expressly define the “practice of law” in a

133. Anthony Lin, *Indian Lawyers Group Seeks to Prohibit Activities of Foreign Law Firms*, AM. LAWYER (Mar. 26, 2010), <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202446805344>.

134. *Writ Petition Filed Against 31 Foreign Law Firms and An LPO – Immigration Law Violations Also Alleged*, BAR & BENCH (Mar. 22, 2010), <http://www.barandbench.com/brief/2/597/writ-petition-filed-against-31-foreign-law-firms-and-an-lpo-immigration-law-violations-also-alleged>.

135. *Madras High Court: Foreign Law Firms Case Next on October 5*, BAR & BENCH (Aug. 19, 2010), <http://barandbench.com/brief/2/929/madras-high-court-foreign-law-firms-case-next-on-october-5>. See also Anthony Lin, *Indian Lawyers Group Seeks to Prohibit Activities of Foreign Law Firms*, AM. LAWYER (Mar. 26, 2010), <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202446805344> (quoting Liam Brown, CEO of Integreon: “We were surprised to hear that our range of LPO services, such as document review, e-discovery, contract management, and other legal support services could be confused with the practice of law.”).

136. *Foreign Law Firms Case Next on March 8: Petitioners May Amend Petition; BCI and UOI to Decide on January 29*, BAR & BENCH (Jan. 24, 2011), <http://www.barandbench.com/brief/2/1243/foreign-law-firms-case-next-on-march-8-petitioners-may-amend-the-petition-bci-and-uoi-to-decide-on-january-29>.

137. Vinaya Natarajan, *Looking Past the Hype: Lawyers Collective v. Chadbourne, Ashurst and White & Case*, BAR & BENCH (Dec. 17, 2009), <http://www.barandbench.com/brief/3/402/looking-past-the-hype-lawyers-collective-v-chadbourne-ashurst-and-white-case>.

138. Sanjay Bhatia, *Legal Outsourcing Companies and “Foreign” Law Firms Have Nothing to Fear from Ashurst Decision or Chennai High Court Petition*, SDD GLOBAL SOLUTIONS, <http://www.sddglobal.com/legal-outsourcing-companies-and-foreign-law-firms-have-nothing-to-fear-from-ashurst-decision-or-chen.htm>.

non-litigious context to clarify the legality of LPOs in India.¹³⁹ Nevertheless, the ultimate outcome of this important issue remains up in the air, a variable that may influence law firms' decisions to invest in India's offshore LPO market until the legality of the practice is settled.

2. Underdeveloped Infrastructure

A key question when choosing an outsourcing region is whether the provider has the ability to provide continuity of service.¹⁴⁰ Despite the economic and technology boom that facilitated the growth of KPO and, in turn, LPO, India lacks a strong internal infrastructure to support its offshore LPO industry, which requires reliable systems for secure access to the U.S. Specifically, highways, modern bridges, world-class airports, reliable power, and clean water are in short supply in India, and what foundations do exist are literally crumbling under the weight of progress.¹⁴¹ At least one high-profile Indian politician says that, of India's 70,000 kilometers of highways, 16,000 are not worth driving on.¹⁴² Consequently, economic losses from congestion and poor roads alone were as high as \$6 billion a year in 2007.¹⁴³ The country's lackluster infrastructure has the potential to impact offshore LPO and other outsourcing services by hindering the ability of service providers to ensure continuous, undisrupted service.

To remedy the problem, India – Asia's third-largest economy – plans to invest \$1.5 trillion from 2007 through 2017 to improve its infrastructure.¹⁴⁴ To supplement this government support, how-

139. *Id.*

140. DAVID A. STEIGER, *THE GLOBALIZED LAWYER: SECRETS TO MANAGING OUTSOURCING, JOINT VENTURES AND OTHER CROSS-BORDER TRANSACTIONS* 94 (ABA Publishing 2008).

141. Steve Hamm, *The Trouble with India*, *BUSINESSWEEK* (Mar. 19, 2007), http://www.businessweek.com/magazine/content/07_12/b4026001.htm. The article goes on to further emphasize the differences between these two Asian powerhouses: "India has weaker government finances and an unruly democratic government that lacks China's authoritarian discipline. Clearing land for roads or power plants in China is a cinch; not so in India, where land rights are often hugely contentious. Government-backed companies have led China's infrastructure build-out. India's push will depend heavily on the private sector. And India, with its history of murky and investor-unfriendly rules on infrastructure investment, has a record of disappointment."

142. Peter Stein, *India's Infrastructure Drive Must Steer Around Potholes*, *WALL ST. J.* (Apr. 10, 2010), <http://online.wsj.com/article/SB10001424052702303531304575177031459506218.html> (quoting Kamal Nath, who is seeking \$41 billion in private-sector investment over the next few years to help fund construction in the country).

143. *Id.*

144. Jui Chakravorty, *Implementation is India Infrastructure's Main Woe*, *REUTERS*

ever, more than a third of infrastructure finance now comes from the private sector.¹⁴⁵ An example of this input is AMP Capital, which is planning to invest about \$200 million in the Indian infrastructure sector over the next two years.¹⁴⁶ Likewise, the Infrastructure Development Finance Company (IDFC) has built \$8 billion worth of projects and plans to triple that over the next four years.¹⁴⁷ One thing in India's favor is an active stock exchange, where infrastructure companies have raised about \$6.3 billion since 2008.¹⁴⁸ Another is the recently announced plan between India and the U.S. to create a \$10 billion infrastructure debt fund as a public-private partnership to expedite investments in India's infrastructure.¹⁴⁹ Although none of these solutions is simple, business leaders, some government officials, and ordinary citizens are chipping in to make things better,¹⁵⁰ work that could pay off by assuring law firms and corporations that their clients' needs can be continuously met.¹⁵¹

III. LATIN AMERICA: A REGION RIPE FOR ENTRY

Based on an evaluation of both the advantages and disadvantages of doing business in India, one survey predicts the market share of the Indian offshore KPO industry will decrease to fifty-nine percent of the global market by 2013-14 from more than seventy percent four years ago.¹⁵² Thus, although India continues to

(Sept. 29, 2010, 6:49 AM), <http://www.reuters.com/article/idUSTRE68Q0YK20100929>.

145. Jyoti Thottam, *Raising India: Why More Infrastructure Isn't Enough*, TIME (Nov. 14, 2010), <http://www.time.com/time/magazine/article/0,9171,2030900,00.html>.

146. *Id.*

147. *Id.*

148. Peter Stein, *India's Infrastructure Drive Must Steer Around Potholes*, WALL ST. J. (Apr. 10, 2010), <http://online.wsj.com/article/SB10001424052702303531304575177031459506218.html>.

149. Mukesh Jagota & Anant Vijay Kala, *India, US Agree to Set Up \$10 Bln Infrastructure Fund*, WALL ST. J. (Nov. 8, 2010, 7:10 AM), <http://online.wsj.com/article/BT-CO-20101108-705689.html>.

150. Steve Hamm, *The Trouble with India*, BUSINESSWEEK (Mar. 19, 2007), http://www.businessweek.com/magazine/content/07_12/b4026001.htm.

151. Mark W. Heaphy & Sarvesh D. Mahajan, *The "Nuts and Bolts" of Legal Process Outsourcing*, 2008 A.B.A. SEC. INT'L L. 405 ("In addition to facilities, customers need to consider the [offshore LPO] provider's hardware, connectivity, as well as specialized legal applications. One should consider bringing a technology expert for due diligence. Importantly, the provider should explain what kind of disaster recovery options it offers and how it can insure business continuity for the law firm and its clients.").

152. *Recession Sets KPOs Back by Three Years*, TIMES OF INDIA (Sept. 1, 2010, 5:23 PM), <http://timesofindia.indiatimes.com/tech/news/outsourcing/Recession-sets-KPOs-back-by-3-years/articleshow/6474826.cms>.

be the largest provider of offshore KPO generally and LPO specifically, and is poised to remain the most important spoke in the knowledge services wheel, the offshore KPO and LPO industries have gained traction in other developing countries as firms seek the best value rather than simply focusing on the cheapest cost.¹⁵³ The door is therefore left open for other regions, including Latin America, to step into the offshore LPO marketplace.

Latin America is well positioned to do this because it provides a nearshore alternative to services offered a half a world away in India. In short, companies and law firms that nearshore not only save on travel and other expenses associated with doing businesses in India, but they simultaneously position themselves to maintain a stronger supervisory presence in compliance with the Model Rules. Although when viewed as a whole, Latin America has a host of disadvantages that could hinder its ability to markedly infiltrate the offshore LPO market – including infrastructural and socio-economic deficiencies – there are individual countries in the region that are capable of stepping into the offshore LPO market. In fact, as will be discussed, at least two countries have already entered the arena: Argentina and El Salvador. This section surveys these nations and how they have successfully implemented offshore LPO practices. It also considers some other Latin American nations – including the traditionally most powerful outsourcing centers – and examines whether they have the necessary attributes to successfully segue into the LPO marketplace. Finally, the section concludes by examining a sampling of some commonly cited barriers to entry that, while important, do not prove pivotal in Latin America's transition from BPO to more value-added services.

A. *What Nations Have What it Takes to Enter the Offshore Legal Process Outsourcing Marketplace?*

Latin America has become a hot story for outsourcing in recent years. Leading global companies such as General Motors, Exxon, Procter & Gamble, American Express and Unilever all have set up large offshore operations in the region.¹⁵⁴ This is because, in the aftermath of the financial crisis, cash-strapped companies are seeking low-risk nearshoring solutions that

153. *Id.*

154. *Destination Latin America: A Near-Shore Alternative*, A.T. KEARNEY (2009), at 1, <http://www.atkearney.com/index.php/Publications/destination-latin-america-a-near-shore-alternive.html>.

decrease travel costs and other expenses that are racked up by doing business in India.¹⁵⁵ Additionally, Latin America offers physical proximity, cultural affinity and language skills in the off-shore BPO market, most notably by offering call center services in Spanish and Portuguese.¹⁵⁶ These advantages, as well as the regions favorable business market, and tax incentives have led to global outsourcing success for some Latin American countries that could translate to success in offshore KPO and perhaps LPO as well.

1. Argentina

Argentina owes much of its success in the offshoring industry to its sizeable English-speaking population, which has allowed the country's largest captive centers to embrace not just call center services, but finance and accounting, translations and collections as well.¹⁵⁷ Since 2009, Argentina's GDP has been growing at more than eight percent per year, putting the country in a good position for export services.¹⁵⁸ In 2011, the nation ranked thirtieth in the Global Services Location Index (GSLI) sponsored by A.T. Kearney.¹⁵⁹ Additionally, the Argentine government has offered big tax breaks that have attracted the likes of Disney, Microsoft, Hewlett-Packard, Oracle, Cisco, IBM, and AOL.¹⁶⁰ Recently, Argentina has prioritized its software industry by offering special benefits to IT companies, including tax exemptions of sixty percent of the total amount of income tax.¹⁶¹

Argentina also boasts one of the best-educated workforces in

155. *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination*, KPMG INTERNAT'L (2009), at 10, http://images.forbes.com/forbesinsights/StudyPDFs/KPMG_LatAm_Outourcing.pdf.

156. *Id.*

157. *Destination Latin America: A Near-Shore Alternative* at 11-12.

158. *Id.* at 11.

159. *Offshore Opportunities Amid Economic Turbulence*, A.T. KEARNEY (2011), at 10, http://www.atkearney.com/images/global/pdf/Offshoring_Opportunities_Amid_Economic_Turbulence-GSLI_2011.pdf; *The Shifting Geography of Offshoring*, A.T. KEARNEY (2009), at 15, http://www.atkearney.com/images/global/pdf/Global_services_location_index_2009.pdf. Argentina's GSLI rating decreased slightly from twenty-seventh in 2009. This decrease was attributed to the fact that, although Argentina saw a favorable cost environment since the devaluation of the peso in 2001, inflation and rising demands for increased wages diminished that advantage. *Id.*

160. Geri Smith, *Can Latin America Challenge India?*, BUSINESSWEEK (Jan. 30, 2006), http://www.businessweek.com/magazine/content/06_05/b3969427.htm.

161. *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination*, KPMG INTERNAT'L (2009), at 19, http://images.forbes.com/forbesinsights/StudyPDFs/KPMG_LatAm_Outourcing.pdf.

Latin America, which has facilitated a transition into offshore KPO services.¹⁶² Specifically, the adult literacy rate is nearly ninety-seven percent and English capability in the country is one of the highest in Latin America, with eighty-one percent of the university graduates in IT successfully passing internationally recognized English tests.¹⁶³

As proof of the power of these advantages, an offshore LPO provider has already sprung up in the nation that bills itself as a nearshore alternative to India. Los Angeles-based Novadios is a legal service provider that offers document review, contract drafting and corporate governance services to U.S. and U.K. customers at its Córdoba, Argentina, outpost.¹⁶⁴ Founded in October, 2008, by Stanford Law graduate Ash Anderson and his Argentine partners, Matias Avila-Nores and Joquin Acuña, Novadios boasts an impressive clientele, including MGM Resorts International, Adobe Systems, Yahoo! and Universal Music Group.¹⁶⁵ To facilitate its business, Novadios employs top-level Argentine law graduates who are not just fluent in English, but who understand the nuances of legalese as well. These attorneys work within a hybrid model alongside U.S.-based attorneys, whereby mid-level and junior work is shifted to Argentina while the senior-level work remains onshore. In developing its business model in this way, the lower-level work is accomplished at decreased rates while the more substantive work and strategy is overseen by more experienced American lawyers. All told, this enables Novadios to generate a product for its corporate clients at an overall average of \$65 per hour. This is true even in the face of Novadios' three levels of review for low-level work: first with the Argentine lawyer, then by an American supervising attorney and finally by the corporate client's counsel. Further, this hybrid model responds to ethical concerns pertaining to attorney accountability and supervision of work product as required by the Model Rules. All told, Novadios' ability to attract major corporations to Argentina, coupled with the country's other positive attributes, makes Argentina a nation to watch in the offshore LPO marketplace.

162. Smith, *Can Latin America Challenge India?*

163. Tarun George, *Haunted By a Poor Image, Argentina Bids to Become a Key Latin America Outsourcing Player*, NEARSHORE AMERICAS (Mar. 18, 2010), <http://nearshoreamericas.com/top-latin-america-outsourcing-country/>.

164. *Novadios* (last accessed March 2, 2011), <http://novadios.com/>.

165. Interview with Ash Anderson, President and Co-Founder, Novadios (Feb. 25, 2011).

2. Brazil

As the nation with the largest economy in Latin America, Brazil is the established host to some of the world's most competitive IT shops, including Accenture, HSBC, Intel, Microsoft, Sun and Unisys.¹⁶⁶ The outsourcing industry was launched here some thirty years ago when IBM and Electronic Data Systems (EDS) arrived to take advantage of the country's low wages, large workforce and political stability.¹⁶⁷ Since then, Brazil has developed a reliable telecommunications infrastructure, which has facilitated a growing IT-BPO industry with exports of \$2.2 billion in 2008.¹⁶⁸ However, the transportation infrastructure has much left to be desired as an estimated \$30 billion infrastructure development investment is required to get the nation up to speed.¹⁶⁹ As Brazil prepares to host the 2014 World Cup and the 2016 Olympic Games, the nation is expected to expand its toll roads and railways.¹⁷⁰ Likewise, the São Paulo and Rio de Janeiro subway systems are currently being expanded and a high-speed train between the two cities is being planned.¹⁷¹

Although Brazil can capitalize on its size in the offshore BPO market, it is not yet a strong competitor for English-language BPO.¹⁷² This is a huge barrier to entry into the offshore KPO and LPO markets as an educated workforce that is fluent in English is required to undertake these highly specified services. Additionally, foreign law firms may come under renewed regulatory pressure after the recent issuance of a São Paulo Bar Association advisory opinion. Currently, Brazil prohibits foreign ownership of law firms within the country, forcing overseas firms to enter a formal association with a local entity.¹⁷³ In September, 2010, how-

166. *Destination Latin America: A Near-Shore Alternative* at 12; *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination*, KPMG INTERNAT'L (2009), at 21, http://images.forbes.com/forbesinsights/StudyPDFs/KPMG_LatAm_Outsourcing.pdf.

167. *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination*, KPMG INTERNAT'L (2009), at 21, http://images.forbes.com/forbesinsights/StudyPDFs/KPMG_LatAm_Outsourcing.pdf.

168. *Id.*

169. *Foreign Law Firms in Brazil: Opportunities in 2010 and Beyond*, ZEIGHAUSER GROUP (Feb. 2010), at 8, <http://www.consultzg.com/assets/Uploads/ZGAlertForeignFirmsBrazil2010-02-3.pdf>.

170. *Id.*

171. *Id.*

172. *Destination Latin America: A Near-Shore Alternative*, A.T. KEARNEY (2009), at 12, <http://www.atkearney.com/index.php/Publications/destination-latin-america-a-near-shore-alternative.html>.

173. Chris Crowe, *Behind the BRICs: Big Global Deals Emanating from BRIC*

ever, the São Paulo Bar Association concluded that foreign law associations break local practice rules.¹⁷⁴ The opinion, though only advisory, calls into question the legitimacy of the approximately twenty foreign firms operating as consultants in Brazil today, including Clifford Chance, Allen & Overy and Clyde & Co.¹⁷⁵ Further, the advisory opinion could indicate how a court ruling would go if a case were to be pursued against one of these foreign firms.¹⁷⁶ Thus, although there is not a case pending as in India, there is a similar sense of uncertainty about the legitimacy of outside law firms and possibly even LPO in Brazil that should be considered when looking to Brazil as an offshore LPO destination. In sum, this uncertainty, coupled with the fact that Brazil lacks a large English-speaking workforce, makes the country an unlikely candidate to break into the offshore LPO market unless and until it addresses these concerns.

3. Chile

Chile is the only Latin American country to make the top ten in the GSLI index both in 2009 and 2011, and for good reason.¹⁷⁷ For one thing, the nation is economically and politically stable, boasting the lowest foreign currency risk of any country in the region.¹⁷⁸ A network of free trade agreements with a number of countries, including the U.S., has also facilitated economic and business growth.¹⁷⁹ Additionally, Chile is home to a state-of-the-

Nations are Presenting Challenges for International Law Firms, 64 No. 3 Int'l B. News 29 (2010).

174. Alex Aldridge, *Brazil Bar Rules Against Associations with Foreign Law Firms*, LegalWeek (Sept. 24, 2010, 4:12 PM), <http://www.legalweek.com/legal-week/news/1735286/brazilian-bar-rules-foreign-law-firm-associations>.

175. *Id.*

176. *Id.*

177. *Offshore Opportunities Amid Economic Turbulence*, A.T. KEARNEY (2011), at 2, http://www.atkearney.com/images/global/pdf/Offshoring_Opportunities_Amid_Economic_Turbulence-GSLI_2011.pdf; *The Shifting Geography of Offshoring*, A.T. KEARNEY (2009), at 14, http://www.atkearney.com/images/global/pdf/Global_Services_Location_Index_2009.pdf. Between 2009 and 2011, Chile dropped two spots from eighth to tenth in the GSLI. This decrease in the rankings was attributed to the stable wage rates in the face of increase elsewhere and also to the slight downgrade in its infrastructure score due to the February, 2010 earthquake. *Offshore Opportunities Amid Economic Turbulence* at 9.

178. *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination*, KPMG INTERNATIONAL (2009) at 13, http://images.forbes.com/forbes/insights/StudyPDFs/KPMG_LatAm_Outsourcing.pdf.

179. Geri Smith, *Can Latin America Challenge India?*, BUSINESSWEEK (Jan. 30, 2006), http://www.businessweek.com/magazine/content/06_05/b3969427.htm.

art telecommunications infrastructure.¹⁸⁰ In fact, Chile has been called Latin America's most technologically favorable nation, with nearly twelve percent broadband penetration and slightly more than eighty percent telephony penetration.¹⁸¹ Furthermore, the country is connected to three international fiber optic networks and has cable modem Internet and high-speed ADSL access.¹⁸² Consequently, Chile's offshore BPO call center industry is expected to see double-digit growth in the next five years.¹⁸³

By capitalizing on its business environment, availability of high-end skills, and dominant position in select sectors, Chile has successfully expanded into the offshore KPO industry, demonstrating its potential in the offshore LPO market as well.¹⁸⁴ The Chilean government is interested in expanding its outsourcing industry into value-added BPO and KPO, which it has already made considerable steps in accomplishing through pharmaceutical and biopharma clinical trials as well as industrial biotechnology research and development.¹⁸⁵ Likewise, KPO giant Evalueserve opened a research outpost in Valparaiso, Chile, in 2006.¹⁸⁶ This office was provided rent-free by the Production Development Corporation (CORFO), a Chilean governmental agency founded to promote economic growth in the nation.¹⁸⁷ Although Chile has higher labor costs than its neighbors, namely Argentina and Costa Rica, Evalueserve expanded here because the country was a less expensive alternative to Mexico and Brazil and offered other advantages like a stable social, political and economic environment as well as a well-educated talent pool of bilin-

180. *Id.*

181. *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination* at 18.

182. *Id.* For more on the difference between broadband and ADSL, see REGIS J. BATES & DONALD W. GREGORY, *VOICE & DATA COMMUNICATIONS HANDBOOK* 484 (McGraw-Hill Professional, 2007).

183. *Destination Latin America: A Near-Shore Alternative*, A.T. KEARNEY (2009), at 13, <http://www.atkearney.com/index.php/Publications/destination-latin-america-a-near-shore-alternative.html>.

184. *Id.* at 14; See also *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination*, KPMG INTERNATIONAL (2009) at 11-12, http://images.forbes.com/forbesinsights/StudyPDFs/KPMG_LatAm_Outsourcing.pdf ("Companies such as EDS, IBM, Equifax and JP Morgan have all recently opened service and data centers in Chile").

185. *Destination Latin America: A Near-Shore Alternative* at 13.

186. Evalueserve (last accessed Jan. 24, 2011), <http://www.evalueserve.com/>.

187. *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination*, KPMG INTERNATIONAL (2009) at 16, http://images.forbes.com/forbesinsights/StudyPDFs/KPMG_LatAm_Outsourcing.pdf.

gual, highly skilled workers.¹⁸⁸ Consequently, Evalueserve now employs 150 professionals in Chile and plans to triple in size in the coming years.¹⁸⁹ Nevertheless, Chile must still make strides in continuing to improve its English language skills in order to effectively enter the value-added sectors like offshore LPO.¹⁹⁰

4. Costa Rica

Costa Rica is best known for its software development industry, which was sparked by Intel's arrival in 1997.¹⁹¹ This led to several subsequent success stories, including IBM and Hewlett-Packard's expansion into the region through BPO operations.¹⁹² Today, Costa Rica is still adding new investors, including Amazon.com, which opened a contact center in 2008.¹⁹³ While the country is noted for its call centers and tech-support operations, it has begun to step into more knowledge-based services as well.¹⁹⁴ For instance, a local IT company, Xeltron, recently developed a computerized solution for sorting coffee beans.¹⁹⁵ This step into more value-added processes is facilitated by the fact that, although small in size, Costa Rica has a highly skilled workforce, with a literacy rate of nearly 96 percent.¹⁹⁶ Additionally, the nation aggressively promotes English language skills among young professionals, a fact that becomes increasingly important as the country attempts to switch from offshore BPO to more value-added services.¹⁹⁷

The telecommunications infrastructure in Costa Rica was, for more than sixty years, a barrier to the nation's entry in the outsourcing market while it was exclusively controlled by the state-

188. *Id.*

189. *Id.*

190. *Id.* at 24.

191. Geri Smith, *Can Latin America Challenge India?*, BUSINESSWEEK (Jan. 30, 2006), http://www.businessweek.com/magazine/content/06_05/b3969427.htm.

192. *Destination Latin America: A Near-Shore Alternative*, A.T. KEARNEY (2009), at 15, <http://www.atkearney.com/index.php/Publications/destination-latin-america-a-near-shore-alternative.html>.

193. *The Shifting Geography of Offshoring*, A.T. KEARNEY (2009), at 15, http://www.atkearney.com/images/global/pdf/Global_Services_Location_Index_2009.pdf.

194. W. David Gardner, *The New Outsourcing Kid on the Block*, INFORMATION WEEK (Feb. 14, 2005, 12:50 PM), <http://www.informationweek.com/news/global-cio/outsourcing/showArticle.jhtml?articleID=60400691>.

195. *Id.*

196. *Destination Latin America: A Near-Shore Alternative* at 14.

197. *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination*, KPMG INTERNATIONAL (2009) at 17, http://images.forbes.com/forbesin sights/StudyPDFs/KPMG_LatAm_Outsourcing.pdf.

owned Instituto Costarricense de Electricidad (ICE).¹⁹⁸ This monopoly resulted in limited broadband services as well as a government control over telephone services.¹⁹⁹ However, as a stipulation for signing the Central American Free Trade Agreement (CAFTA) with the United States, ICE's telecom service was broken apart, with new licenses issued to two outside bidders – Spain's Telefonica and Mexico's America Movil.²⁰⁰ As a result of the \$170 million combined licensing deals,²⁰¹ as well the fact that Internet availability has improved in recent years, Costa Rica's telecommunications infrastructure is starting to improve, making it more competitive in the offshore outsourcing market.²⁰² This, combined with Costa Rica's strong English skills, means the nation has potential as an entrant into the offshore LPO market.

5. El Salvador

El Salvador put itself on the map as an outsourcing destination in 2004 when outsourcing companies in the country acquired contracts with Dell and Sykes. Today, at least forty BPO call centers exist in the country, making the more than \$75 million outsourcing industry an important one in the country.²⁰³ This growth is due in part to the country's appeal to American companies in proximity as well as its competitive rates in comparison to Mexico and Costa Rica. The most influential factor contributing to El Salvador's success, and that which makes it an important player for the future of offshore LPO in Latin America, is that the nation boasts an English fluency rate of seventy to seventy-five percent of the population.²⁰⁴ El Salvador spends \$20 million annually on English language training and recently received a boost from the United States Agency for International Development (USAID), which included \$7.5 million over four years to increase English

198. *Id.* at 18; See also *Historia del Sector Telecomunicaciones del ICE*, INSTITUTO COSTARRICENSE DE ELECTRICIDAD (Jan. 24, 2011), <http://www.grupoice.com/esp/tele/infobase/hist.htm>.

199. *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination* at 18.

200. *Costa Rica's ICE Seeks Overseas Growth*, WIRELESS FEDERATION (Jan. 17, 2011), <http://wirelessfederation.com/news/33684-costa-ricas-ice-seeks-overseas-growth/>.

201. *Id.*

202. *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination* at 25.

203. Victor Casiano, *El Salvador: On the Right Path*, NEARSHORE AMERICAS (Apr. 13, 2010), <http://nearshoreamericas.com/el-salvador-bpo-opportunities-on-the-right-path/>.

204. *Id.*

and computing skills in the region.²⁰⁵

Although the nation focuses on providing call center services, one El Salvadorian offshore BPO provider – The Office Gurus – made the leap into offshore LPO in November 2009 when it teamed up with Florida-based law firm Tucker & Ludin to provide clerical and legal support services. Of the offshore company's 150 employees, six work exclusively with Tucker & Ludin to maintain the firm's calendar, take dictation, create legal documents, schedule hearings with judges, schedule lunches, handle medical records requests and conduct client intake.²⁰⁶ Although the initial overhead resulted in increased costs in improving the phone and computer systems in the law firm's office as well as hiring the new employees, the partnership with The Office Gurus resulted in an expected \$1 million in savings during the first year of the partnership and a two-fold increase in billing in just one month.²⁰⁷

Tucker & Ludin takes various steps to ensure its affiliation with The Office Gurus is compliant with ethical standards. For one thing, the law firm personally trains its employees – both upon hiring and during biweekly training sessions – not only on the business of the firm, but on employee obligations and issues like confidentiality as well. Additionally, the offshored employees are segregated in a different area of The Office Gurus building and not given access to printers in order to further address confidentiality and security concerns. As part of its oversight and supervision, Tucker & Ludin also uses a computer software system that tracks who has viewed and altered documents within the system and allows employees to exchange notes in the course of creating legal forms. Finally, in an effort to remain transparent about its offshoring, Tucker & Ludin discloses to clients that it works with The Office Gurus, a fact that attorney Eric E. Ludin says has not been a problem for clients.²⁰⁸ All told, the law firm's partnership with the El Salvadorian call center demonstrates not only the country's potential in the offshore LPO marketplace, but

205. Jon Felperin, *El Salvador Gets Boost from U.S. Agency to Improve English Skills*, NEARSHORE AMERICAS (May 4, 2010), <http://nearshoreamericas.com/call-center-english-training3609/>.

206. Art Levy, *Crossing the Border: A Clearwater Attorney Turns to El Salvador for Paralegal Services*, FLORIDA TREND (Oct. 1, 2010), http://www.floridatrend.com/law_article.asp?cName=law%20and%20Government&rName=Of%20Counsel&whatID=4&aID=53739.

207. Jane Meinhardt, *Superior Uniform Model a "Vertical for Smaller Law Firms to Outsource,"* TAMPA BAY BUS. J. (Mar. 15, 2010, 12:00 AM), <http://www.bizjournals.com/tampabay/stories/2010/03/15/story6.html>.

208. Interview with Eric E. Ludin, Tucker & Ludin (Feb. 24, 2011).

also the ease in which offshore BPO companies with strong English-speaking workforces can make the transition to more value-added services.

6. Mexico

The United States' closest Latin American neighbor, Mexico, is the second largest economy in Latin America and, likewise, the second largest call center industry in the region.²⁰⁹ This market strength is expected to continue to grow, putting Mexico in a good position to expand its outsourcing operations beyond call centers.²¹⁰ Other factors that facilitate Mexico's strength as an offshore outsourcing option are the country's proximity to the U.S. and its large pool of low-cost workers.²¹¹ The nation's solid infrastructure – particularly in the main cities – also puts Mexico in a better position in the outsourcing marketplace since there is a correlation between telecommunications infrastructure and competitiveness in the region.²¹² Nevertheless, Mexico is not yet known for its offshore KPO because, although it does have a large pool of workers trained in the law, it does not have a large bilingual population, which is essential for entry into the offshore LPO marketplace.²¹³ Thus, like Brazil, while Mexico is big in the BPO arena, the country has little potential as an offshore LPO destination if it does not train and retain highly skilled, English-speaking workers to work in the industry.

If, in the future, Mexico addresses its lack of a large English-

209. *Destination Latin America: A Near-Shore Alternative*, A.T. KEARNEY (2009), at 15, <http://www.atkearney.com/index.php/Publications/destination-latin-america-a-near-shore-alternive.html>.

210. *Id.*

211. *Id.*

212. *Nearshore Attraction: Latin America Beckons as a Global Outsourcing Destination*, KPMG INTERNATIONAL (2009) at 18, http://images.forbes.com/forbesinsights/StudyPDFs/KPMG_LatAm_Outsourcing.pdf.

213. According to 2005 figures from the U.S. government, nearly ninety-three percent of Mexico's population speaks Spanish as a sole language. *The World Factbook*, C.I.A. (last accessed Mar. 4, 2011), <https://www.cia.gov/library/publications/the-world-factbook/geos/mx.html>. This is compounded at the university level, where "Only the private universities teach in English, which means their grads are close to bilingual. But the real numbers are in the public universities, which are still slow to integrate English." Tarun George, *How Does Guadalajara Do IT?*, *Nearshore Americas* (Jan. 20, 2011), <http://nearshoreamericas.com/guadalajara-it-services/>. Additionally, Mexican attorney Jose Eduardo Salgado of Aguilar Noble, Salgado y Asociados, S.C. notes that, as legal training and English language skills increase, it becomes more difficult to retain qualified individuals at the low rates offered at even the best law firms in the country. Interview with Jose Eduardo Salgado, Aguilar Noble, Salgado y Asociados, S.C. (Feb. 24, 2011).

speaking workforce, the country does have several advantages over India as an outsourcing center that could make it competitive in the offshore LPO industry. Although labor costs are higher there than in India, “the efficiency gains from working close to the U.S. and in the same time zone mean nearshoring in Mexico costs about the same as offshoring in India.”²¹⁴ Thus, as India’s costs go up, Mexico looks better as an outsourcing hub.²¹⁵ Further, due to U.S. legislative restrictions focusing on India’s position as a nuclear power, certain kinds of projects involving sensitive aviation and energy technology are more likely to go to Mexico than to India.²¹⁶ Although currently specific to offshore BPO, this could affect the importation of certain legal services to India, namely sensitive patent applications. Thus, if well leveraged, Mexico’s location, relative stability and specialized labor availability could attract a significant volume of services in the future.²¹⁷

B. Analysis of the Potential Barriers to Latin American Entry into the Offshore Legal Process Outsourcing Marketplace

Although, as noted, several Latin American countries have the attributes required for an offshore LPO industry, there are several commonly cited constraints to this region’s entry into the offshore LPO marketplace that need to be addressed. In sum, although there are socioeconomic and structural issues that need to be considered by the region as a whole, individual nations have been able to overcome the shortfalls in areas most pertinent to offshore LPO. Further, one of the most frequently offered barriers – the differences in the legal systems between common law American and mostly civil law Latin America – does not seem to be a barrier to the region’s entry into the offshore LPO industry.

1. Differing Rules of Law

One of the key reasons why India has become a powerhouse for legal process outsourcing is its adoption of English common law. Such is not the case for most of Latin America. Of the

214. Geri Smith, *Can Latin America Challenge India?*, BUSINESSWEEK (Jan. 30, 2006), http://www.businessweek.com/magazine/content/06_05/b3969427.htm.

215. *Id.*

216. *Id.*

217. *Destination Latin America: A Near-Shore Alternative*, A.T. KEARNEY (2009), at 15, <http://www.atkearney.com/index.php/Publications/destination-latin-america-a-near-shore-alterntive.html>.

twenty-one nations that make up this region, only two are derived solely from English common law (Belize and Guyana), while one includes a mix of U.S. and Western law (Argentina), one uses U.S. constitutional theory in conjunction with civil law (Mexico) and one uses an open, adversarial system (Venezuela).²¹⁸ Each of the others is predicated on the civil law system. This distinction is often presumed to curb the potential for offshore LPO in Latin America, as substantially more resources are required to educate the workforce on the basic rules of law in America.

Nevertheless, the civil-common law divide is not a dispositive barrier to entry. True, there are exceptional differences between common law and civilian legal systems. Most notably, common law is an adversarial process consisting of legislatively enacted and judicially created law.²¹⁹ As such, this system takes a “bottom up” inductive approach to law, creating a body of law through interpretation of specific factual situations.²²⁰ Further, in the English common law system, judges use their interpretive powers to fill gaps in statutory law²²¹ while juries serve as a check on government power to ensure a fair and just outcome for the litigants.²²² The inquisitorial civil law system, on the other hand, takes a “top down” deductive approach by starting with codified principles and applying these codes and treatises to particular cases.²²³ Accordingly, judges merely apply the law in civilian systems; there is little to no room for judge-made law as is the case in the common law system.²²⁴ Nevertheless, the civil-common divide is not nearly as pronounced when considering the various common law aspects that have infiltrated the civil law system in recent decades. International treaties, for instance, reflect dual characteristics. Some are akin to civil law codes created in anticipation of likely issues in a substantive area²²⁵ while others reflect com-

218. *The World Factbook*, CENTRAL INTELLIGENCE AGENCY (last accessed Nov. 14, 2010), <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>.

219. Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 VAND. J. TRANSNAT'L L. 1083, 1109 (2008).

220. Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and Its Implications for Clinical Education*, 15 CLINICAL L. REV. 131, 137 (2008).

221. Picker, 41 VAND. J. TRANSNAT'L L. at 1109.

222. Nadia E. Nedzel, *The Rule of Law: Its History and Meaning in Common Law, Civil Law and Latin American Judicial Systems*, 10 RICH. J. GLOBAL L. & BUS. 57, 73 (2010).

223. Genty, 15 CLINICAL L. REV. at 137-38.

224. Picker, 41 VAND. J. TRANSNAT'L L. at 1109.

225. *Id.* at 1110 (citing United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397).

mon law values, reacting to specific problems in an ad hoc manner.²²⁶ Further, trade and investment agreements can serve as vehicles for the transfer of common law and legal procedure from the U.S. to civil law regions like Latin America, including common law dispute settlement procedures as well as real and intellectual property law standards.²²⁷

The common law recognition of jurisprudence as a source of law has also gained acceptance in Latin America. For instance, Mexico has developed the notion of *jurisprudencia*, which holds that, if the supreme court reaches the same majority decision in five consecutive judgments, that decision is binding on other courts.²²⁸ This five-case rule is not a matter of *stare decisis*, but instead a procedural efficiency developed to curtail waste of court time and resources.²²⁹ Likewise, Argentina has adopted a precedential system designed to reduce the number of appeals.²³⁰ In addition to the recognition of jurisprudence and precedent, other procedural components of the common law have also been adopted in some Latin American systems, including checks and balances, the judge as arbitrator and a more adversarial stance.²³¹

Furthermore, the civil-common law divide has also been weakened by attempts from North America and Western European countries to promote legal reform and development in Latin America.²³² According to historians, these legal education and outreach programs – or “legal proselytizing”²³³ – date back to the 1970s when U.S. professors traveled to Latin America “as missionaries of the case method and the interdisciplinary study of law.”²³⁴ This early law and development movement was considered a failure, namely because it did not result in a change in Latin

226. *Id.* at 1111.

227. Eric Gillman, *Legal Transplants in Trade and Investment Agreements: Understanding the Exportation of U.S. Law to Latin America*, 41 GEO. J. INT'L L. 263, 265 (2009).

228. Ken Gormley, *Judicial Review in the Americas: Comments on the United States and Mexico*, 45 DUQ. L. REV. 393, 404 (2007).

229. *Id.* at 404-05.

230. Nadia E. Nedzel, *The Rule of Law: Its History and Meaning in Common Law, Civil Law and Latin American Judicial Systems*, 10 RICH. J. GLOBAL L. & BUS. 57, 85 (2010).

231. *Id.* at 85-86.

232. *Id.* at 89-90.

233. Eric Gillman, *Legal Transplants in Trade and Investment Agreements: Understanding the Exportation of U.S. Law to Latin America*, 41 GEO. J. INT'L L. 263, 280 (2009).

234. ROGELIO PÉREZ-PERDOMO, *LATIN AMERICAN LAWYERS: A HISTORICAL INTRODUCTION* 110 (Stanford University Press 2006).

America's legal culture after an investment of several years and several million dollars.²³⁵ Nevertheless, today the United States Agency for International Development (USAID) spends more than \$135 million per year promoting democracy and the rule of law in Latin America by, among other things, developing the legal and institutional infrastructure for trade.²³⁶ Overall, this transplantation approach to incorporating common law procedure in Latin American civil law systems is predicted by scholars to "foster open markets, democracy, and peace throughout the world" through a global "Pax Americana."²³⁷ Conversely, importation of common law procedures and law via international treaties and agreements could spur Latin American governments to hire outside counsel rather than become educated in the common law system when defending against claims by foreign companies.²³⁸

Finally, the fact that an offshore LPO already serves U.S. clients from Argentina and that an El Salvadorian call center is successfully providing support services to an American law firm demonstrates the civil-common law divide is not an outcome determinative barrier to Latin America's entry into the offshore LPO marketplace. Instead, both Novadios and Tucker & Ludin both stated the work being provided by Novadios and The Office Gurus respectively is universal in nature.²³⁹ In other words, Latin American companies providing legal support services to U.S. law firms and corporations are doing work like basic contract drafting and document review that does not require a great deal of knowledge about the distinction between the two legal systems. Thus, the fact that most of Latin America uses the civil law system should not be considered a major hindrance when evaluating the region's offshore LPO potential.

2. Poor Economic System

Despite the fact that Latin American countries have experienced steady growth rates in recent years,²⁴⁰ the powerful

235. *Id.*

236. Gillman, 41 GEO. J. INT'L L. at 280.

237. *Id.* at 267-68.

238. *Id.* at 272.

239. Interview with Ash Anderson, President and Co-Founder, Novadios (Feb. 25, 2011); Interview with Eric E. Ludin, Tucker & Ludin (Feb. 24, 2011).

240. See ROGELIO PÉREZ-PERDOMO, LATIN AMERICAN LAWYERS: A HISTORICAL INTRODUCTION 100 (Stanford University Press 2006) ("In the 1990s the Latin American economy resumed its growth, but at an irregular pace, with some national differences and some setbacks. The integration of the world by new

reemergence of the Asian economies, particularly India and China, has left the region on the backburner in the global marketplace. From 2002 to 2006, Latin America and the Caribbean achieved its best economic performance in 30 years as the annual growth averaged close to five percent and nations in this region trimmed their fiscal deficits, with the average dropping from 9.3 percent in 1982 to about 1.4 percent in 2005.²⁴¹ Nevertheless, Latin American companies have low incomes and are struggling to compete with Asian competitors in India, China, Japan and Korea.²⁴² This has facilitated the hard truth that, in 2006, 213 million people lived below poverty in Latin America and the Caribbean.²⁴³ In short, “[t]hrough some countries such as Chile are now making progress in terms of economic development and stability, over the past century a number of Latin American countries remained politically unstable, alternating between military and communist rule, suffering from economic stagnation or even financial collapse.”²⁴⁴

In order to overcome the economic shortfalls, scholars have suggested that the region needs to “democratize trade and credit, broaden access to technology, and create new employment training and entrepreneurship mechanisms” because “[i]nequality is a drag on development, an impediment to progress.”²⁴⁵ As a whole, Latin America needs to take steps to improve in these areas in order to compete with India and China as an attractive outsourcing destination. As individual nations, however, there are definite standouts, namely Argentina with its growing GDP and extremely high literacy rate; Chile and its well-educated pool of bilingual workers, state-of-the-art telecommunications infrastructure, and emphasis on value-added educational training; and Costa Rica with its highly skilled workforce. Consequently the region is making strides to overcome its economic disadvantage in the offshoring market.

telecommunications and Internet systems has brought the world so much closer, permitting the instantaneous transfer of capital or information”).

241. Luis Alberto Moreno, *Beyond Macro Reforms*, Latin Business Chronicle, May 11, 2006, <http://www.latinbusinesschronicle.com/app/article.aspx?id=313>.

242. *Id.*

243. *Id.*

244. Nadia E. Nedzel, *The Rule of Law: Its History and Meaning in Common Law, Civil Law and Latin American Judicial Systems*, 10 RICH. J. GLOBAL L. & BUS. 57, 88 (2010).

245. Luis Alberto Moreno, *Beyond Macro Reforms*, Latin Business Chronicle, May 11, 2006, <http://www.latinbusinesschronicle.com/app/article.aspx?id=313>.

3. Underdeveloped Infrastructure

In addition to the economic shortcomings, Latin America, like India, is also plagued by severe infrastructure deficiencies, a fact that could hinder its LPO potential, as this value-added service requires advanced infrastructure and telecommunication systems to function efficiently. In the 1980s, Latin American countries were ahead of Asian rivals such as Korea by a factor of three to two in the provision of infrastructure.²⁴⁶ Today, however, these proportions have been reversed, with East Asia surging ahead in terms of supplying roads, telecommunications systems and electricity.²⁴⁷ Thus, while the rest of the world has reduced logistics costs since 1980, in most of Latin America, they have risen.²⁴⁸

Again, as with India, private investors have been encouraged to foot much of the bill to improve the troubled infrastructure.²⁴⁹ This initiative was further pushed when the U.S. government announced the creation of an infrastructure development program to increase investment in infrastructure projects in Latin America and the Caribbean in 2007.²⁵⁰ This initial \$17.5 million infrastructure project development program included a \$4.6 million U.S. contribution and a \$1.9 million contribution from Brazil. Further, as with the varying degrees of economic stability, some Latin American nations have far superior transportation and telecommunications infrastructures than others.²⁵¹ Nevertheless, even as more countries in the region work to improve their communication and transportation systems, it should still be remembered that India, too, has infrastructural failings that have not significantly impaired the country's dominance in the offshore LPO industry. Thus, while infrastructural improvements in Latin America would help the region's entry into the marketplace, the fact that certain

246. *Latin America Hit by Poor Infrastructure*, BBC NEWS (Aug. 30, 2005, 9:13 PM), <http://news.bbc.co.uk/2/hi/business/4197874.stm>.

247. *Id.*

248. *The State of Latin American Infrastructure and Logistics*, LATIN AM. LOGISTICS (2007), <http://www.latinamericanlogistics.org/articles/the-state-of-latin-american-infrastructure-and-logistics.htm>.

249. *Latin America Hit by Poor Infrastructure*, BBC NEWS (Aug. 30, 2005, 9:13 PM), <http://news.bbc.co.uk/2/hi/business/4197874.stm>. Although in some ways this has worked – for instance, 86 percent of telecoms subscriptions and 60 percent of electricity connections were privately managed in 2003 – private investment fell from \$71 billion in 1998 to \$16 billion in 2003.

250. *Secretary Paulson Announces New Latin American and Caribbean Initiative to Catalyze Private Finance for Infrastructure*, U.S. DEPT. OF THE TREASURY (July 6, 2007), <http://www.ustreas.gov/press/releases/hp482.htm>.

251. *See supra* Section III.A.3. (discussing Chile's offshore outsourcing potential).

countries are lacking in this area is not a determinative barrier to entry.

4. Educational Deficiencies

Finally, as mentioned previously, Latin America must consider more investment in education and English language skills in order to become a LPO power player. Across the region, the quality of education is lacking, namely because of the drastic cuts that were implemented in response to the slow growth that occurred in the last two decades.²⁵² Even where governments have maintained their commitment to education and training, access, quality and/or equity are often still compromised.²⁵³ In 2001, for instance, the average Latin American child spent fewer than nine years in school – only a year and a half more than two decades prior.²⁵⁴ “Although primary school enrollment is high in most countries, attendance in early childhood development programs and tertiary education is dominated by those from higher income groups, demonstrating the extreme disadvantage of rural poor and indigenous populations.”²⁵⁵

Nevertheless, the educational scene in Latin America has been positively affected by the promotion of urbanization, industrialization and the expansion of primary and secondary education.²⁵⁶ This development has opened up the prospect of secondary education to more students than merely those who could afford to leave commercial and agricultural work and move to the city.²⁵⁷ Consequently, in the legal field, the number of law students in the nine most populous Latin American countries dramatically increased in the second half of the twentieth century.²⁵⁸ “The growth in numbers of students is a manifestation of a much deeper change: the democratization of education – that is, access by groups and social classes previously excluded from university

252. *Latin American and the Caribbean: Regional Report*, UNESCO (2001), at 11-12, http://www.uis.unesco.org/TEMPLATE/pdf/ed2001/Amerique_latine_ENPDF.pdf.

253. *Id.* at 12.

254. *Id.*

255. *Id.* at 13.

256. ROGELIO PÉREZ-PERDOMO, *LATIN AMERICAN LAWYERS: A HISTORICAL INTRODUCTION* 105 (Stanford University Press 2006).

257. *Id.* at 104.

258. *Id.* at 105. According to Perez-Perdomo's numbers, the number of law students in Argentina increased from slightly more than 29,000 in 1970 to nearly 164,000 in 1998. Likewise, Brazil's numbers jumped from 23,519 in 1961 to nearly 293,000 in 1998; Chile went from 2,284 in 1950 to 24,478 fifty years later; and Mexico saw an increase from 16,808 law students in 1965 to more than 188,000 in 2000.

education.”²⁵⁹ In addition, several regional nations – most notably Argentina and Costa Rica – have extremely high literacy rates and highly skilled, bilingual workforces, factors that favor value-added KPO services.

Regarding legal education specifically, Latin American countries have been criticized recently for providing a “ritualistic, formalistic method of learning” that emphasizes memorization and which results in “poorly prepared lawyers who cannot possibly advance their society.”²⁶⁰ How, then, can law students be expected to undergo bi-jural education in both common and civil law when the legal institutions merely promote legalism isolated from critical thinking and social contexts?²⁶¹ The answer could come from the innovative legal institutions that have sprung up across Latin America in recent years. For instance, the Universidad de Sonora Law School in Mexico reformed its curriculum in 2004, adopting a competencies-based system to replace the traditional emphasis on teaching major disciplines and codes.²⁶² Likewise, both the Universidad de Los Andes in Colombia and the Universidad Torcuato Di Telia in Argentina implemented interdisciplinary educational systems in the late 1990s that upend the traditional Latin American approach.²⁶³ Universidad Torcuato Di Telia in particular emphasizes practical professional training as it mixes the case method with the traditional civilian lecture approach.²⁶⁴

While none of these institutions has yet to completely overhaul the legal educational system in the region, the innovative nature of these and other universities suggests that there is room for incorporation of common law training in Latin American law schools in the future. Such a system could, if adopted, mirror the bi-jural or “transsystemic” curriculum implemented at McGill University in Montreal, which teaches integrated law courses without distinction between civil and common law.²⁶⁵ This sort of modernization could increase Latin America’s LPO potential, as it would alleviate the costs incurred by investors when setting up shop by providing an alternate medium for legal education. Skep-

259. *Id.* at 106.

260. Juny Montoya, *The Current State of Legal Education Reform in Latin America: A Critical Appraisal*, 59 J. LEGAL EDUC. 545, 547 (2010).

261. *Id.* at 549.

262. *Id.* at 555.

263. *Id.* at 553-57.

264. *Id.* at 553-54.

265. Roderick A. Macdonald & Jason MacLean, *No Toilets in Park*, 50 MCGILL L.J. 721, 736 (2005).

tics, however, argue that lawyers brought up within a particular legal system cannot transform themselves from one jurisdiction to the other because of the irreducible differences between the common and civilian systems.²⁶⁶ Thus, while bi-juralism invites future lawyers to think of law in a new way, it is inconclusive whether Latin America would adopt such legal education reforms and whether such reforms would have an impact on Latin America's offshore LPO potential in the wake of its civilian culture.

IV. RECOMMENDATION: INCREASED ENGLISH FLUENCY IS LATIN AMERICA'S TICKET INTO THE OFFSHORE LEGAL PROCESS OUTSOURCING MARKETPLACE

By evaluating the offshore LPO industry in India, it is clear that the region's biggest asset is the large pool of highly skilled, bilingual workers. By leveraging these attributes, India is able to staff its LPO companies without the added transaction cost of training its employees not just in basic English skills, but in legalese and syntax that is required when evaluating and creating legal documents. True, the country is additionally well positioned by not having the burden of educating its Indian-trained lawyers in the common law system, but for the most part, the work being done by offshore LPO providers does not require such an understanding. Instead, the offshore LPOs are providing the bulk of their low-cost support in contractual matters and document review, areas that are generally considered universal without distinction between legal systems. In considering all of this, Latin America would be best positioned to compliment India's offshore LPO dominance by investing early in English language training. The very fact that Argentina and El Salvador have skilled, English-speaking workers is what most drastically facilitated the launch of Novadios and enabled The Office Gurus to create a LPO sector for Tucker & Ludin. In so investing, Latin America would not only facilitate the growth of the offshore LPO industry, but would enable the region to offer other offshore KPO services as

266. Philip M. Genty, *Overcoming Cultural Blindness in International Clinical Collaboration: The Divide Between Civil and Common Law Cultures and Its Implications for Clinical Education*, 15 CLINICAL L. REV. 131, 139 (2008) (citing PIERRE LEGRAND, FRAGMENTS ON LAW-AS-CULTURE 75-76 (1999): "It does not matter how long a civilian spends studying the common law or living in a common-law jurisdiction; she can never transform herself into a common-law lawyer who would have been born, raised, and educated in the jurisdiction").

well. Thus, the region as a whole – not just individual nations – would be more attractive to outside investors as a nearshore alternative to India.

A cautionary note, however, is in order. Although investing in English language fluency would make Latin America a more attractive destination for offshore LPO, there are other factors that need to be studied and evaluated, both by academics and by law firms and corporations considering offshore LPO. The first issue that comes to mind is data security concerns in the wake of confidentiality requirements under the Model Rules. This would require investigation into the internal infrastructure of particular nations and individual companies to ensure clients' personal and professional information is safe. In a related vein, it is important to consider the political climate of the offshore nation, as corrupt governmental practices and unstable political regimes could impact the safety of the offshored project, the efficiency of the LPO provider and the continuity of service. Additionally, a given Latin American nation's ease of doing business should also be weighed, as red tape and start-up fees can add up to transaction costs – both time and money – that impact the bottom line. Finally, when considering offshoring legal work to any nation, including those in Latin America, it is important to consider national laws and international agreements to ensure the practice of offshore LPO is not barred or otherwise burdened in the foreign nation. Each of these issues, though not addressed here, requires consideration when analyzing the potential for individual Latin American nations in the offshore LPO marketplace and should be borne in mind when picking an offshore destination.

CONCLUSION: LATIN AMERICA, A COMPLEMENT TO INDIA
IN THE OFFSHORE LEGAL PROCESS
OUTSOURCING MARKETPLACE

While India may have dominated the offshore KPO and LPO industries in the past, the operational and cost benefits of nearshoring in Latin America should not be ignored. India's LPO success can be principally attributed to its large pool of bilingual, educated workers, criteria possessed by several Latin American countries, including Argentina, Costa Rica and El Salvador. The bilingual, educated workforces in these nations could easily be leveraged to allow the development of value-added services such as LPO in the region. Specifically, Argentina already has a proven track record as a Latin American LPO destination. Like-

wise, El Salvador has demonstrated that countries with English language skills can tap into existing BPO success in order to step into the LPO marketplace. This strategy could prove effective for Mexico since it has existing BPO centers and strong language skills in at least some parts of the country. Thus, while it is unrealistic to suggest here that Latin America will replace India as an offshoring center, it is far more humble to predict that Latin America could serve as a compliment to India's emerging knowledge-based offshore LPO industry in the years ahead.