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The Ethics of Legal Process Outsourcing—Is the Practice of Law a "Noble Profession," Or Is It Just Another Business?

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THE ETHICS OF LEGAL PROCESS OUTSOURCING—IS THE PRACTICE OF LAW A "NOBLE PROFESSION," OR IS IT JUST ANOTHER BUSINESS?

*Aaron R. Harmon**

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I. INTRODUCTION

I first learned about Legal Process Outsourcing (LPO) last fall while having lunch with the managing partner of a firm where I was interested in working. We were discussing how much the practice of law had changed since he was a young lawyer. I was unsurprised by many of his observations, most of which clustered around the ways in which technology had affected his practice. For the most part, I agreed with him; advances such as email, cellular telephones, computer research, document management, remote networking, electronic filings, and even cutting and pasting have all transformed the practice of law. Still, when he told me his firm had been thinking about outsourcing legal work to Bangalor, India, I realized technology had gone somewhere beyond the comfort zone of even this jaded Generation X-er.

It could be said that the evolution of technology in the workplace has had both a positive and a negative influence on the practice of law. To be sure, some developments have been liberating, giving attorneys the means with which to maximize both efficiency and mobility without sacrificing quality. For some lawyers, technology provides the means with which to negotiate the tension between their professional and personal lives. At many firms, young parents now have the option to work from home while their newborns nap, logging into the firm network as seamlessly as if they were in their own offices.

On the other hand, constant access to communication has also made lawyers, well, constantly accessible. Attorneys have become hardwired to their firms: email, cell phones, and Blackberries allow them to be reached anywhere. Work can now literally be done from anywhere in the world, and it has become increasingly difficult to ever truly leave the office behind. Since attorneys can always be found when they are "needed," the same forces purported to liberate them also end up holding them captive. Situations that would once, by necessity, have had to wait until morning can now be handled IMMEDIATELY. As a result, today's lawyers are perpetually "on-call," free only to the extent their firms and clients refrain from tugging on the electronic leashes.

Driving back from my interview, I became progressively indignant at the very idea of LPO. It just seemed so shortsighted. In my Copyright Law class two weeks prior to this meeting, we discussed how the United States had gradually ceded its role as global manufacturing center to China, which has become a progressively more powerful world actor as a result. The current model for U.S. competition in the global marketplace is grounded in the development of new and innovative ideas. Our status as a global superpower is inextricably linked to our ability to "manufacture" intangible, intellectual property. The United States remains the most powerful political and economic force on the planet, in large part because of these big new ideas and the products that come from them. While a large portion of the talent behind these innovations comes from homegrown domestic labor, a substantial number of foreign workers have also been drawn to the opportunities offered here. People come from all over the world to work in places like Seattle, Silicon Valley, and New York to contribute their skills to the new "intellectual economy."

For the past few decades, the United States has been an incubator for what author Richard Florida has termed the "Creative Class."[1] The Creative Class is comprised of the thinkers and "idea" persons who drive intellectual property products to market.[2] Florida divides the Creative Class into two sub-classes: "creative professionals," such as doctors, lawyers, engineers, etc.; and the "creative core," made up of the truly innovative, outside-the-box thinkers who have helped revolutionize the way we live.[3] The creative core contains the sort of thinkers who created Microsoft, Ebay, Google, and YouTube.[4]

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1. RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE (2002).
2. *Id.*
3. *Id.*
4. *Id.*

Continued U.S. economic influence is predicated on remaining at the top of this pyramid, generating ideas and turning them into products to be manufactured elsewhere. However, over the past few decades, the international economic climate has subtly shifted. The European Union has largely consolidated its economies, raising its collective resources and influence.[5] Asia has seen even more impressive growth, particularly in countries like China and India.[6]

Some economists theorize that the United States has begun to lose its economic leverage.[7] As a result, its influence is fading, and may eventually be replaced by a newer "New World Order," in which it is quite possible that Europe and Asia will drive the global economy.[8] The United States, who once set the agenda, will be relegated to the back seat.

Perhaps, the most disturbing thing about the decline of U.S. economic hegemony is that we still hold the key to our modern greatness. That key is our ability to create valuable intellectual property, which owes substantial credit to our (relatively) open, democratic society. Unfortunately, we insist on giving away the keys to the castle, one job at a time, in the name of concepts such as "free trade," "globalization," "efficiency," and "profit margin." As Florida states, "[r]ather than a single deathblow, the U.S. is much more likely to see its dominance eroded by the sting of a thousand cuts."[9] The "flight of the creative class,"[10] as Florida has characterized this emerging phenomenon, to creative centers in other countries is a gradual process. Moreover, the metamorphosis is far from complete. The flight of the creative class is happening right now, and given the historical trend of outsourcing,[11] it is likely to continue on its current trajectory. Like moths drawn to a flame, it is as if we are compelled, beyond our collective will, to continue behaving in a way that promises to ultimately destroy us.

Additionally, the relationships between nations and corporations have also evolved over the last half-century or so, which further complicates the equation. Larger U.S.-based companies are no longer really "United States" companies. Although they flexed their economic muscle behind the United States during the Cold War, American companies now straddle the

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5. Creativeclass.org, Flight Overview, http://www. creativeclass.org/_flight_overview.shtml (last visited May 13, 2007).

6. *Id.*

7. *See infra* text accompanying note 9.

8. *Id.*

9. *Id.*

10. RICHARD FLORIDA, THE FLIGHT OF THE CREATIVE CLASS—THE NEW GLOBAL COMPETITION FOR TALENT (2005).

11. *See infra* Part II.

globe, and have become "multi-national corporations," or "MNCs." Many modern-day MNCs still are headquartered in the United States, but their operations increasingly transcend national borders. Furthermore, while these companies might have a special, almost nostalgic affinity for the United States, they are ultimately loyal to no government. MNCs operate on a global scale and, having gained enough leverage to pit states against states for the best incentives and tax breaks, they can now pit countries against other countries for the lowest wages. In the final analysis, states and countries that offer the most effective way to reduce costs and maximize profits have the best chance to win MNC business.

The loss of manufacturing jobs for U.S. workers is an unfortunate byproduct of globalization, especially for families that rely on selling their labor for support and sustenance. However, manufacture and production is often messy and dangerous, and it pollutes the air and water. In this sense, sending away the industrial blight created by a strong manufacturing base could be beneficial in the sense that it keeps the U.S. environment (relatively) pristine. In addition to allowing us all to breathe cleaner air, offshoring manufacturing jobs helps to keep things aesthetically pleasing here on the domestic front for the new, "creative" economy workers. However, if we also send all the creative jobs overseas, Americans will eventually be left with nothing to do. So, while sending manufacturing jobs overseas may be a bad idea, offshoring our "creative class" jobs is an even worse idea. Ironically (or perhaps tragically), this is exactly what is starting to happen.

The idea that our national addiction to low, low prices has driven us to start outsourcing our low-level "creative professional" jobs undermines the foundation upon which modern U.S. competitiveness rests. My concerns intensified when I realized that LPO not only included routine, back-office paralegal tasks, but also some higher-level types of work normally handled by new associates.[12] Routine work is still the bread and butter of the LPO industry. However, key players in the Indian LPO market have expressed their intention to develop value-added service products that go beyond transcription and word processing, dealing instead with more substantive issues such as patent applications and electronic discovery.[13]

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12. Luladey B. Tadesse, *U.S. Losing Legal Work to Overseas Firms*, ASBURY PARK PRESS, Dec. 12, 2006, www.apostille.us/news/us_losing_legal_work_to_overseas_firms.shtml(last visited Mar. 1, 2008). According to Tom Sager, assistant general counsel at DuPont, "[Indian LPO workers] can handle anything of a complex nature, [including] toxic tort, insurance coverage cases, complex commercial, [and] intellectual property". *Id.*

13. *Id.*

The future of LPO involves many tasks traditionally done by U.S. lawyers for substantially higher prices.[14] LPO companies seeking to attract clients readily point out that Indian lawyers can perform the exact same tasks as U.S. lawyers, and are willing to work for a fraction of the price.[15] As I drove home from lunch and these realizations began to sink in, my indignation slowly dissipated, and were replaced by the uneasy feeling that someday I, too, may become a statistic of globalization.

Aside from, and perhaps more important than, the moral outrage and job security issues, outsourcing legal work to foreign companies also raises a host of ethical and professional conduct issues. LPO workers are not licensed to practice law in the United States, which means they are not bound by the Rules of Professional Conduct.[16] Moreover, neither the Model Rules nor the Formal Opinions issued by the Committee on Ethics and Professional Responsibility of the American Bar Association (ABA Committee) provide any formal guidance for firms interested in exploring this new opportunity without risking unnecessary exposure to ethics violations.

In August 2006, the ethical ramifications of LPO were formally addressed for the first time when the Committee on Professional and Judicial Ethics of the Bar of the City of New York (NYC Bar) issued an opinion on the subject.[17] The NYC Bar covers the offices of many of the largest firms in the world. Considering that it has provided what is currently the only formal legal guidance available on LPO, the NYC Bar may quite literally be defining the rules by which U.S. firms will develop LPO relationships in the near future.

In its opinion, the NYC Bar analogized LPO to the use of domestic contract attorneys, a subject on which the ABA Committee has previously provided guidance.[18] Although the comparison leaves much to be desired (LPO work is performed by non-licensed persons not subject to rules of professional responsibility who live completely outside the reach of U.S. law), the NYC Bar opinion does help to highlight the major ethical considerations involved in LPO, and offers some constructive suggestions to help firms navigate the line between cost savings and professional malpractice.

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14. *See infra* Part III.
15. *See infra* Part III.
16. *See infra* Part III.
17. N.Y.C. Comm. on Prof'l and Judicial Ethics, Formal Op. 2006-3 (2006) [hereinafter NYC Formal Op. 2006-3].
18. *Id.*

As a profession, we are on the threshold of a new phase in the practice of law. As the stigma associated with LPO dissipates and more firms start to explore it, states will need to create rules regulating the interactions between law firms and LPO service providers. Now is the key time for the ABA to consider, at the very least, issuing a Formal Opinion on LPO. Since the use of third party administrative support staff, domestic or foreign, is not extensively treated in the Model Rules, it may eventually be appropriate to include additional guidance in the Comments to relevant Rules. It may even become necessary to draft a Rule directly addressing the subject. As will be demonstrated below, the ramifications of LPO are important enough to justify the special attention.

In this Article, I analyze the emergence of LPO in India, as well as the ethical considerations raised for firms that offshore legal work. I chose to focus on India, where the industry has evolved most rapidly, for two reasons. First, as a result of British colonization, many Indian workers speak English fluently, thereby facilitating an East-West synergy more easily than other countries. Second, India utilizes a common law system similar to what is practiced in the United States and Britain (a result of British colonization).

Since the subject of LPO has been, as of yet, relatively unexplored by legal scholars,[19] Parts II and III are provided as an extended background on the evolution of LPO, and can be read independently of the analysis of the ethical issues contained in Part IV. Part II examines the emergence of LPO in India, placing it in the context of a larger trend of globalization and offshoring. Part III looks at LPO as an industry, evaluating several studies that predict widely disparate rates of growth over the next decade.

Readers already familiar with the LPO industry can proceed directly to Part IV, which takes the "business of law" focus explored in Parts II and III, and places it back into the context of the "profession of law." Part IV considers LPO in conjunction with the fiduciary duties unique to the legal profession, considerations that do not arise when other industries consider sending their work offshore. Part IV analyzes the five major ethical/professional conduct issues raised by LPO: (1) unauthorized practice of law by non-lawyers; (2) conflicts of interest; (3) client confidentiality; (4) client disclosure and consent; and (5) billing issues related to outsourcing. Each of these ethical considerations is examined

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19. *But see generally* 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); Marcia L. Proctor, *Considerations in Outsourcing Legal Work*, 84 MICH. B.J. 20 (2005); Mimi Samuel & Laurel Currie Oates, *From Oppression to Outsourcing: New Opportunities For Uganda's Growing Number of Attorneys in Today's Flattening Worlds*, 4 SEATTLE J. SOC. JUST. 835 (2006).

using three sources of authority: the Model Rules of Professional Conduct, the Formal Opinions issued by the ABA Committee on related subjects, and the recent opinion on LPO issued by the NYC Bar. In Part V, this Article assesses the efficacy of the Model Rules as applied to LPO and concludes that the present Rules are ill-equipped to deal with the unique issues posed by this new development in the "business of law."

II. BACKGROUND—THE EVOLUTION OF OFFSHORING IN INDIA

A. *Outsourcing and Offshoring—A Brief Overview*

"Outsourcing" is defined generally as "sending work traditionally handled inside a company or firm to an outside contractor for performance."[20] When outsourced work is sent outside of the country, it is referred to as "offshoring" or "offshore outsourcing."[21] In practical terms, however, the different monikers are relatively synonymous. Although outsourcing originally denoted the practice of sending work to third party companies in the United States, it gradually expanded to include sending work abroad, a practice that eventually eclipsed domestic outsourcing.

More optimistic advocates of offshoring characterize it as a means of globalizing the economy, creating opportunities, and raising the living standards for workers in all countries.[22] Other advocates take a more results-oriented, economic view looking only at an organization's bottom line, seeking to reduce inefficiencies, maximize profitability, and gain or retain competitive advantages.[23]

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20. Proctor, *supra* note 19, at 20.

21. U.S. GEN. ACCOUNTING OFFICE, GAO-06-676, PRIVACY: DOMESTIC AND OFFSHORE OUTSOURCING OF PERSONAL INFORMATION IN MEDICARE, MEDICAID, AND TRICARE 1 n.2 (2006) ("For the purposes of this report, we define offshore outsourcing as providing services that are performed by workers located in foreign countries, whether the workers are employees of U.S. or foreign companies.").

22. Terry Kelly, *A Brief History of Outsourcing*, Dec. 7, 2004, http://www.globalenvision.org/library/3/702/ (last visited May 13, 2007) ("For some, globalization is about opening up free trade between countries—increasing globalization helps to create opportunities for nations and benefits workers in both rich and poor countries.").

23. Tadesse, *supra* note 12. "Sharon Klein, managing partner at Pepper Hamilton in California, 'it's very difficult to argue to one of our firms' customers or clients that we shouldn't [offshore], because the talent is there.'"; Cathleen Flahardy, *Overhyped, Underused, Overrated: The Truth About Legal Offshoring*, INSIDE COUNSEL, July 2005, *available at* http://www.mindcrest.com/July%202005%20Corporate%20Legal%20Times%20-%20Overhyped,%20

Critics of offshoring view it as a means for companies to exploit different economies of scale for the purposes of generating extra—albeit unearned—profit.[24] They also see it as a major setback for organized labor because it leverages second- and third-world workers, who may not have basic amenities such as hot water or electricity and will work for a few dollars a day, against first-world workers accustomed to higher wages and additional benefits such as health insurance and retirement contributions.[25] These critics view outsourcing as a vehicle for unscrupulous businessmen to generate profits at the expense of the workers to whom the work is being outsourced, and who are being paid a fraction of the wages demanded by the United States citizens who once performed the same tasks on American soil.[26] Regardless of how it is characterized, offshore outsourcing is not a new phenomenon. Companies have been referring work to foreign third parties for many years. In fact, United States companies engaged in outsourcing as early as the 1800s, when sails for clipper ships and covers for westward-bound wagons were outsourced to workers in Scotland, who in turn imported raw materials from India.[27]

Offshoring in its most modern incarnation first surfaced in the 1970s, and evolved over the course of the 1980s.[28] Until that time, American companies had operated under the assumption that a large, integrated

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Underused,%20Overrated,%20The%20Truth%20About%20Legal%20Outsourcing.pdf. "[A] law department isn't going to offshore something purely on the basis of cost . . . . If quality nd efficiency aren't there, it makes no sense." *Id.* (quotations omitted)).

24. *Id.* ("For others, globalization is yet another way for the rich to line their pockets at the expense of the poor—a non-sustainable system that excludes developing nations.").

25. Knowledge@Wharton, How Should Companies Deal With Life After BPO?, Jan. 14, 2005, http://knowledge.wharton.upenn.edu/ article.cfm?articleid=1099 (last visited May 1, 2008) ("Although some analysts view shifting work overseas as ultimately healthy for the U.S. economy, critics say 'offshoring' hurts U.S. workers and threatens the country's long-term prospects.").

26. AFL-CIO, *Exporting America—Shipping Jobs Overseas: How Real is the Problem?*, http://www.aflcio.org/issues/jobseconomy/ xportingamerica/outsourcing_problems.cfm (last visited May 13, 2007).

> Various independent estimates indicate the number of white-collar jobs lost to shipping work overseas over the past few years is in the hundreds of thousands and millions are at risk in the next five to ten years. But the number of jobs lost need not be overwhelming in order to concern policymakers: increased overseas outsourcing also undermines wages and working conditions in those jobs left behind and threatens the long-term health of the economy.

Id.

27. Kelly, *supra* note 22.

28. Rob Handfield, *A Brief History of Outsourcing*, May 31, 2006, http://scm.ncsu.edu/ public/facts/facs060531.html.

company could own, manage, and control the entire lifecycle of their product or service.[29] This theory reached the pinnacle of its popularity in the 1950s and 1960s, as companies scrambled to diversify their assets.[30] Even though vertical control of the supply chain was inefficient and required multiple levels of management, companies projected substantial savings and profits as a result of these changes.[31]

In the 1970s, however, companies began to focus on expansion into global markets, which required large amounts of capital and economic leverage.[32] Corporate conglomerates proved ill-suited to compete in foreign markets because they were unable to respond to market changes as quickly as smaller, more nimble organizations.[33] The competitive disadvantage created by their size caused conglomerates to begin shedding their supply interests. As they spun off divisions, the new paradigm of flexibility also inspired companies to seek additional ways to increase their ability to innovate and adapt.[34]

The emphasis on flexibility continued through the 1980s. During the 1990s, the focus shifted, yet again, toward cutting costs in order to further boost profitability and competitiveness.[35] Companies began to scrutinize processes beyond the supply chain, identifying other non-essential business functions that could be performed by third parties.[36] These "non-core" functions included back-office administrative tasks such as accounting, human resources, data processing, and database security.[37] From these humble origins, the service industry now known as "Business Process Outsourcing" (BPO) began to emerge.[38]

In a relatively short period of time, global outsourcing has become a multi-billion dollar industry. Since the turn of the 21st century, growth has snowballed, going from approximately $119 billion in 2000 to

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29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. Handfield, *supra* note 28.
34. *Id.*
35. *Id.* ("In the 1990s, as organizations began to focus more on cost-saving measures, they started to outsource those functions necessary to run a company but not related specifically to the core business.").
36. *Id.*
37. PRICEWATERHOUSECOOPERS, THE EVOLUTION OF BPO IN INDIA, 8-9 (2005) [hereinafter PWC—BPO], *available at* http://www.pwc.com/images/tech/BPOinIndia.pdf (last visited May 13, 2007).
38. *Id.* at 8.

approximately $234 billion in 2005.[39] By the end of 2008, revenues are projected to rise to around $310 billion.[40] The United States is one of the biggest consumers of outsourcing services. Approximately 59% of the global trade in outsourced work originates in North America.[41] The next closest consumer is the European Union, which consumes approximately 27% of the market.[42] Love it or hate it, offshoring is here to stay.

B. *Business Process Outsourcing (BPO)—Office Services By the Pound*

BPO has been defined as "the outsourcing of business processes, such as procurement, to a third party."[43] An essential element of BPO is that the vendor must assume responsibility for the entire process and manage it on behalf of the outsourcing company.[44] The BPO market can be broken down into three main areas: business administration (dealing with issues such as data processing and human resources), supply chain management (dealing with issues such as procurement, warehousing, and delivery), and sales, marketing, and customer care services.[45]

The first phase of BPO was "service-oriented" rather than "solutions-oriented," meaning, BPO work involved routine, non-revenue generating functions.[46] The tasks did not require much independent judgment, and productivity was measured in terms of the volume of product generated, not the degree of creativity or innovation required.[47] Countries such as India that could tap into vast pools of educated, unemployed labor were uniquely poised to take advantage of the new opportunity presented by BPO. India has managed to secure a substantial percentage of the BPO market, in large part because Indian workers cost a fraction of the salary

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39. *Id.*

40. *Id.*

41. *Id.*

42. PWC-BPO, *supra* note 37, at 8.

43. IGC Commerce, Frequently Used Procurement Terms and Definitions, http://www.icgcommerce.com/corporate/doc/html/resource/procurement_terms.htm (last visited May 13, 2007).

44. *Id.*

45. PWC—BPO, *supra* note 37, at 8–9.

46. PRICEWATERHOUSECOOPERS, GLOBAL INTEGRATION THROUGH KNOWLEDGE PROCESS OUTSOURCING 3 (2005) [hereinafter PWC—KPO], *available at* http://www.pwc.com/images/tech/KPOglobal.pdf (last visited May 13, 2007) (BPO was "characterized by high-volumes, labor-intensity, and support functionality .... Success was measured based on pre-defined parameters, which encompassed timeliness, error-rates and productivity for each transaction that was undertaken. In this manner, the entire operation occurred in a controlled environment—with no aspect of the process delivery or measurement left to judgment.").

47. *Id.*

necessary to employ American workers. Additionally, India's large population enables it to provide a steady supply of English-speaking workers,[48] which means the barriers to market entry are lower for Indian workers than other aspiring BPO powerhouses such as China and the Philippines.

The BPO industry in India has evolved through several basic stages. During each phase, BPO offerings have become more technical and sophisticated.[49] The first phase of offshoring involved company-owned (captive) units, where basic and repetitive "back-office" tasks were sent by companies such as GE (considered by most to be the "corporate pioneer" of Indian offshoring) and AOL.[50] During the second phase, non-captive service providers began to emerge.[51] As more companies set up back-offices in India, venture capitalists began to fund start-up companies to provide similar services to third party clients.[52] Still, the back-office tasks outsourced to India during the second phase continued to be relatively simple and routine.[53]

As other countries such as China and the Philippines sought to establish themselves, it became apparent that simply providing lower-cost services would not always be enough to maintain India's competitive advantage.[54] The third phase began when larger information technology (IT) service companies started getting involved in BPO. The IT companies brought a new level of service sophistication to the table that had previously been missing.[55] As a result, Indian companies began to focus on diversifying their offerings, developing solutions-oriented services in addition to their automated, process-oriented services.[56]

In recent years, a fourth wave of BPO has emerged. The latest incarnation involves marketing targeted offerings to specialized industries

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48. PWC—BPO, *supra* note 37, at 10.

49. *Id.* at 14.

50. *Id.*

51. *Id.*

52. *Id.*

53. PWC—KPO, *supra* note 46, at 3 (BPO was "characterized by high-volumes, labor-intensity, and support functionality").

54. Venkatesha Babu, *From Voice to Value*, BUS. TODAY, Oct. 8, 2006, at 118 ("Despite its soaring revenues, the [BPO] industry is fragmented and there are new low-cost outsourcing destinations emerging elsewhere in the world . . . . When a BPO from India pitches for a contract, it often must fend off contenders from countries such as Hungary, Ireland, Czech Republic, China, Vietnam, and the Philippines . . . . '[L]ow cost alone cannot be a permanent advantage. Other low-cost emerging destinations may eventually undercut India on price.'").

55. PWC—BPO, *supra* note 37, at 14–15.

56. *Id.* at 15–16.

such as software development, investment banking, and law firms.[57] Indian companies are endeavoring to provide industry-specific solutions that, in addition to streamlining a client's non-core processes, also provide independent improvements to help boost the business's productivity.[58] Solutions-oriented customer service has become the modern paradigm of Indian BPO, and has been the incubator from which the Knowledge Process Outsourcing (KPO) and LPO industries have emerged.[59]

C. *Knowledge Process Outsourcing (KPO)—From Service to Solutions*

The most recent wave of BPO has come to be known as "Knowledge Process Outsourcing."[60] In contrast to pure BPO, the focus of KPO has shifted from clerical service to broader clerical solutions. KPO-oriented organizations seek to add value to a company's business processes and, as a result, become an integral part of the corporate infrastructure.[61] Since KPO is more judgment- and solutions-oriented, the work product is more qualitative than quantitative. The technology involved is in a constant state of flux, and organizations are continually discovering ways to apply new technological innovations to their client's business processes.[62] As a result, the KPO industry is more difficult to quantify, as it has the potential to take many different forms.[63]

KPO providers have developed levels of specialized expertise to better serve particular industries.[64] LPO was developed as a KPO service set for the legal industry, and can be traced back as far as 1995, when the law firm Bickel and Brewer first opened a satellite office to handle

57. *Id.* at 14.

58. PWC—KPO, *supra* note 46, at 5 ("BPO is about size and volume and efficiency. In contrast, KPO will not be about size but depth of knowledge, experience and judgment.").

59. *Id.* at 3.

60. *See generally id.* (introducing the concept of KPO and providing a general background of its emergence).

61. *Id.* at 5.

62. *Id.*

63. PWC—KPO, *supra* note 46, at 4 ("KPO as an 'industry' is in the process of evolution. Every day, companies are discovering new ways of leveraging high-speed telecommunication networks or the evolution of computing to innovate around how they operate their businesses.").

64. *See generally id.* (discussing the specialized expertise of KPO providers). These industries include: engineering research and development; pharmaceutical research and development; medical services; education and training; writing and content development; animation and content development; software product development; market research, consulting, and advertising; data analytics; taxation support; finance and accounting; and equity research. *Id.*

administrative support issues.[65] The modern incarnation of LPO dates back to 2001, when GE created a captive center in Gurgaon, India to absorb in-house legal work.[66] The usefulness of captive LPO centers was initially limited because it was difficult to get workflow to and from the captive centers. Over the last few years, technological advancements have enabled service providers to make LPO more responsive, and potentially more useful, to law firms in primary markets such as the United States and United Kingdom.

III. LEGAL PROCESS OFFSHORING—PARALEGALS WHO WORK WHILE YOU SLEEP

A. *A Brief History of LPO*

Outsourcing legal work is not a new phenomenon. On the contrary, law firms have been outsourcing legal work to domestic contractors for years.[67] The only major differences between using a contract attorney in the United States and LPO is that with LPO, the attorney or paralegal lives in another country and is not licensed to practice U.S. law. Otherwise, the two services share many common characteristics.

As is discussed below, the American Bar Association (ABA) has addressed the issue of outsourcing in the context of domestic contract attorneys. The ABA recommendations provide the most useful available starting point for analyzing the ethical implications of LPO.[68] Even so, LPO raises separate ethical issues attorneys should be mindful of as they decide how to structure these unique business relationships.

Approaches to LPO can be roughly grouped into four categories: corporate captive centers, law firm captive centers, third party multi-service BPOs, and third party niche vendors.[69] Corporate captive centers are established by corporations for the benefit of their in-house legal

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65. ValueNotes, Offshoring Legal Services to India (July 2007), http://valuenotes.biz/bpo/legaloutsourcing.asp.

66. PWC—KPO, *supra* note 46, at 7.

67. Samuel & Oates, *supra* note 19, at 856 ("The novelty in this phenomenon is outsourcing legal services to foreign attorneys. Although they may not have used the term 'outsourcing,' law firms and corporations have, in fact, been 'outsourcing' (or 'contracting') legal work domestically for a number of years").

68. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988).

69. EVALUESERVE, LEGAL PROCESS OUTSOURCING (LPO)—HYPE VS. REALITY (2005) [hereinafter EVALUESERVE REPORT], *available at* http://www. evalueserve.com/Media-And-Reports/WhitePapers/Evalueserve%20 Article%20on%20LPO.pdf (last visited May 13, 2007).

department, and provide services only to the corporation.[70] Companies with captive centers in India include GE, Cisco, Oracle, and DuPont.[71]

Like corporate captive centers, law firm captive centers are designed to provide services to a single law firm, performing work exclusively for clients of the firm.[72] Firm captives may operate under the firm's name, or may instead be operated as a subsidiary.[73] For example, Intellevate, which has two centers in India (one in Delhi-Gurgaon and one in Bangalore), is a subsidiary of Minneapolis-based firm Schwegman, Lundberg, Woesser and Kluth.[74] Other firm captives include companies such as Lexadigm and NewGalexy.[75]

Third party multi-service BPOs are companies that originally began as BPO service providers, but who have developed LPO departments within their company. These organizations have the added ability to integrate LPO services with traditional BPO services. Examples of third party multi-service BPOs are Integreon, Office Tiger, and Evalueserve.[76]

Third party niche vendors are smaller operations that, like multi-service vendors, are equipped to handle multiple clients. However, niche vendors provide only legal services, and do not offer ancillary BPO services.[77] Furthermore, niche vendors may focus exclusively on a certain area of law, such as complex litigation or patent applications. Examples of third party niche venders include Pangaea3, IP Pro, and Patent Metrix.[78]

Although some types of legal work can probably never successfully be offshored due to the amount of attorney supervision required, a substantial amount of work has already been successfully outsourced to Indian service providers. As technology continues to make the integration between law firms and LPO service providers more seamless, other types of projects will likely adapt to the LPO model. Examples of current LPO services include: electronic document management (which includes word processing, legal transcription, legal coding, data digitization, and archiving); legal research; due diligence services for mergers and acquisitions; contract drafting and proofreading; review and coding of

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70. *Id.* at 4.

71. Nevidta Sharma, *Net Value: Legal Services Outsourcing Next Big Trend?*, EDGE MALAYSIA, Feb. 20, 2006; ValueNotes, *supra* note 65.

72. EVALUESERVE REPORT, *supra* note 69, at 2.

73. *Id.*

74. *Id.*

75. ValueNotes, *supra* note 65.

76. *Id.*

77. *Id.*

78. *Id.*

discovery; and intellectual property services (such as patent application drafting and prior art searching).[79]

B. *Benefits of LPO—Taking "Associate Leveraging" to a Whole New Level*

As with BPO and KPO, LPO is attractive to U.S. companies and law firms for several reasons. First and foremost, there is a substantial amount of money to be saved by outsourcing.[80] Indian lawyers are paid a fraction of the cost of U.S. attorneys, working for $50 to $70 dollars per hour as compared to $200 or more per hour.[81] Contract attorneys in India cost about $20 per hour. In the United States, contract attorneys cost around $70 per hour.[82]

The potential cost differential is significant enough to make even a skeptic take notice. For example, DuPont has a team of about 100 non-U.S. attorneys, mostly located in India, who provide legal support on complex litigation matters such as asbestos-related class actions.[83] By leveraging the different economies of scale (the difference between the value of the work in U.S. dollars and the cost of the work in Indian rupees), DuPont projects a savings of between 30% and 60% on its legal expenses.[84] Considering it spends approximately $200 million per year in legal fees, that translates into a savings of over $60–120 million per year.[85]

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79. *Id.* Here is a more comprehensive list of legal services that either have been or have potential to be offshored: (I) Litigation Support—discovery analysis; discovery management, presentation & access; document abstraction, indexing & collation; exhibit preparation; (II) Transaction Support—customized draft transactional documents; forms development & standardization; form libraries & version histories; custom expert systems; (III) IP Services—application drafting; patent & trademark searches; patentability & infringement assessments; status tracking; (IV) Legal Research—customized work product; work product libraries; work product updating; in-house research database; newsletters & journal articles; (V) Corporate Secretarial—incorporation documents; statutory reports & filings; board and shareholder resolutions & minutes; resolution & minutes libraries; online tickler system; regulatory & compliance support; application & report drafting; document review & analysis; rules & regulations monitoring & tracking; (VI) Administrative Services—conflict management; promotion & marketing; human resource management; business process consulting requirements & feasibility studies; design & implementation of client-specific solutions; management of captive staff & facilities. *See* Suman Chennameni's Blog (Aug. 9, 2006), http://chennamaneni.blogspot.com/2006/08/is-lpolegal-process-outsourcing-future.html.

80. Tadesse, *supra* note 12; EVALUESERVE REPORT, *supra* note 69, at 4.

81. Tadesse, *supra* note 12.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

Moral indignation aside, if it is possible to bundle and farm out projects to LPO service providers and save that kind of money, organizations definitely have an economic incentive to do so.

In addition to the financial benefits, advocates of LPO point to several other noneconomic benefits, such as improved quality of final work product, reduced response time to clients, and reduction of junior associate churn.[86] The quality of the final work product is improved, at least in theory, because the low cost of LPO allows a firm to devote more hours to a project for the same amount of money.[87] Outsourcing mundane, routinized tasks to India also creates opportunities for U.S. lawyers to focus on other aspects of their practice,[88] such as client development or pro bono work.

The ability to get more support work for less money could also benefit small and midsize firms. LPO would allow a smaller organization to provide a more sophisticated and consistent service menu to their customers, which might otherwise spread them too thin.[89] With LPO, smaller firms can pursue work more aggressively without becoming overextended if they receive too much work at one time.[90] A smaller firm with an established LPO relationship can confidently handle an unexpected workload increase simply by sending the overflow offshore.[91] This can help level the playing field for smaller firms that lack resources for a large support staff.[92]

Reduced response time is another potential benefit that LPO advocates emphasize.[93] Practicing law on both sides of the world allows workflow to be pushed forward on a 24-hour schedule. For example, there is a 10.5-hour time difference between New York and New Delhi, which means that when an East Coast lawyer is leaving work at 5 p.m. (or, as is more likely, taking a dinner break before returning to work), it is 3:30 a.m. the next day in New Delhi. If an assignment is discrete and requires no additional clarification, an LPO worker could come in at 7:00 a.m., complete the assignment by 5:00 p.m., and have it ready for review the next morning when the East Coast lawyer returns to work.[94] Some companies take this concept even further, rotating three shifts of workers on a continual basis.

86. EVALUESERVE REPORT, *supra* note 69, at 4–5.

87. *Id.* at 4.

88. *Id.*

89. *Id.*

90. *Id.*

91. EVALUESERVE REPORT, *supra* note 69, at 4.

92. *Id.*

93. *Id.*

94. *Id.*

This means that some LPO companies literally provide 24-hour service, which could be very attractive to a firm running up against a litigation or transaction deadline.[95]

Finally, some service providers claim that LPO is the answer to junior associate attrition because it reduces the need to hire fresh law school graduates.[96] Since partners would be able to leverage work against Indian lawyers for a fraction of the cost of a U.S. associate, firms that use LPO would require fewer junior attorneys.[97] In addition to the immediate cost savings, firms would also save money on associate development because less money would be spent courting summer associates and training new hires, many of whom leave the firm prior to becoming profitable. Additionally, when or if they left the firm, there would be fewer junior attorneys in positions to take clients with them.[98] Instead, firms would be free to focus their resources on lateral hires with existing books of business, and allow other firms to spend money training new law students each year.[99] Setting aside, for a moment, the obvious concerns raised for recent law school graduates, the economic incentives to leverage LPO workers are substantial enough to justifiably arouse the curiosity of any cost-conscious firm.

C. *Conflicting Growth Projections—Dueling Studies*

There is no dispute that LPO is a rapidly growing industry, and is still in a very early stage of development. The market is in a state of flux, and the services offered are still evolving. As such, an assessment of the future of LPO is obviously premature. Since the industry has not existed long enough to isolate essential variables or identify patterns, growth projections are, by necessity, highly speculative. Although analysts uniformly agree that LPO will continue to grow, there has been some disagreement as to the rate of such growth. Some studies project massive gains, while others predict a more conservative arc.

1. LPO is Blowing UP!—The ValueNotes, Forrester, and Nasscom Studies

Of the reports that predict LPO will grow very quickly, three particular studies—by ValueNotes, Forrester, and Nasscom, respectively—have been

95. *Id.*

96. EVALUESERVE REPORT, *supra* note 69, at 5.

97. *Id.*

98. *Id.*

99. *Id.*

prominently featured in recent literature and news articles on the industry. With minor variations, each study concludes that LPO is quickly gaining momentum, and that the Indian market share will continue to increase rapidly for at least the next decade.

a. ValueNotes Paysite

The 2005 ValueNotes study, "Offshoring Legal Services to India," estimates employment of attorneys and paralegals in the Indian LPO market at around 1,800 persons.[100] That number is projected to increase to 24,000 workers by 2010,[101] which is an increase of more than 1200% over five years. As of December 2005, LPO in India had generated an estimated $61 million in revenues,[102] and is expected to grow almost ten-fold (to $605 million) by 2010.[103] By 2015, the annual revenue of LPO in India is projected to exceed $1 billion, more than sixteen times the 2005 revenue.[104]

ValueNotes expects captive centers to grow more quickly than third-party vendors, primarily because captive centers do not have the same confidentiality and security issues.[105] This assessment is directly contrary to the Evalueserve report (discussed below), which anticipates that captive centers will struggle to survive unless they reach a critical mass of 100 employees. According to Evalueserve, smaller organizations will be unable to provide the career opportunities necessary to retain talent in a progressively competitive and tightening labor market.[106]

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100. ValueNotes, *supra* note 65.

101. *Id.*

102. *Id.*

103. *The Emerging Indian Legal Offshoring Opportunity*, FINANCIALWIRE (Apr. 18, 2006); ValueNotes, *supra* note 65. ValueNotes estimates the global offshoreable legal services market will be $11.5 billion by 2010, meaning that India would be poised to secure 20% of the potential LPO market. The report assumes a market shrinkage rate of 60% (including, for example, services kept in-house because they could not be outsourced at a significant cost savings). The resulting global market for LPO would be $4.6 billion by 2010. *Id.*

104. ValueNotes, *supra* note 65.

105. *Id.*

106. EVALUESERVE REPORT, *supra* note 69, at 3 ("We believe that this model is unlikely to succeed, unless the corresponding center can grow to at least 100 professionals. Captive centers smaller than 100 will be unable to provide good career paths to its professionals, who are likely to leave quickly, especially because the job market in India is expected to remain 'hot' for the next 4–5 years.").

b. Forrester

A report released by Forrester Research is similarly optimistic.[107] According to the report, an estimated 12,000 legal jobs were to be sent offshore by U.S. firms and companies by the end of 2004.[108] By 2015, this number is expected to increase to 40,000, and will cost firms an expected $4.3 billion in lost fees.[109] By 2010, the number of jobs outsourced to India is expected to top 35,000, and is estimated to increase more than six-fold by 2015, for a total of up to 79,000 jobs.[110]

The Forrester report estimates the global market for legal services to be $250 billion, the vast majority of which comes from U.S. companies and law firms ($170 billion).[111] In terms of revenue, Forrester predicts that about 65% ($111 billion) of the U.S. legal service market could potentially be outsourced.[112] As of 2005, the Indian LPO market generated approximately $80 million[113] (33% higher than ValueNotes' estimate of $60 million). By 2015, the Forrester report estimates that annual revenue could be more than $2 billion.[114]

c. Nasscom

In August 2005, the National Association of Software and Service Companies (Nasscom) released a report[115] estimating the market potential for LPO services outsourced from the United States to be at $3–4 billion.[116] Of this potential, the vast majority is still untapped. Indian LPO service providers have captured only 2–3% ($60–80 million) of the market for outsourceable U.S. legal work.[117] As of 2005, Nasscom estimated that

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107. Abhinav Ramnarayan, *"Go Slow" in Order*, HINDU BUSINESS LINE, Feb. 6, 2006, *available at* http://www.thehindubusinessline.com/ew/2006/02/06/stories/2006020600020100.htm.

108. *Id.*

109. Flahardy, *supra* note 23.

110. Ramnarayan, *supra* note 107.

111. Shyamanuja Das, *Legal Services—The Mass-Piloting Stage*, Apr. 24, 2006, http://www.globalservicesmedia.com/Content/general200705211022.asp.

112. *Id.*

113. Sharma, *supra* note 71.

114. *Id.*

115. NASSCOM, LEGAL SERVICES OFFSHORING, MARKET INTELLIGENCE SERVICE 60, Aug. 18, 2005.

116. Ramnarayan, *supra* note 107; Joe Leahy, *Investing in India*, FIN. TIMES (London), Nov. 1, 2006, at 8.

117. Ramnarayan, *supra* note 107; Leahy, *supra* note 116.

the number of workers providing these services numbered between 600–700 employees.[118]

2. A Lone Voice of Caution—The Evaluserve Report

In 2005, Evalueserve, an Indian LPO company, released a report intended to temper these optimistic predictions, entitled "Legal Process Outsourcing (LPO)—Hype vs. Reality."[119] The report provides a comprehensive discussion of the evolution of LPO in India, and also provides a snapshot of the current LPO industry. The report outlines several obstacles[120] likely to hinder the impressive growth projections of other reports, and concludes that the long-term viability of LPO depends on addressing these issues to the satisfaction of United States law firms.[121]

As of January 5, 2005 (the date the report was published), Evalueserve estimated that the number of professionals employed to work for Indian LPO companies was relatively modest, totaling only about 1,300 individuals.[122] The number of professionals was expected to continue to grow, rising to about 5,200 by 2010 and 16,000 by 2015.[123] Similarly, revenue was expected to increase, from approximately $56 million in 2006 to 300 million in 2011 to $960 million in 2016.[124]

Although the Evalueserve projections are substantially lower than the ValueNotes, Forrester, and Nasscom reports, the numbers are still substantial. However, the expected increase is tempered by the fact that the United States legal industry is expected to continue growing as well, from 975,000 attorneys and paralegals and $270 billion in revenue in 2005, to 1.125 million professionals generating $360 billion in 2010, to 1.3 million professionals and $480 billion in revenue by 2015.[125] From this perspective, the projected growth of the LPO industry will not keep pace with the increase in the total size of the legal market. By 2015, the percentage of legal jobs offshored to India is estimated to amount to 1.2% of the total size of the U.S. market, and would account for only 0.2% of the total revenue.[126]

118. Das, *supra* note 111.

119. EVALUESERVE REPORT, *supra* note 69.

120. *Id.* It is interesting to note that the obstacles described by Evalueserve overlap substantially with the ethical and professional issues discussed in Part IV *infra*.

121. *See generally id.*

122. *Id.* at 1.

123. *Id.* at 2.

124. EVALUESERVE REPORT, *supra* note 69, at 2.

125. *Id.*

126. *Id.*

As could be expected, the Evalueserve report has not been enthusiastically received by the more optimistic members of the LPO community. Sanjay Kamlani, Co-CEO of Pangea3, took issue with the report's conclusions:

> I can only give you case studies to refute the report . . . . For example, every week we get called by anywhere from one to three Fortune 500 companies asking what legal services we can offer them. Instead of our calling large MNCs they are calling us unsolicited to see what we can do for them . . . .
>
> I cannot comment on the 1.2 percent as stated in the said report . . . I will say that we are a lot more confident with Forrester's numbers. I think the LPO market will surprise software companies the way it happened in investment banking. Investment banking today far exceeds what anybody would have anticipated five years ago.[127]

Kamlani's conjectural response to the Evalueserve report demonstrates the lack of certainty currently surrounding LPO. Everyone agrees something major is happening, but no one can say exactly what. The resulting confusion allows analysts to conform the available facts to suit their preferred conclusions.

Although the Evalueserve report might be a buzz kill when compared to the nonstop party predicted by the other analysts, Evalueserve's message is by no means pessimistic. On the contrary, it is simply a warning to exercise restraint and resist the impulse to grow too quickly. The underlying message of Evalueserve is there is money to be made, but not every start-up that hangs a shingle in Bangalor is going to get rich. As Alok Aggarwal, CEO of Evalueserve and architect of the LPO report stated, "[l]et me make it clear. I am not saying that offshoring in the legal domain is not profitable. The report just says it is unlikely that the industry will flourish the way the other IT companies have . . . . We are only advising caution . . . ."[128]

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127. Ramnarayan, *supra* note 107.

128. *Id.*

IV. ETHICAL CONSIDERATIONS—FROM THE MODEL RULES TO THE NEW YORK CITY BAR

Some LPO providers seem dismissive of concerns raised by U.S. firms about confidentiality and data security, apparently unaware that these concerns are motivated by something deeper than a simple desire to protect trade secrets. For example, Anupam Ahuja, Vice President-Marketing for BPO company Office Tiger, says that client concerns over risk will simply resolve themselves. According to Ahuja:

> "Typically, clients do their due diligence in a detailed manner. They will come here, go through your security audits, check how mature and capable you are, and then the question of risk is out of the picture." As for the higher risk involved, "There is risk involved in any service that goes offshore, why single out the legal market?" she asks.[129]

By downplaying these concerns, LPO providers betray a fundamental misunderstanding of the roles that ethics and professional responsibility play in the U.S. legal profession. An attorney considering LPO should not be comforted and reassured by the knowledge that other outsourced businesses care about security too. The legal profession may have become progressively more corporate and automated, but an attorney still has a fiduciary relationship with her client that goes beyond the mere "business" of practicing law.

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

LPO does raise some interesting issues that place the business of practicing law in tension with a lawyer's ethical responsibilities as a member of a noble profession. The Evalueserve report acknowledges these concerns, emphasizing that confidentiality and conflicts of interest are major issues for U.S. firms, and that successful Indian start-ups must put processes in place to resolve these issues. As LPO becomes more widespread, more formal guidance will be necessary to help firms and LPO companies prevent problems before they arise.

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129. *Id.*

Although the ABA has not yet issued a Formal Opinion addressing LPO, offshore outsourcing is, in many ways, analogous to the use of contract lawyers, and has been treated as such in the limited literature discussing LPO. In 1988, the American Bar Association issued Formal Opinion 88-356 on contract lawyers.[130] The analogy is imperfect as applied to LPO, especially considering that Indian "contract workers" are unlikely to be licensed to practice in the United States. However, it does provide a useful starting point to help frame the ethical issues involved.

In August 2006, LPO was directly addressed for the first time in a Formal Opinion issued by the NYC Bar.[131] The NYC Bar's treatment was relatively comprehensive, and provides a valuable blueprint for other states to look to in considering how to best approach LPO. In the remainder of Part IV, I describe the major ethical considerations applicable to LPO raised by the Model Rules of Professional Conduct, and contrast the positions taken by the ABA regarding temporary lawyers with the positions on LPO taken by the NYC Bar.

A. *Unauthorized Practice of Law and Lawyer Supervision*

1. Model Rules of Professional Conduct

Attorney supervision of LPO work is perhaps the most important factor in the ethics of legal offshoring. In addition to being a prophylactic measure for maintaining client confidentiality and guarding against conflicts of interest, it carries independent significance, as the Model Rules prohibit unsupervised paralegals from engaging in the practice of law. Firms that fail to monitor the work done by their LPO companies risk potential ethics sanctions. As such, it is imperative that licensed U.S. attorneys closely monitor the workflow for outsourced projects.

Model Rule 5.3 addresses a lawyer's responsibilities to supervise non-lawyer assistants.[132] Under Rule 5.3, partners and lawyers with comparable managerial authority are required to put adequate processes in place to give "reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer . . . ."[133] Furthermore, individual lawyers with direct supervisory authority over non-lawyers are required to make reasonable efforts to verify that their assistants are conducting

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130. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 88-356 (1988) [hereinafter ABA Formal Op. 88-356].

131. NYC Formal Op. 2006-3, *supra* note 17.

132. MODEL RULES OF PROF'L CONDUCT R. 5.3 (2003).

133. MODEL RULES OF PROF'L CONDUCT R. 5.3(a) (2003).

themselves in accordance with the "professional obligations of the lawyer . . . ."[134] Ultimately, however, the supervising lawyer is responsible for the final work product of the non-lawyer assistant.[135]

The Comment to Rule 5.3 indicates that non-lawyer assistants should be given sufficient instruction about the ethical requirements imposed on attorneys, as well as how to distinguish between acceptable and unacceptable behaviors.[136] The Comment further states that the "measures employed in supervising nonlawyers should take into account of the fact that they do not have legal training and are not subject to professional discipline."[137] These considerations are particularly applicable to LPO because, in addition to being unlicensed to practice law in the United States, they are not even physically located in this country. The culture in a country such as India may not impart the same default values to an LPO worker that a U.S. attorney could expect from domestic support staff.[138]

The LPO service provider could easily conduct trainings to educate workers and closely supervise the assignment and completion of projects. It is in the best interests of companies courting the confidence of U.S. law firms to ensure their workers comply with the Model Rules, and that the final work product adequately meets the needs of the outsourcing firm. Close supervision by the LPO company would arguably prevent the most egregious errors. Still, the outsourcing attorney must remain sensitized to the fact that neither the individual worker nor the LPO service company will be held accountable for inadequate supervision or other ethics violations. While contract remedies may be negotiated for breaching these duties, the ultimate responsibility to supervise LPO work still rests with the outsourcing lawyer.

2. New York City Bar Position

The NYC Bar similarly emphasizes attorney supervision in LPO to prevent the unauthorized practice of law. The NYC Bar previously assented to the use of domestic legal research firms staffed by non-lawyers, on the condition that the outsourcing lawyer supervises the

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134. MODEL RULES OF PROF'L CONDUCT R. 5.3(b) (2003).

135. MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. (2003).

136. *Id.*

137. *Id.*

138. Proctor, *supra* note 19, at 22 ("In some cultures, it may be common to display the amount of money one has, to brag about important business ventures, or share work information with coworkers and family. These cultures may not appreciate or realize that revealing information about a matter can be embarrassing or detrimental.").

work.[139] If LPO work is adequately supervised, no unique ethical considerations are raised simply because it is performed outside of the United States.[140]

In addition to monitoring the progress of outsourced projects, the attorney should independently verify that the final work product is reliable. Formal Opinion 2006-3 notes with approval the standard for domestic outsourcing set out by the Los Angeles County Bar Association, which requires the supervising attorney to "review the brief or other work provided by [the non-lawyer] and independently verify that it is accurate, relevant, and complete. . . ."[141] In short, the NYC Bar has determined that the duty of supervision is actually two separate duties: first, to adequately outline the assignment and monitor the non-lawyer's progress; and second, to review the final work product and amend or revise it as necessary.[142]

Formal Opinion 2006-3 recognizes that, in practice, the actual development of an LPO relationship is a complicated process.[143] While it does not establish a protocol for demonstrating adequate attorney supervision, the Opinion does make several recommendations. First,

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139. New York State Bar Ass'n Comm. on Prof'l Ethics Formal Op. 721 (1999) (proper supervision involves "considering in advance the work that will be done and reviewing after the fact what in fact occurred, assuring its soundness.").

140. Ellen L. Rosen, *Corporate America Sending More Legal Work to Bombay*, N.Y. TIMES, Mar. 14, 2004, § 10, at 1.

> When any American legal work is done overseas, American lawyers must review—and bear responsibility for—the final product. "There is no problem with offshoring," said Stephen Gillers, a professor at New York University School of Law and a legal ethics expert, "because even though the lawyer in India is not authorized by an American state to practice law, the review by American lawyers sanitizes the process."

Id.

141. L.A. County Bar Assoc. Op. 518 (June 19, 2006) at 8–9.

142. NYC Formal Op. 2006-3, *supra* note 17, at 4.

> [T]o avoid aiding the unauthorized practice of law, the lawyer must at every step shoulder complete responsibility for the non-lawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality.

Id.

143. *Id.* at 5 ("[G]iven the hurdles imposed by the physical separation between the New York lawyer and the overseas non-lawyer, the New York lawyer must be both vigilant and creative in discharging the duty to supervise.").

conducting preliminary due diligence on the LPO service provider would help determine whether the LPO company was reliable, and would also provide a means to identify whether processes are in place to assure compliance with the Model Rules.[144] Second, the attorney should conduct reference checks on both the LPO company as well as the individual non-lawyer assistant(s).[145] Third, the attorney should consider interviewing the non-lawyers in order to make sure their skills and abilities are adequate to complete the project.[146]

Finally, continued communication during the life of the assignment is crucial.[147] Close communication ensures that the non-lawyer assistant understands what is expected, and that they are executing the assignment at each stage of the process in accordance with those expectations.[148] Put another way, communication serves the same function in LPO as it does within the law firm: if the LPO worker takes the wrong direction early in the project, an attentive supervising attorney can redirect them, losing less productive time than had the attorney waited to receive a final product wholly unsuited to her needs.

B. *Conflicts of Interest*

1. Model Rules of Professional Conduct

Model Rule 1.7 outlines the basic rule regarding conflicts of interest, namely that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[149] "Concurrent conflicts of interest" arise in situations where representation of one client would negatively impact simultaneous representation of another client.[150] Model Rule 1.7 is complemented by Model Rule 1.8, which addresses specific limitations on the scope of an attorney's dealings with her client,[151] and

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144. *Id.*

145. *Id.*

146. *Id.*

147. NYC Formal Op. 2006-3, *supra* note 17, at 5.

148. *Id.* ("[A]mong the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to . . . communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the non-lawyer is discharging the assignment according to the lawyer's expectations.").

149. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2003).

150. *Id.*

151. MODEL RULES OF PROF'L CONDUCT R. 1.8 (2003).

Model Rule 1.9, which focuses on an attorney's continuing obligations to former clients.[152]

Since a single LPO company could conceivably be retained to work on both sides of the same issue, the use of LPO raises potential conflict of interest scenarios for U.S. law firms who utilize their services. Moreover, these conflicts are particularly difficult to control for because client confidentiality may hinder LPO companies from disclosing matters for which they have previously been retained.

2. ABA Committee on Ethics Position

In 1988, the ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 88-356, which addressed conflicts of interest for contract lawyers.[153] The ABA concluded that a temporary lawyer retained to work on a particular client matter is deemed to "represent" that client for the purposes of Rules 1.7 and 1.9. As a result, a temporary lawyer could not work for two opposing firms on the same matter without violating Model Rule 1.7, and could not thereafter work on a substantially related issue materially adverse to the temporary lawyer's former "client" without committing a violation of the Model Rules.[154]

Formal Opinion 88-356 concludes that potential conflicts of interest are minimized when firms retain control over access to sensitive information.[155] As such, temporary lawyers can only access information relevant to the specific matter for which they are retained, and should be screened from all other matters.[156] Firms can minimize the risk of conflict by maintaining accurate records of clients for which each temporary lawyer works, as well as the particular matters to which they were assigned. Similarly, each temporary lawyer should maintain records of clients and matters they have worked on, and should avoid assignments that are materially adverse to matters on which they previously worked.[157]

The analogy between temporary attorneys and LPO workers is fundamentally problematic, however, as both Indian paralegals and attorneys are non-lawyers for purposes of the Model Rules. Even so, the importance of restricting access to information is relevant in both situations and, in addition to limiting potential conflicts of interest, is also useful for protecting client confidentiality.

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152. MODEL RULES OF PROF'L CONDUCT R. 1.9 (2003).
153. *See* ABA Formal Op. 88-356, *supra* note 130.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*

3. New York City Bar Association Perspective

NYC Bar Opinion 2006-3 applies an analysis similar to that of Formal Opinion 88-356, but limits its discussion of access to information to the issue of client confidentiality.[158] With regard to conflicts of interest, Formal Opinion 2006-3 also emphasizes record keeping and accountability, advising firms to inquire into conflict-checking procedures and mechanisms for tracking workflow.[159] Firms are also counseled to refrain from assigning work to individuals previously involved in matters materially adverse to one of their clients.[160]

Accurate record keeping is particularly important for LPO assignments. By some accounts, worker attrition in LPO is relatively high, meaning workers may move from company to company in the same city.[161] It is unclear how LPO service providers can create record keeping systems sophisticated enough to control for conflicts of the company as well as for particular workers. Even assuming such a system is feasible, full disclosure by LPO workers may not be forthcoming, and disclosures of one company's assignments to another company may raise independent conflict of interest issues.

As workers migrate between LPO companies, adequate disclosure for conflict of interest purposes implicates the importance of maintaining client confidentiality. This is less likely to be an issue for captive work centers than for third party service providers, but it represents a vulnerability that must be addressed if U.S. law firms are going to feel comfortable utilizing LPO services.

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158. NYC Formal Op. 2006-3, *supra* note 17, at 5–6.

159. *Id.*

160. *Id.* at 6.

161. Julie Stauffer, *Going Global: As Corporate Budgets Tighten, In-House Counsel—and Their Firms—Start Looking Offshore*, LAWYERS WKLY. (Canada) Nov. 10, 2006, *available at* http://www. lawyersweekly.ca/index.php?section=article&articleid=376&rssid=4.

> [M]any types of legal work require a good knowledge of the client's business and their past practices, so it's important to have the same individual stay on their files. However, there is a perception that many of the offshore providers have very rapid employee turnover. ValueNotes reports attrition rates of 15 to 25 per cent per annum.

Id.

C. *Client Confidentiality*

1. Model Rules of Professional Conduct

Confidentiality of client information is governed by Model Rule 1.6, which states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized in order to carry out the representation . . . ."[162] Rule 1.6 lists several exceptions to this general principle, such as prevention of crime, fraud, or financial injury, all of which are largely inapplicable to either hiring contract lawyers or offshoring legal work.

Protecting client confidentiality entails more than just safeguarding proprietary information. In addition to run-of-the-mill corporate confidentiality, an attorney is obligated to protect client confidences (information given to the lawyer pursuant to a privilege) and secrets (information gained about the client that is embarrassing or undesirable.)[163] An attorney who reveals confidential information to third parties without a client's informed consent may be subject to discipline.[164]

Furthermore, Model Rule 5.1(b) charges a supervising lawyer with the additional responsibility of ensuring subordinate lawyers conform to the Rules of Professional Conduct.[165] Under Rule 5.1(c), a lawyer is responsible for another lawyer's violation of the Rules if she orders or ratifies the conduct of the other lawyer,[166] or if she knows of the conduct "at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."[167]

2. ABA Committee on Ethics Position

Formal Opinion 88-356 extends the scope of Rule 1.6 to cover every lawyer in a law firm, regardless of whether they have contact with a particular client.[168] Likewise, a temporary lawyer may not disclose

162. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003).

163. Proctor, *supra* note 19, at 22.

164. *Id.*

165. MODEL RULES OF PROF'L CONDUCT R. 5.1(b) (2003). Rule 5.1(b) states that lawyers in a supervisory role "shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." *Id.*

166. MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(1) (2003).

167. *Id.* at (c)(2).

168. ABA Formal Op. 88-356, *supra* note 130.

confidential information learned as a result of working at a firm, whether or not she actually worked on the client matter.[169]

The Opinion confirms that supervising lawyers have a heightened responsibility to make sure subordinate lawyers comply with Rule 1.6,[170] and extends this obligation to the supervision of temporary lawyers as well.[171] However, it should also be noted that, under Rule 5.2, subordinate lawyers are independently responsible for ethical violations, even if the transgressions were committed at the direction of a supervising attorney.[172]

3. New York City Bar Position

Issues of client confidentiality are uniquely implicated when legal work is sent offshore. Since Indian attorneys and paralegals are not licensed to practice law in the United States, they are not bound by the Rules of Professional Conduct, and may not be sensitized to the differences between acceptable and unacceptable disclosures.[173] Analogizing overseas support staff to domestic support staff, Formal Opinion 2006-3 states, "the transient nature of lay personnel is cause for heightened attention to the maintenance of confidentiality . . . . Lawyers should be attentive to these issues and should sensitize their non-lawyer staff to the pitfalls, developing mechanisms for prompt detection of . . . breach of confidentiality problems."[174]

As was the case with conflicts of interest (discussed above), Formal Opinion 2006-3 recommends restricting access to information to what is necessary for completing an assignment.[175] Restricting the flow of potentially sensitive information will help limit potential disclosure, intentional or accidental, to unauthorized third parties. Furthermore, firms should require service providers to maintain complete and accurate records of the information particular workers have had access to, which may later prove useful for damage control in the event of a breach.

Formal Opinion 2006-3 further recommends that firms considering LPO make sure foreign, non-licensed workers understand the heightened duties imposed on attorneys in the United States.[176] Since LPO workers are

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169. *Id.*

170. *See id.*

171. *Id.*

172. *Id.*

173. NYC Formal Op. 2006-3, *supra* note 17, at 6.

174. *Id.* at 5–6 (2006) (quoting N.Y.C Comm. on Prof'l and Judicial Ethics, Formal Op. 1995-11 (1995)).

175. *Id.* at 6.

176. *Id.*

not bound by the Rules of Professional Conduct, and may not be familiar with them at all, firms should be explicit with their expectations, and remedies for breaching those expectations should be stipulated by contract.[177] Finally, the commitment to client confidentiality, as memorialized in the contract, should be reaffirmed periodically. Firms may wish to occasionally re-evaluate the processes implemented by their service provider to ensure they still provide adequate protection.

D. *Disclosure to Clients*

1. Model Rules of Professional Conduct

According to Model Rule 7.5(d), which deals with firm names and letterheads, "[l]awyers may state or imply that they practice in a partnership or other organization only when that is the fact."[178] Both the Comment to Rule 7.5[179] and the ABA Canon of Professional Ethics[180] interpret this statement as a prohibition on the use of certain names in certain contexts for law firms. Rule 7.5 is permissive, not mandatory; as such, the focus is on names that firms may NOT use. There are no references requiring attorneys to disclose when non-firm lawyers (or India-based paralegals, for that matter) are employed on a project. As is demonstrated below, the ABA Ethics Committee took significant liberties when it interpreted Rule 7.5(d) in Formal Opinion 88-356. The Committee arrived at a conclusion that, while equitable, is unsupported by the text of the Rule.[181]

Rule 1.6 authorizes attorneys to disclose client information to other attorneys within their firm without obtaining prior client consent.[182] Subsection (a) allows attorneys to reveal information relating to a client matter if "the disclosure is impliedly authorized."[183] The Comment to Rule 1.6 provides that "[l]awyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to

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177. *Id.*

178. MODEL RULES OF PROF'L CONDUCT R. 7.5(d) (2003).

179. MODEL RULES OF PROF'L CONDUCT R. 7.5 cmt. (2003).

180. MODEL CODE OF PROF'L RESPONSIBILITY Canon 33 (2003).

181. Although I support the Ethics Committee's conclusion that close attorney supervision makes client consultation unnecessary, I am not persuaded it follows from the text of the Rule.

182. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003).

183. *Id.*

specified lawyers."[184] In other words, client consent is implied by the act of retaining the firm, and a firm attorney may consult another firm attorney without seeking additional permission.

Rules 1.2 and 1.4 are also relevant to the inquiry of client disclosure. Rule 1.2(a) sets the allocation of authority between an attorney and a client. Basically, the client controls the ends to be pursued, and the lawyer has control over the means.[185] By retaining an attorney or firm, the client gives implied consent for the attorney to pursue the goals of representation as the attorney sees fit.[186]

However, the attorney's authority is limited by Rule 1.4, which requires client consultation "as to the means by which [the client's goals] are to be pursued."[187] Rule 1.4(a)(2) states that a lawyer must "reasonably consult with the client about the means by which the client's objectives are to be accomplished."[188] The Comment to Rule 1.4 indicates that the "means" contemplated by Rule 1.4(a)(2) relate to substantive actions taken on the client's matter.[189] The Comment makes no reference to the particular administrative or clerical choices an attorney makes to accomplish the client's objectives, nor does it address the decision to employ outside assistance. However, a strict interpretation of both Rule 1.2(a) and Rule 1.4(a)(2) supports (or could support) the conclusion that consent to employ non-firm attorneys is not implied by retaining a particular attorney or firm and that, therefore, consultation would be required.

2. ABA Committee on Ethics Position

Formal Opinion 88-356 interprets Rule 7.5 expansively, stating the Rule "articulates the underlying policy that a client is entitled to know who

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184. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (2003).

185. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003).

186. *Id.* ("A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.").

187. *Id.*

188. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2003).

189. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. (2003).

> In some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation.

Id.

or what entity is representing the client."[190] When clients retain an attorney, they give implied consent for the attorney to take action on their behalf under Rule 1.2(a),[191] and it is reasonable to expect that others in the attorney's law firm may also work on the case. However, client consent cannot reasonably be assumed when it comes to associating non-firm attorneys.[192] For contract attorneys, Rule 7.5 would appear to require consultation whenever they perform work on a client matter.

The ABA Ethics Committee rejected this interpretation, concluding instead that client consultation is unnecessary where a firm attorney supervises the temporary lawyer.[193] Opinion 88-356 indicates it is reasonable to expect "legal services [to] be rendered by lawyers and *other personnel closely supervised by the firm*."[194] As such, if a temporary lawyer works on a client matter under the direct supervision of a lawyer from the firm, consultation would not be required.[195] However, if the temporary attorney were to work independently on the project, without supervision, then prior client consultation and consent would need to occur.[196]

As a client, it is reasonable to expect to be informed before your matter is referred to outside counsel. In Formal Opinion 88-356, the ABA Ethics Committee acknowledges EC 2-22 of the New York Code of Professional Responsibility, which states "[w]ithout the consent of the client, a lawyer should not associate in a particular matter another lawyer outside the lawyer's firm."[197] However, the Committee still found that "where a temporary lawyer is working under . . . close firm supervision . . . such employment does not involve 'association with a lawyer outside the firm . . . .'"[198]

The "attorney supervision" exception advanced by Formal Opinion 88-356 requires that the temporary attorney be paid as an independent contractor to the firm. The contract attorney cannot directly share fees charged for the particular client matter. Provided the temporary attorney is paid directly by the law firm and is supervised, "the firm has no

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190. *See* ABA Formal Op. 88-356, *supra* note 130. The Opinion also references Rule 1.2(a) (client consultation regarding means of achieving objectives) and Rule 1.4 (duty to communicate with the client), both discussed *supra*, as relevant to this inquiry.

191. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003).

192. *See* ABA Formal Op. 88-356, *supra* note 130.

193. *See id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. N.Y. CODE OF PROF'L RESPONSIBILITY EC 2-22 (2007).

198. *See* ABA Formal Op. 88-356, *supra* note 130.

obligation to reveal to the client the compensation arrangement with the temporary lawyer,"[199] and client consultation is not required.

3. New York City Bar Position

Unlike the ABA, the NYC Bar has taken a strict position on client disclosure with regard to temporary lawyers, charging law firms with "an ethical obligation in all cases (i) to make full disclosure in advance to the client of the temporary lawyer's participation in the law firm's rendering of services to the client, and (ii) to obtain the client's consent to that participation."[200] This position is more restrictive than that taken by the New York State Bar, which has concluded disclosure of temporary lawyers is required in only three situations: when client confidences and secrets will be divulged to the temporary lawyer, when the lawyer is highly involved in the client's case, or when the lawyer performs work of high significance to the client's matter.[201] Work performed by a temporary attorney that does not trigger these issues would not require client consent.[202]

Surprisingly, the NYC Bar does not extend this strict standard for client disclosure to LPO, and does not require client disclosure and consent to use LPO services for client matters. The distinction apparently turns on the presumption that LPO assignments do not require independent decision-making.[203] The NYC Bar distinguishes contract lawyers from LPO workers on the grounds that non-lawyers are generally not assigned work in which they play significant decision-making functions.[204]

Temporary lawyers, as compared to non-lawyers, are more likely to be placed in situations where access to client secrets and confidences are necessary to complete the project. Moreover, temporary lawyers are also more likely to be required to exercise independent judgment on the client's behalf. Under this reasoning, a strict rule requiring client disclosure to

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199. *See id.*

200. N.Y.C. Comm. on Prof'l and Judicial Ethics, Formal Op. 1989-2 (1989); N.Y.C. Comm. on Prof'l and Judicial Ethics, Formal Op. 1988-3 (1988) ("The temporary lawyer and the Firm have a duty to disclose the temporary nature of their relationship to the client.").

201. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 715 (1999).

202. *Id.*

203. NYC Formal Op. 2006-3, *supra* note 17, at 7–8 ("Non-lawyers often play more limited roles in matters than contract or temporary lawyers do. Thus, there is little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to outsource legal support services overseas to a non-lawyer.")

204. *Id.*

non-lawyers would fail to serve the same purposes as the rule for temporary lawyers.

Still, Formal Opinion 2006-3 is not an unqualified mandate to use LPO without informing clients. Client consent is still required where confidences and secrets must be divulged to complete the assignment, or where the non-lawyers will be extensively involved in the matter (such as an LPO team hired to conduct a large-scale document review).[205] In situations where it is reasonable for a client to expect an issue to be handled only by firm attorneys and personnel, client consent must still be obtained before any work is sent out.[206]

E. *Billing Issues—Surcharges on Expenses and Disbursements*

Technically, the means by which the fees for contract employees are passed on to clients are closely related to the client disclosure issues discussed in the previous section. However, the issue is significant enough to deserve independent consideration, as is demonstrated by the extensive treatment the ABA has given the subject in their Formal Opinions.

1. Model Rules of Professional Conduct

The issue of reasonable and ethical billing is not unique to LPO. Attorneys are under constant pressure to bill hours and generate additional revenue, which creates potential for abuse, such as over-billing, billing two clients for the same work, and surcharging services performed by outside vendors.[207]

Rule 1.5(a) provides a reasonableness standard for fees and costs, stating simply that an attorney "shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses."[208] Rule 1.5(b) requires an attorney, at the beginning of the attorney-client relationship, to disclose the basis upon which fees and expenses are to be calculated.[209] These two provisions are augmented by Rule 7.1, which prohibits a lawyer from making false or misleading statements about the lawyer or the lawyer's services.[210] "[F]alse or misleading" is defined as "material misrepresentation[s] of fact or law, or [omission of] a fact

205. *Id.*

206. *Id.*

207. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) [hereinafter ABA Formal Op. 93-379].

208. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2003).

209. MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2003).

210. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2003).

necessary to make the statement considered as a whole not materially misleading."[211] Failure to include information relevant to billing rates and ancillary charges would violate Rule 7.1.

2. ABA Committee on Ethics Position

Other than the references discussed above, the Model Rules provide no further guidance as to how much a firm can acceptably charge for costs incurred independently of an attorney's hourly fee.[212] Formal Opinion 93-379 acknowledges this deficiency, and clarifies the issue by extending the "reasonableness standard" in Rule 1.5(a) to costs other than attorney fees.[213] As such, charges to a client for expenses incurred above and beyond the attorney's fee must be reasonable for the services rendered.

Inherent in the reasonableness standard is a requirement that the client be charged only for the actual costs incurred.[214] It would be acceptable to charge a premium over the actual costs only when the surcharge was disclosed in advance.[215] The reasonableness standard applies to all costs: from depositions, to copies and faxes, and finally, to services contracted to third parties, overseas or otherwise.[216] Presumably, this means that firms utilizing LPO services would be unable to benefit from arbitrage (i.e., charging the client more than the cost of the outsourced services and retaining the difference as profit).

Although the reasonableness standard clearly resolved any ambiguities, Formal Opinion 00-420 was published seven years later to address the issue of surcharging fees for temporary lawyers.[217] The Opinion distinguished between legal services and expenses, concluding that, subject to the reasonableness requirement of Rule 1.5(a), a firm may charge a premium for work done by a temporary lawyer, provided they are

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211. *Id.*

212. ABA Formal Op. 93-379, *supra* note 207.

213. *Id.* ("The Rules provide no specific guidance on the issue of how much a lawyer may charge a client for costs incurred over and above her own fee. However, we believe that the reasonableness standard explicitly applicable to fees under Rule 1.5(a) should be applicable to these charges as well.").

214. *Id.* ("[C]lients justifiably should expect that the lawyer will be passing on to the client those actual payments of funds made by the lawyer on the client's behalf.").

215. *Id.* ("In the absence of disclosure to the contrary, . . . it would be improper if the lawyer assessed a surcharge . . . unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item.").

216. *Id.* ("In the same regard, if a lawyer receives a discounted rate from a third-party provider, it would be improper if she did not pass along the benefit of the discount.").

217. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420 (2000) [hereinafter ABA Formal Op 00-420].

billed as legal services.[218] If the contract lawyer were billed as a cost, however, no premium could be charged without client consent.[219]

Although Formal Opinion 00-420 does not overrule Formal Opinion 99-379, the distinction seems arbitrary when applied to LPO. After all, copy costs and mileage are easily categorized as expenses, and attorney fees are clearly legal services. But what about offshore paralegals? Are they expenses or are they fees? LPO falls somewhere between these two extremes.

3. New York City Bar Position

Formal Opinion 2006-3 devotes very little space to the issue of billing for LPO work. However, its treatment is definitive:

> By definition, the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer to include the cost of outsourcing in his or her legal fees. [citation omitted] Absent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service. ABA Formal Opinion 93-379 (1993).[220]

Under Formal Opinion 2006-3, the amount billed to the client for legal support staff may include both the employee's wage as well as a reasonable amount for overhead. Although the "reasonability" standard allows firms substantial discretion to determine the final amount charged to a client, the rule is, at least facially, relatively clear.

The bottom line is that a client may be billed for more than the cost of the fees charged to the firm by an LPO company, but the premium may reflect only reasonable expenses associated with providing the service. In the case of work performed outside of the law firm, these additional costs will presumably be low, as only a very minor percentage of administrative expenses could reasonably be attributed to providing the LPO service. Still, the potential for abuse in the form of overbilling for LPO services should be addressed.

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218. *Id.*

219. *Id.*

220. NYC Formal Op. 2006-3.

V. CONCLUSION

After spending over a hundred hours researching and writing this piece, I have had time to cool down and to abstract from my gut-level reactions during that fateful lunch. I am now somewhat less indignant about outsourcing legal work to other countries than I was when I first learned of the concept. After all, the practice of law has become as cost-conscious as any other profession. Lawyers used to be able to collect exorbitant fees from clients without question. The days of delivering a bill containing only an amount due with a description of "for services rendered" are long gone. As clients, especially corporate clients, have become more streamlined and efficient, they have come to expect the same behavior from their law firms.

To a certain extent, clients have removed lawyers from the "professional" pedestal on which they once comfortably sat, too civilized to quibble over costs. Lawyers today have become just another third party service provider, and are expected to provide the same low, low prices companies get from their other suppliers. To remain competitive, therefore, it seems logical for firms to imitate the same cost-cutting measures embraced by their corporate clients.

There are multiple ethical issues fairly raised by sending confidential legal work overseas, and very little guidance for law firms currently considering LPO. However, the limited authority currently available appears to conclude that the ethical implications of LPO are adequately addressed by attorney supervision of the final work product and, where applicable, client disclosure and consent. Although the Model Rules provide a means to identify the ethical concerns raised by LPO, they are currently ill-suited to accommodate the unique issues inherent to foreign outsourcing. The ABA is undoubtedly aware that LPO is happening, but has not yet issued an opinion providing formal instruction. Luckily, the NYC Bar opinion has filled the vacuum and provided the first extensive treatment of LPO, allowing firms to anticipate to a certain degree how the ABA and/or their own state and local bars will treat the subject.

If the NYC Bar Opinion is right, LPO is not much cause for concern, at least on the level of professional conduct. Ultimately, LPO workers are not very different from temporary attorneys or other third party contract workers, and the solutions are the same as with temporary lawyers: client disclosure and attorney supervision.

Still, I was troubled when I realized I was no longer morally outraged at the concept of LPO. Rationalizations and reasons aside, LPO still instinctively felt wrong, as if it somehow cheapened and commodified the practice of law. My brain had convinced me that LPO was innocuous, but my gut kept insisting LPO was a bad idea. As I sought inspiration for the

conclusion to this Article, I resolved to follow my instincts. As Stephen Colbert told President Bush at the White House Correspondents Dinner in 2006, sometimes our guts are more reliable than our heads, because our guts are not distracted by things like facts and logic.[221]

During a conversation with one of my professor-mentors who was, like me, instinctively opposed to LPO, I realized my uneasiness was not simply reactionary economic protectionism. On the contrary, my concerns rested upon a solid foundation, and were shared by others. My mentor's major critique, with which I completely agree, was that adequate attorney supervision in the context of LPO is, at best, wishful thinking. At worst, it was outright deception.

The point of LPO is to farm out work that attorneys were too busy to do in the first place. LPO companies have been ramping up their rhetoric for the past year about adding value to their services, about becoming an integral part of a law firm's operations. Essentially, they propose to evolve to the point where they are doing the same work U.S. attorneys do, but for a fraction of the price. Moreover, LPO companies clearly have the capacity to do so, considering a substantial part of the LPO work force has graduated from Indian law schools and are capable of working at the level of a new U.S. associate. In short, LPO companies may not be aspiring overtly to engage in the unauthorized practice of law, but they clearly intend to push the envelope.

Although such behavior arguably violates the Model Rules of Professional Conduct, and is therefore at odds with the rules of many state and local bar associations, the aspiration to provide a sophisticated service menu to U.S. firms is understandable, from both an economic as well as a law-culture perspective. From an economic perspective, the more comprehensive an LPO company's skill set is, the more business they can attract from law firms. From a law-culture perspective, the desire to please the assigning partner is a concept that most U.S associates are intimately acquainted with. One of the hallmarks of mid-size and large firm culture

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221. Stephen Colbert, Keynote Address at the White House Press Correspondents Dinner (Apr. 29, 2006).

> It is my privilege tonight to celebrate our president. We're not so different, he and I . . . . We're not members of the fact police. We go straight from the gut, right sir? That's where the truth lies, right down here in the gut. Do you know you have more nerve endings in your gut than you have in your head? You can look it up. I know some of you are going to say, 'I did look it up, and that's not true.' That's because you looked it up in a book.

Id.

is that the associate's job is to make the partner's life easier. Since the partner is dealing with other sources of pressure, associates should do whatever can be done to lessen the partner's workload and anticipate their needs.

Since LPO companies seem to be intently striving to provide services that could be construed as the unauthorized practice of law, the onus of responsibility ultimately rests exactly where it should: with the supervising U.S. attorney. The U.S.-based attorney is the only involved party that is bound by a code of professional conduct, which means it is her responsibility to supervise all LPO work and make sure the final product is accurate. By taking responsibility for the work as her own, the U.S. attorney thereby "sanitizes" the outsourced work of any potential ethical issues.

The irony involved here should be apparent. The proffered solutions to the ethical dilemmas created by LPO are that the work can be sanitized by supervision and review of the final product. However, the work was offshored in the first place because U.S. attorneys were either too busy or too expensive to attend to it. It is unrealistic to assert that attorneys will be able to continue to "adequately" supervise LPO work for professional conduct purposes under these conditions, especially if more and more work starts going overseas.

The projects outsourced to LPO companies are likely to involve discrete tasks on larger issues, such as document review, coding discovery for complex litigation, or perhaps patent research and application drafting. In many cases, attorney supervision and review will likely be adequate to avoid malpractice, but supervision for the purposes of avoiding tort liability or a bar disciplinary action is not the same thing as actually adequately supervising and reviewing LPO work. Although having an attorney stand behind the final work product as her own is comforting for liability purposes, in reality it seems naïve to believe that an attorney busy enough to send the work to India in the first place is going to be able to adequately supervise and review the final product. Where thousands, hundreds of thousands, or even millions of pages of data were processed to arrive at the final product, it is more likely that attorneys will be forced, by necessity, to cross their fingers and play the odds, hoping the work product they have endorsed never ends up giving rise to a cause of action.

The threshold of "adequate" attorney supervision for LPO projects highlights the tension between law as a business and law as a profession. When considered from the perspective of the "profession of law," a "noble calling" involving fiduciary responsibilities, the issues raised are almost enough to justify rejecting LPO altogether. However, the "noble calling" paradigm has, in many law firms, given way to the "law as product"

paradigm, less concerned with fiduciary duties than with maximizing profits and competitive advantages. From the "business of law" perspective, the ethical issues raised by LPO are risks, and nothing more. As with any other business risk, the relative burdens can be allocated by contract.

Given the increasing corporatization of law firm management, the ethical "risks" of LPO will undoubtedly be able to be "managed" to the satisfaction of the market. As the hype surrounding LPO dissipates over time, the practice may even become commonplace. LPO companies will continue to develop their processes and services, and as more cautious firms witness more adventurous firms utilizing LPO without getting into trouble, they will become less apprehensive about doing so as well.

So what should be done about LPO? Is there anything that can be done? After all, LPO is a global phenomenon, and to some extent whether it thrives or perishes is not the United States' decision to make. While the United States is the largest target market for offshore legal services providers, LPO is, fundamentally, beyond U.S. control. The United States does not—nor should it—have the power to prevent an industry halfway around the world from continuing to evolve and grow, not even if every firm in this country miraculously decided to reject it. Even if the United States opted out altogether, other countries, such as Canada, the U.K. and Australia, would still provide large potential markets for these services. LPO is inevitable, and it is a question of when—not a question of whether—it will become widespread enough to attract broad acceptance.

Although the United States cannot unilaterally decide whether LPO lives or dies, lawyers in this country are definitely in a position to help define how the industry develops. After all, the United States is the biggest potential LPO market. We are the most sought after customers, and LPO companies are eager to please us because they want our business. Since LPO is in the early stages of development, U.S. firms have a collective opportunity to help guide the growth of a phenomenon that could very well revolutionize the practice of law. Given the inevitability of LPO, as well as the limitations provided by busy attorneys expected to oversee major projects from halfway across the globe, it is imperative for the ABA and other bar associations to revisit their outdated precedents and guidelines, and recognize that LPO gives rise to unique ethical considerations.

In 1988, when the use of contract attorneys was a new thing, the ABA addressed it head-on, and it put out some very useful guidance. It is now 2008, thirty years have passed, and LPO is a new thing. The world has changed a lot over the past three decades, and the 1988 analysis only takes us so far by analogy. We have reached that tipping point. Now is the time for the ABA to address LPO directly and on its own terms. Given the

magnitude of the situation, relying by analogy on opinions issued when email did not even exist seems intellectually lazy, and fails to satisfy the needs of a profession standing at a major crossroads.