Legal Offshoring: A Cost–Benefit Analysis

Courtney I. Schultz*

I. INTRODUCTION ........................................................................................................ 640
II. BACKGROUND ......................................................................................................... 640
   A. History of Outsourcing and Legal Offshoring ..................................................... 640
      1. Business Process Outsourcing ....................................................................... 641
      2. Knowledge Process Outsourcing .................................................................... 642
      3. Legal Process Offshoring ............................................................................... 642
         a. Captive Centers .......................................................................................... 643
         b. Third-party Multiservice ........................................................................... 644
         c. Third-party LPOs ......................................................................................... 644
   B. LPO Growth ...................................................................................................... 645
III. ANALYSIS ................................................................................................................ 646
   A. Potential Savings ............................................................................................... 647
      1. Monetary Savings .......................................................................................... 647
      2. Operational Benefits ...................................................................................... 650
   B. Potential Costs .................................................................................................... 651
   C. Unique Legal Issues ........................................................................................... 653
      1. Work Quality .................................................................................................. 653
      2. Attorney-Client Privilege ................................................................................. 655
      3. Ethical Considerations ..................................................................................... 657
IV. RECOMMENDATION ................................................................................................. 659
V. CONCLUSION ........................................................................................................... 661
I. INTRODUCTION

News headlines revealed a depressing 2009 for law firms: cuts, cuts, and more cuts. The year 2009 marks possibly the worst year ever for layoffs in firms. One website reports that more people were laid off in 2009 than in all other reported years combined. The new year has not brought new life to law firms. The layoffs have slowed, but not ceased, and there have been “no signs of significant hiring.” While U.S. attorneys may not have a positive outlook on the current legal job market, their counterparts halfway across the world may have a different story to tell.

Big firms, small firms, corporations, and nearly everything in between are offshoring legal work. The legal offshoring industry has grown about 60% annually. While offshoring may be a tempting cost-saver, especially during tough economic times, it is time to consider the benefits, costs, and legal implications.

This Note provides insight on several issues that arise when offshoring legal work, and how those issues may be addressed. Part II provides a brief history of outsourcing and an overview of how outsourcing eventually transitioned into legal offshoring. This Part also explains the three forms in which legal offshoring services are provided. Part III outlines and analyzes several issues that offshoring presents to law firms, businesses, and licensed attorneys. This Part focuses on cost savings and other advantages that offshoring may provide, along with a discussion of significant issues and disadvantages that offshoring may cause. Part IV discusses the recent ABA opinion on offshoring and highlights that many questions still remain unanswered. Building upon the analysis in Part III, Part IV also aims to assist licensed attorneys who are considering offshoring. In addition, this Part recommends that state and local bar associations take action by: 1) providing opinions on offshoring with specific examples of ethical violations; 2) putting pressure on the offshoring industry to ensure a minimum level of competency; and 3) encouraging offshoring vendors to adhere to other standards that would preserve client confidentiality. This Note concludes that if state and local bar associations take these specific actions, licensed attorneys will benefit.

II. BACKGROUND

A. History of Outsourcing and Legal Offshoring

At the most basic level, outsourcing is nothing new. Many American businesses routinely engage in conventional outsourcing—transferring services to markets where

---

* J.D. Candidate, 2010, The University of Iowa College of Law; B.S., 2006, Iowa State University. Thank you to the Journal of Corporation Law writers and board members for their editing assistance and to my family for their support.

2. Id.
4. Rama Lakshmi, U.S. Legal Work Booms In India, WASH. POST FOREIGN SERV., May 11, 2008, at A20 (reporting on the increase of legal work that U.S. firms are outsourcing to India).
employers’ costs are lower. Outsourcing began with companies simply transferring services to a lower-cost provider. For example, in the context of legal work, transferring services to lower-cost providers may occur when one attorney hires another attorney down the street to temporarily work on a project. Some even consider transferring work from a senior partner to an associate within the same firm a form of outsourcing, because the partner is transferring services to a lower-cost provider. While this type of outsourcing has existed for centuries, outsourcing has assumed a new role in the United States as developments in technology have made it easier and cheaper for the United States to connect with developing countries. This new method of transferring work overseas became known as offshoring.

1. Business Process Outsourcing

In the last two decades, offshoring has expanded from its roots in lower-skilled, labor-intensive jobs. U.S. businesses, under pressure to cut costs and raise productivity and profitability, found a solution by utilizing new technology to offshore business processes. This new form of offshoring, business process outsourcing (BPO), refers to transferring “non-critical, but essential, business processes and services” to other markets.

Beginning in the 1990s, BPO consisted mostly of entry-level, low-paying jobs. This offshoring focused on business processes that could be electronically transmitted. Examples of these processes include voice and email processing, customer service, basic accounting such as payroll, and debt collections. With further technological advancements, BPO processing grew to include a variety of services beyond business

7. See Legal Outsourcing, supra note 5 (providing examples of legal outsourcing).
8. Id. (noting that transferring work from a senior partner to a junior associate is a form of outsourcing).
9. See RUDI HIRSCHHEIM & JENS DIBBERN, INFORMATION SYSTEMS OUTSOURCING: ENDURING THEMES, NEW PERSPECTIVES, AND GLOBAL CHANGES 3 (2d ed. 2006) (noting that outsourcing can be traced back to the ancient Roman Empire).
14. Id. (defining business process outsourcing).
15. Id. at 5.
16. Id. (providing a description of business process outsourcing).
17. Id.
18. Technological advancements included fiber optic links, internet connections, and computer and software development. Greene, supra note 10, at 5. (describing the technology advancements that led to growth in business process outsourcing).
processing, such as accounting, engineering, and research development. This represented a shift from service-oriented, labor-intensive outsourcing to value-added outsourcing, which is often referred to as “higher-end processes.”

2. Knowledge Process Outsourcing

This shift from service-oriented processes to higher-end processes paved the way for knowledge process outsourcing (KPO). KPO vendors serve a variety of industries, including healthcare, marketing, engineering, legal, and research and development. While BPO draws upon the process the vendor employs, KPO relies on the specialized knowledge and skills of the employee. For example, a company may use a BPO vendor for payroll processing while also employing a KPO vendor for market research. The BPO vendor completing the payroll processing will focus on offering a more efficient process. On the other hand, in addition to an efficient process, the KPO vendor will rely heavily on the skills of its employees to offer cost-effective market research.

3. Legal Process Offshoring

Legal process offshoring (LPO) is one subset of KPO. LPO vendors rely on employees’ abilities to research, reason, and apply legal knowledge. The U.S. law firm Bickel and Brewer was one of the first U.S. law firms to engage in LPO when it opened a subsidiary in 2005 to handle administrative support issues. The LPO industry has grown rapidly in recent years and continues to expand the services that it offers.

LPO vendors offer a range of services, from lower-level work that would traditionally be completed by a U.S. paralegal, to work that has historically required a
U.S. licensed attorney. Document review and other litigation support services are popular services offered by LPO vendors. Some document review and litigation support involves digitizing and indexing paperwork, which may not require a skilled attorney, but other document review involves an attorney making crucial decisions. For example, in some cases, a U.S. attorney would make decisions as to whether a document is pertinent to a case.

In addition to document review and litigation support, many LPO vendors offer a variety of specialized services. Some services include drafting patent applications, legal briefs, contracts, and complaints. Legal research is yet another service provided by LPOs. With the variety of offerings, one U.S. company estimates that offshoring vendors can provide services for 70% of the labor required in a typical insurance or liability case.

The LPO services offered by vendors often depend on the structure of the LPO. LPO service providers are generally categorized into three forms: 1) U.S. entities that have subsidiaries or departments in foreign countries (also called “captive centers”), 2) third-party multiservice BPO vendors, which offer other services in addition to LPO, and 3) third-party vendors that focus only on LPO services.

a. Captive Centers

Some U.S. entities and law firms have established captive centers to benefit an in-house legal department or firm. General Electric, Cisco, Oracle, and DuPont are examples of entities that have captive centers in India. Law firm captives operate either under the firm’s name or as a subsidiary. For example, Intellevate, a subsidiary of

32. Let’s Offshore The Lawyers, BUS. WK., Sept. 18, 2006, http://www.businessweek.com/magazine/content/06_38/b4001061.htm (last visited Mar. 11, 2010) [hereinafter Let’s Offshore] (explaining that one offshoring project involved reviewing two million pages of documents vital to a case, and U.S. attorneys typically would have performed this document review).
34. See Brook, supra note 30 (listing examples of services that LPO vendors provide).
35. See Let’s Offshore, supra note 32 (discussing a U.S.-based chemical company’s practice of legal offshoring).
38. NewGalexy, supra note 36.
39. See id. (identifying three examples of law firm captives). For an example of a U.S. law firm operating
Minneapolis-based intellectual property firm Schwegman, Lundberg, Woesser, and Kluth, has two captive centers in India. Due to issues of confidentiality and security, captive centers are expected to grow even faster than the rate of third-party vendors.

b. Third-party Multiservice

The second category of LPOs is third-party multiservice vendors. Third-party multiservice vendors are appropriately labeled “third-party” because they are typically not subsidiaries of an entity. Instead of being linked to one entity, third-party multiservice vendors provide services to a variety of clients. Third-party multiservice vendors provide numerous services to their various clients. For example, multiservice vendors’ services include investment, business, and market research, in addition to legal process services. Examples of third-party multiservice vendors include Integreon, R.R. Donnelley, and Evalueserve. Integreon, for example, focuses on document services, business administration services, and legal and discovery support services. Integreon serves law firms, corporations, and investment banks.

c. Third-party LPOs

The final category of LPOs is third-party LPO vendors, which are sometimes referred to as niche vendors. Third-party LPOs are companies established to provide...
legal services to multiple clients. Like multiservice vendors, LPO vendors are also third-party vendors. However, distinct from multiservice vendors, LPO vendors only serve the legal industry. Some LPO vendors provide a variety of legal services, while others focus exclusively on a certain area of law, such as complex litigation or patent applications. Examples of third-party LPO vendors include Pangea3, IP Pro, and Patent Metrix.

Pangea3, the self-titled “leading outsourcing firm in India,” offers a wide range of services to its clients in the United States, Europe, and Japan. Pangea3 Co-Chief Executive Officer Sanjay Kamlani claims that “[s]hort of anything where you have to physically be there or sign on the dotted line, we can do it.” While this may be an exaggeration, Pangea3 does offer services in patent drafting and patent litigation, contract drafting, document review, electronic discovery, and legal research and support services.

B. LPO Growth

Professional outsourcing in the United States jumped from a $260 million industry in 2001 to a $3.05 billion industry in 2007. The LPO industry follows that general trend, growing about 60% annually. While predictions for the future of LPO vary, studies indicate that the industry will grow rapidly throughout the next decade. One study suggests that law firms will offshore over $4 billion of U.S. legal work by 2015. The United States offshores legal work to several countries, but India is the frontrunner in the LPO industry.
India has become the frontrunner in the growing offshoring industry for a number of reasons. First, India emerged as a “technology powerhouse” in the era of the dot-com boom and the year 2000 (Y2K) crisis, when it was willing and able to meet the U.S. demand for software programmers and computer coders and testers. While many Indian vendors’ first outsourcing contracts were in the area of information technology stemming from the Y2K crisis, India’s technology has allowed Indian companies to offer KPO services in a variety of industries.

In addition to technological advances and advantages, India has cost and labor advantages over other offshoring locations. India offers a large, educated, English-speaking workforce at a relatively low cost. Other low-cost countries, such as Brazil, Hungary, China, and the Philippines, do not offer the same educated workforce that India provides. Countries that do offer an educated, English-speaking workforce—such as Canada, Australia, and Ireland—have considerably higher labor costs compared to India. For example, a call center agent employed in the United States costs about $19,000; the same call center agent would cost $17,000 in Australia and $19,500 in Ireland, but only $7500 in India.

India’s labor force is also particularly well equipped to support the growing LPO industry. With about 300,000 students enrolling in Indian law schools each year, India offers access to a large workforce educated in common law. This is a distinct advantage for the Indian LPO industry, since legal systems in India and the United States share a common-law foundation derived from England. Although India and other countries are becoming popular destinations for U.S. legal work, U.S. companies and law firms need to consider several issues before sending work offshore.

III. ANALYSIS

This Part analyzes the savings, costs, and other issues that may arise when U.S. businesses and law firms consider offshoring. This Part first analyzes the potential

($1.43 billion) within the next four years. NewGalexy, supra note 36.

67. Greene, supra note 10, at 4 (noting that India is a leader in the industry); see also PWC, supra note 20, at 10 (noting that India has emerged as one of the most preferred offshoring locations).
68. Greene, supra note 10, at 4.
69. Id.
70. Sathe & Kolhatkar, supra note 21 (listing India as a vendor in the following seven KPO segments: animation; content; financial services; healthcare; information technology and research and development; legal; and pharmaceutical research, while noting that vendors in China, Russia, New Zealand, and the Philippines offer, at most, services in only three segments).
71. PWC, supra note 20, at 10 (reporting that India’s currency exchange rates and costs of infrastructure and labor gives India an advantage over other countries).
72. Id.
73. Id.
74. Id.
75. Id.
76. Lakshmi, supra note 4.
savings that firms may realize by offshoring. Next, this Part discusses the costs of offshoring. Finally, this Part analyzes three issues, each unique to legal offshoring, that U.S. businesses and firms need to consider when offshoring legal work.

A. Potential Savings

Not surprisingly, cost savings is often cited as the driving factor behind the recent explosion of legal offshoring. This Part provides examples to illustrate how offshoring has the potential to generate substantial monetary savings. In addition, this Part will analyze the operational benefits that offshoring may produce.

1. Monetary Savings

Conventional outsourcing—transferring services to markets where costs are lower to employers—inherently produces monetary savings. Some firms report realizing cost savings of 60–90%, varying by the type of legal work performed. The nature of the outsourced work plays a large role in determining cost savings. As the LPO market continues to expand its services beyond traditional paralegal work to include functions traditionally performed by attorneys, LPO will likely generate even more cost savings. The following examples detail the potential cost savings that a firm may realize by offshoring the work of a legal secretary and an associate attorney.

First, consider the cost savings generated by offshoring the work of a legal secretary. In major metropolitan areas, the average salary of a legal secretary with three to six years of experience is $64,000 per year. On average, wages only account for 70.7% of the total cost of an employee. Employer-provided benefits account for the remaining costs.

79. Paz-Frankel, supra note 78.
80. See supra Part II.B (discussing LPO growth).
82. See Robert Half Legal, Salary Center, Salary Calculator, http://www.roberthalflegal.com (last visited Mar. 5, 2010) (reporting that the median salary for a legal secretary with 3 to 6 years of experience at a firm with 75+ attorneys is $69,971 in New York City, New York; $61,039 in Chicago, Illinois; and $61,535 in Los Angeles, California). This analysis uses $64,000, the rounded average of the median salaries in these cities (the actual average being $64,181.67).
83. Employer-provided benefits account for the remaining costs.
84. Examples of employer-provided benefits include: paid leave, such as vacation, holiday, sick leave, and personal leave; life, health, and disability insurance benefits; retirement and savings; and legally required benefits such as unemployment insurance, workers’ compensation insurance, and employer contribution to Social Security and Medicare. Id.
remaining 29.3% of the direct costs associated with an employee.\textsuperscript{85} Using this data, an employer would pay an estimated $26,523.33 in benefits in addition to $64,000 in salary, for an annual total of $90,523.34.\textsuperscript{86} Assuming that a secretary is utilized 100% of the time and works 240 days per year and 8 hours per day, an employer would be paying an hourly rate of approximately $47.15.\textsuperscript{87} Although the cost varies among offshore vendors, many sources report that legal secretarial work may be outsourced for as low as $30 per hour,\textsuperscript{88} for a savings of about $17 per hour when compared to the hourly cost of an average legal secretary.

Law firms and businesses may realize even more cost savings if offshoring can replace work ordinarily done by a U.S. attorney.\textsuperscript{89} Starting salaries at some large law firms are now $160,000 per year.\textsuperscript{90} On average, U.S. attorneys bill at a rate of $318 per hour, while the average hourly rate at large firms in New York City is $550.\textsuperscript{91} With much lower hourly rates available by offshoring, an attorney in Dallas, Texas said he does not even think about charging his $395 hourly rate or his associate's rate of $225 when he needs to research an issue; instead, he uses Atlas Legal Research,\textsuperscript{92} which charges $60 per hour for the work.\textsuperscript{93}

While law firms in large U.S. cities, such as New York City, may seem more likely to realize cost savings due to higher than average hourly rates,\textsuperscript{94} smaller firms in less populated U.S. cities are also realizing the cost savings. Schwegman, Lundberg, Woessner & Kluth, a 55-attorney patent firm in Minneapolis, Minnesota, offshores work to its Indian subsidiary, Intelellevate, to generate cost savings.\textsuperscript{95} Intelellevate employs scientists with doctorate degrees, patent engineers, proofreaders, and paralegals that produce savings of over $150 per hour to the firm.\textsuperscript{96}

In addition to lower hourly rates, some offshore vendors will work for flat fees or

\begin{itemize}
\item \textsuperscript{85} Id. Note that this figure is taken from the average employer compensation costs in private industry.
\item \textsuperscript{86} This calculation only considers direct costs to an employer. It does not consider other costs associated with employees, such as recruitment and training. In a similar analysis, it is noted that this figure may in fact be higher due to rising health care costs and generous law firm benefits. Friedmann, \textit{supra} note 81.
\item \textsuperscript{87} This calculation is based on 52 weeks per year, 5 business days per week for a total of 260 business days per year. This calculation assumes that an employee will not work 20 business days due to holidays, vacations, sick days, etc., for a total of 240 working business days. Further, this calculation assumes that the employee will work eight hours per day and be fully utilized at all times.
\item \textsuperscript{89} See \textit{supra} Part II.A.3 (discussing how LPOs provide services historically performed by U.S. attorneys).
\item \textsuperscript{90} Skadden, Arps, Slate, Meagher, & Flom LLP, Latham & Watkins LLP, and Baker & McKenzie LLP are examples of firms with starting salaries over $160,000 per year. NALP Directory, available at http://www.nalpdirectory.com/dledir_search_advanced.asp (last visited Mar. 11, 2010).
\item \textsuperscript{92} Atlas Legal Research has an office in Bangalore, India. See http://www.atlaslegal.com (last visited Mar. 11, 2010).
\item \textsuperscript{93} Barlyn, \textit{supra} note 91.
\item \textsuperscript{94} Id. (citing a 2007 survey by Altman Weil that reported attorneys at large firms in New York City bill $232 more per hour than the U.S. national average).
\item \textsuperscript{95} Foster, \textit{supra} note 39.
\item \textsuperscript{96} Id.
even negotiated rates. TransUnion, a credit and information management company based in Chicago, has offshored work to India for four years. Recently, TransUnion employed Indian attorneys to review more than a million litigation-related emails for less than $10 per hour. According to TransUnion’s general counsel, it would cost the company $60 to $85 per hour to contract out the same task to a U.S.-based legal staffing company.

Other U.S. companies have reported saving millions from offshoring. Marty Shively, Associate General Counsel and Director of Worldwide IP Operations, estimates that Microsoft saved about $6.5 million by offshoring patent work in 2007. In 2006, DuPont hoped that it could save over $6 million by offshoring legal work.

In addition to potential savings on labor costs, offshoring may generate additional cost savings benefits by converting fixed costs to variable costs. For example, if a firm offshores work typically performed by legal secretaries, the firm may be able to eliminate the position. Therefore, a salary that was once a fixed cost is transformed into a variable cost. If law firms do not utilize legal secretaries 100% of the time, firms can save money by offshoring the work as needed instead of paying a fixed salary. In addition, through this transfer of costs, a firm may decrease its need to borrow funds to maintain its fixed costs.

Firms and businesses may also have the potential to cut occupancy costs by offshoring legal work. Occupancy cost is the single largest non-salary operating expense a law firm faces. Occupancy costs include rent of office space, electricity and other utilities, commercial rent and occupancy taxes, amortization of leasehold improvements, and storage costs. First, offshoring may result in law firms cutting positions, which may eliminate desks and reduce the need for office space. Second, offshoring vendors provide electronic document management services, which may result in lower storage costs. By reducing the need for office and storage space, offshoring may lower

98. Barlyn, supra note 91.
99. Id.
100. Id.
102. Morrison, supra note 101.
103. Let’s Offshore, supra note 32.
104. Friedmann, supra note 81.
105. See id. (calculating the costs of a legal secretary by assuming an 80% utilization rate).
106. Id.
108. Id. § 4.04(1), at 4–9. Note that some law firms may define occupancy costs narrowly to only include rent expense, while other law firms use a broad definition of occupancy and include the above-mentioned additional costs. Id.
109. See Let’s Offshore, supra note 32 (providing an example of an offshoring vendor that scanned documents held in storage); see also infra Part III.A.2 (explaining storage costs).
Firms and businesses across the United States realize cost savings by offshoring. With attorney salaries on the rise and the costs of providing employee benefit packages following the same trend, firms and businesses may realize even greater cost saving potential from offshoring in the future. Regardless of whether cost savings are generated by eliminating fixed costs, lower hourly rates, or flat-fee contracts, cost savings will undoubtedly continue to be a factor driving the offshoring industry.

2. Operational Benefits

While cost savings are a factor driving offshoring, some companies report that cost savings are just one positive side effect of offshoring, and other benefits are even more significant. The legal industry may be “ripe for radical restructuring,” as evidenced by the mounds of paperwork, inefficient use of expensive office space, and managerial issues and expenses that burden the industry. Offshoring may be a tool to facilitate the needed restructuring.

Storage and review of legal documents can be an issue for businesses. In order to complete the discovery process, U.S. attorneys may need to sort through boxes and boxes of documents. One U.S. company reports that in one warehouse alone it stores more than 200,000 boxes of legal documents, each stuffed with 2500 pieces of paper. Armed with portable scanners, an LPO vendor will visit the storage site, scan necessary documents, and send the images offshore for its employees to review. In one case, this service allowed a U.S. company to reduce its discovery process from 18 months to 3 months.

Aside from managing documents, employee management is another area where law firms and businesses may potentially benefit from offshoring. Offshoring reduces management issues such as finding, recruiting, evaluating, and retaining staff.


111. See Vanessa Fuhrmans, Workplace Health Premiums Continue to Climb but Rates Slow, WALL ST. J., Sept. 24, 2008, available at http://online.wsj.com/article/SB1222211225991369069.html (reporting that employers paid an additional 5% for health care premiums in 2008, and that premiums were expected to rise another 6% in 2009).


113. Let’s Offshore, supra note 32 (noting inefficiencies in the legal industry).

114. See id. (discussing the benefits of offshoring).

115. See id. (providing an example of the number of documents that one U.S. company has in storage).

116. Id. (noting that LPO vendors can substantially decrease the amount of time spent on discovery).

117. Id.

118. Let’s Offshore, supra note 32.

119. Id.

120. See Friedmann, supra note 81 (explaining that offshoring can translate into operational benefits).
offshoring may provide substantial cost savings along with eliminating management responsibilities. Reducing the number of staff may allow attorneys to concentrate on serving clients, billing more hours, and winning new business, instead of handling training and managerial issues.122

Time zones and around-the-clock service may provide U.S. law firms and other businesses with additional operational benefits.123 When offshoring to India, U.S. businesses and firms can take advantage of a time zone difference of over ten hours, depending upon the city in which the U.S. business or firm is located.124 This allows U.S. attorneys to send projects to India at the end of a working day and have them completed by the next morning.125 Some LPO vendors also operate multiple shifts per day in order to provide continual service.126

B. Potential Costs

Despite these savings, offshoring will cost law firms and businesses at every step of the process.127 One offshoring consultant suggests that the costs may outweigh the benefits if a business does not have a large number of repetitive transactions.128 This Part will analyze the costs associated with offshoring and also discuss alternative options.

One of the first expenses law firms and businesses face when offshoring is finding a vendor or creating a captive center.129 Finding a vendor may entail investigating numerous vendors, analyzing services and work quality, and negotiating a contract or an agreement with the vendor. Establishing a captive center may involve investigating and determining the structure of the captive center, hiring employees, securing a physical location, hiring overseas management, and navigating governmental regulations, to name only a few of the many issues and necessary expenses.130 Although costs associated with finding a vendor or establishing a captive center will vary in each situation, each offshoring venture will have a price tag.131

122. See Friedmann, supra note 81 (explaining that offshoring may translate into operational benefits).
123. See id. (noting that 24-hour service is a benefit of offshoring).
126. See Friedmann, supra note 81 (noting that one operational benefit is “24x7 service”).
128. Ann All, Interest in Legal Process Outsourcing Growing, ITBUSINESSEDGE.COM, Jan. 9, 2009, http://www.itbusinessedge.com/cm/community/features/interviews/blog/interest-in-legal-process-outsourcing-growing/?cs=23225 (reporting a legal consultant’s suggestion that immigration and intellectual property companies need to be “at least $5 billion or bigger” to benefit from offshoring).
129. See supra Part II.A.3 (defining vendors and captive centers in the context of offshoring).
130. See Amit Maheshwari, The Offshore Captive Center Model, V-VANTAGE, Fall 2005 (discussing options for structuring a captive center).
131. See Overby, supra note 127, at 1 (reporting that when offshoring information technology work, the
After the initial expenses, law firms and businesses will face additional costs when developing internal processes, transitioning, and managing the projects with the vendor. First, businesses will spend time developing internal processes, such as logistical plans, to track projects that will be offshored. Second, businesses will endure transition costs that may include travel between the vendor and the company offshoring work, time spent developing a system for offshoring projects, and employee training. Finally, more time and money will be spent reviewing the offshored projects and negotiating future projects.

In addition to the monetary costs associated with offshoring, law firms and businesses might suffer other consequences from offshoring. First, offshoring may result in layoffs. Layoffs may result in monetary expenses such as retention bonuses and severance payments. More indirectly, layoffs may also plague the morale of the law firms and businesses.

Beyond the consequences to the offshoring company, layoffs may affect the legal community as a whole. If offshoring results in eliminating positions, it will affect the U.S. legal job market. Simply put, losing jobs to offshoring vendors may result in fewer Americans pursuing careers in law. In addition, layoffs can also pose a “transfer of knowledge” issue, meaning that offshoring also exports experience that accompanies completing projects. For example, if law firms offshore lower-level legal work, new attorneys will not gain experience from those assignments. In the long run, this issue could affect the professional development of attorneys.

To avoid some of these costs, U.S. law firms and businesses may find suitable alternatives without looking offshore. In fact, many businesses provide litigation support services such as document review and document management here in the United States. In addition, many licensed U.S. attorneys are available on a contract basis.

expense of selecting a vendor can cost from 0.2% to 2.0% in addition to the annual cost of the deal). See also infra Part III.C.3 (explaining the costs related to complying with ethical obligations).

See Overby, supra note 127, at 6–7 (detailing some of the internal processes information technology firms must implement when offshoring).

See id. at 2 (noting that transition costs may be the most expensive stage of offshoring).

See id. at 7–8 (providing an example of the time and costs associated with invoices and time sheets plaguing one company that offshored projects).

Id. at 4–5 (describing the “cost of layoffs” when offshoring).

Id.

See Overby, supra note 127, at 5 (noting that companies experience morale problems after they lay off employees due to offshoring).


See id. (noting that the loss of jobs has a negative long-term impact on a profession).

See id. (discussing that offshoring results in fewer job opportunities, which leads to less people pursuing careers in that field).

Id.

See id. (describing the “transfer of knowledge” problem).

See Offshore Outsourcing, supra note 138 (noting how the transfer of knowledge affects higher-level jobs).


For two examples of contract attorneys available in the United States, see Hire Counsel, Home Page,
Hiring temporary U.S. attorneys may provide the same managerial benefits as offshoring while avoiding other costs associated with finding a vendor and implementing an efficient system. Further, hiring a licensed U.S. attorney may avoid ethical and work quality issues that may arise when offshoring.

C. Unique Legal Issues

Potential savings and costs are issues that any business in any industry will face when considering offshoring. However, offshoring legal work sparks issues that are unique to the legal industry. This Part considers three such issues: (1) work quality; (2) attorney-client privilege; and (3) ethical issues.

1. Work Quality

Work quality is arguably more important in the legal industry than in many other industries. For example, when businesses offshore payroll processing, errors may be costly and time-consuming. However, errors in legal work may have grave repercussions for both attorneys and clients. For an attorney, legal errors may result in a breach of ethics or court rules, which may result in a reprimand. A court may also find an attorney liable for legal malpractice due to substantive errors, such as a failure to apply the law properly or a failure to conduct adequate legal research. If a court finds that an attorney is guilty of malpractice, the attorney may be liable for damages, including punitive damages.

An attorney’s legal errors may also result in detrimental consequences for the client. First, a breach of court rules or poor attorney performance may result in a court dismissing a case. Arguably even more devastating to a client is the possibility of a legal error resulting in a wrongful criminal conviction or an error in a contract ending with lengthy litigation. With so much at stake, it is no surprise that law firms and businesses are hesitant to consider offshoring due to work quality concerns.


146. Greene, supra note 10, at 5 (providing examples of business process outsourcing).


150. See TCW/Camil Holding v. Fox Horan & Camerini, 330 B.R. 117, 128–29 (D. Del. 2005) (finding that an attorney may be liable for malpractice for failing to conduct adequate legal research), cited in Margolis, supra note 148, at 84 n.2.

151. See RAYMOND, supra note 149, at 39–40 (discussing damages for a legal malpractice claim).

152. See Margolis, supra note 148 (discussing model rules, court rules, and malpractice with respect to legal research).

153. For example, in Virginia a person was convicted of a criminal offense that did not exist. Taylor v. Davis, 576 S.E.2d 445 (Va. 2003), cited in RAYMOND, supra note 149, at 59. The court then held the attorney liable for legal malpractice for the error. Id.

154. Operational Guarantees, SDD Global Solutions, http://www.sddglobal.com/operational_guaranteed.htm (last visited Jan. 19, 2010) (noting that law firms and in-house counsel are concerned with work quality...
However, many LPOs claim that they can attract better talent and therefore provide higher-quality work. David Perla, co-founder of Pangea3, believes that Pangea3 offers higher-quality work than temporary attorneys in the United States can produce. Perla claims that contract or temporary attorney positions are not a top choice among U.S. law school graduates, so the positions do not attract top U.S. talent. In the United States, many people view contract work as an unattractive career choice because of lower salary, unpredictable work, lack of benefits and promotional opportunities, and mundane or even “mindless” assignments.

However, in India, employees consider LPO positions a good career choice, which allows LPOs to recruit top talent. One Indian attorney and LPO employee says that instead of being involved in an overburdened Indian court system, he is able to gain exposure to American law while enjoying his day in a plush, air-conditioned suburban office working on litigation research and drafting contracts for U.S. companies and firms. Since LPOs are an attractive career option, LPOs can attract “the best and the brightest” lawyers in India. Not surprisingly, LPO vendors such as Pangea3 claim their employees in India can perform the same tasks better than their U.S. counterparts. Some offshoring U.S. businesses support Pangea3’s claim, reporting that their offshore vendors have provided quality work.

To combat the perception of lower-quality work, LPOs have taken steps to provide quality training and ensure high quality work. First, many LPOs employ U.S. licensed attorneys when offshoring).
attorneys to train and supervise Indian attorneys. 166 In addition to training, Rainmaker, a recruitment and training firm, created the Global Legal Professional exam (GLP) in 2007. 167 Rainmaker created the test to screen LPO candidates and to provide a standard measure of skill. 168 The GLP tests candidates in areas of English fluency, technology, professional skills, personal effectiveness, and legal knowledge. 169 Three LPOs—QuisLex, Bodhi Global Services, and the Clutch Group—use the GLP. 170

While the GLP is an attempt to provide a solution to the issue of work quality in the LPO industry, it leaves many issues unresolved. Despite claims of proficiency from Pangea3 and other vendors, it is critical to remember that LPO employees are not equivalent to U.S. attorneys because they are not educated in the same material or in the same manner. In addition, unlike U.S. attorneys who take a bar exam to become eligible to practice law, there is no standard test or set of requirements for LPO employees, since less than a majority of LPOs require or administer the GLP. 171 Although LPO employees who are not licensed U.S. attorneys do not actually practice U.S. law, LPO employees have increasingly taken on projects that were once completed by U.S. attorneys. 172 While the GLP was an attempt to provide a standard in the industry, the GLP was created with the input of only three LPO companies, and those companies are thus far the only companies to utilize the GLP. 173 The GLP would be a more effective tool if it were a standard utilized by a majority of LPOs.

2. Attorney-Client Privilege

Offshoring may present an issue with the attorney-client privilege (ACP). The attorney-client privilege is a rule of evidence that protects certain information from judicially compelled disclosure. 174 Confidentiality breaches from offshoring may prevent clients from using ACP to protect communication between clients and attorneys. ACP is a privilege extended to clients’ confidential disclosures made to attorneys while seeking legal advice. 175 ACP reflects a policy decision to encourage full communication between clients and attorneys by protecting the exchange of information in certain ways. 176 The privilege applies when: “(1) a communication, [is] (2) made between privileged persons, (3) in confidence, (4) for the purpose of obtaining or

168. Id.
169. Id.
171. Id. (noting that only three LPOs use the GLP).
172. See supra Part II.A.3 (discussing the services that LPOs provide).
173. GLP FAQ, supra note 167.
174. RAYMOND, supra note 149, at 169 (discussing the attorney-client privilege).
176. Id. (explaining the purpose of the privilege); see also RAYMOND, supra note 149, at 169 (discussing the policy implications of the attorney-client privilege).
providing legal assistance for the client.”

The third factor, the confidentiality of the communication, is crucial to whether the privilege applies. The privilege may be waived under a number of instances, including the presence of third parties while the confidential information is being discussed. The privilege is also waived if confidential information is released to a third party.

In many ways, offshoring changes the relationship that exists between an attorney and an assistant due to physical proximity, which may make offshoring vendors more susceptible to breaches of confidential information. For example, if an attorney in the United States releases confidential information to his or her legal assistant, the attorney presumably has some control over the work environment and may emphasize the confidential nature of the information to ensure confidentiality. However, if the same information is released to an offshore vendor, the attorney may not have any control or knowledge of the work environment, and the information may be more susceptible to breaches of confidentiality. For example, a U.S. firm may have a practice of shredding confidential information. This type of process may not be used by an offshoring vendor, which may cause the vendor to inadvertently release the confidential information to a third party. Additionally, a U.S. firm may have a policy of not discussing client information in the presence of third parties, while LPOs may not have the same policies to protect confidential information.

Electronic surveillance may spark another confidentiality issue under attorney–client privilege. In 2005, the National Security Agency, a U.S. government agency, implemented an electronic surveillance system that could intercept communication without a warrant. A recent lawsuit contends that the U.S. government’s interception of communication by an automated system constituted a waiver of attorney–client privilege. Although the suit was voluntarily dismissed, it does raise awareness of the possibility of confidential information being intercepted during offshoring.

While some vendors dismiss issues surrounding attorney–client privilege, other vendors and firms have attempted to address confidentiality concerns. Some vendors

178. See In re Quest Commc’ns Int’l Inc., 450 F.3d 1179, 1185 (10th Cir. 2006) (noting that “confidentiality is key to the privilege”).
179. See Lynch v. Hamrick, 968 So. 2d 11, 16 (Ala. 2007) (holding that privilege was waived when a person that did not have “sufficient common legal interest in the subject matter” was present in the room while the client was discussing information with the attorney).
180. Quest Commc’ns, 450 F.3d at 1185 (holding that confidential information released to government agencies resulted in waiver of the privilege).
2010] Legal Offshoring 657

utilize technology to offer encrypted storage, paperless workflow, and restricted access to
data.184 In addition, some vendors complete extensive employee background checks.185 Some U.S. attorneys are also working to ensure client confidentiality by negotiating
offshoring agreements to provide for information protection.186 However, these steps are
not without cost, and any added expenses ultimately cut into the cost saving benefits of
offshoring.187

3. Ethical Considerations

Legal offshoring stirs up a host of ethical issues.188 Mary Daly, Dean of St. John’s
University School of Law, warns that “[l]awyers are being seduced by the business end
of outsourcing and are not . . . concerned enough with the ethical issues it’s raising.”189
Most states derive their ethical conduct rules from the American Bar Association’s Model
Rules of Professional Conduct (Model Rules).190

Many Model Rules are implicated through offshoring.191 Offshoring creates issues
with confidentiality, supervision, conflict of interest, unauthorized practice of law, and
fees.192 Two situations highlight ethical issues that may arise in offshoring. One incident
involved an employee of an offshoring vendor working on computer software.193 The
employee was arrested after allegedly attempting to sell the software code to a competitor
for $200,000.194 Another issue arose in 2003 when an employee of an offshore vendor
threatened to post private medical records online unless the University of California San
Francisco Medical Center paid her money that she claimed a third party owed her.195

While these same situations may also have occurred when outsourcing with a U.S.
vendor, offshoring presents several unique issues. First, if the situation had happened in
the United States, the employee would be subject to any applicable U.S. laws. Second, it

184. See Legal Advantage, Our Technology, http://legaladvantage.net/AboutUs/WhyLegalAdvantage
/OurTechnology.aspx (last visited Jan. 19, 2010) (listing several safeguards Legal Advantage takes to ensure
client confidentiality).
185. Id.
(June 13, 2008) (reporting that a September 2008 LPO Summit held in New York, offered a session on
negotiating to ensure client confidentiality).
187. See supra Part III.A for a discussion on cost savings.
188. Several articles discuss the ethics of legal offshoring. See generally Mary C. Daly, Flattening The
World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services,
38 GEO. J. INT’L L. 401 (2007); Harmon, supra note 63 (listing several Model Rules that are implicated when
offshoring).
189. Barlyn, supra note 91.
190. California, Maine, and New York are the only states that do not follow the format of the ABA Model
Rules of Professional Conduct. New York follows the predecessor ABA Model Code of Professional
Responsibility, and California and Maine developed their own rules. See ABA Center for Professional
191. See Daly, supra note 188; Harmon, supra note 63.
192. See Daly, supra note 188; Harmon, supra note 63.
194. Id.
195. Id.
may be easier to prevent these situations in the United States than in other countries offshore due to resources, supervision, and governing law. Third, if the employee had been a U.S. attorney, the attorney may have been reprimanded by the bar association. However, since it was an offshoring vendor, it is likely that the employee was not a licensed U.S. attorney.

It is easy to imagine other offshoring situations that would give rise to other ethical issues. For example, a temporary attorney, retained for a particular project, may not work for two opposing law firms because it presents a conflict of interest.\(^196\) Since many offshoring vendors provide services to numerous clients, it is possible that two opposing law firms would retain the same offshoring vendor, which would present a conflict of interest.\(^197\) Although LPOs may have a conflict of interest database, they are not full proof.\(^198\) Even U.S. firms that conduct conflict-of-interest checks have experienced problems that have led to serious consequences.\(^199\)

In response to the ethical concerns that offshoring raises, several local bar associations issued opinions on offshoring.\(^200\) In addition, academic authors called for the ABA to issue an opinion on offshoring.\(^201\) In August 2008, the ABA issued a long-awaited opinion on offshoring.\(^202\) The ABA Opinion addressed many ethical considerations that arise under the Model Rules.\(^203\) The ABA opinion, in accord with the other bar association opinions, concluded that U.S. lawyers can offshore legal and non-legal work, provided that U.S. attorneys adhere to ethics rules.\(^204\) Specifically, the ABA noted that attorneys must consider the following issues when offshoring: competence,
supervision, protection of confidential information, reasonable fees, and not assisting in the unauthorized practice of law.\textsuperscript{205}

The ABA Opinion outlines issues that offshoring attorneys must overcome in order to comply with the ethical standards. For example, the ABA states that the outsourcing attorney must “ensure that tasks are delegated to individuals who are competent to perform them, and . . . [must] oversee the execution of the project adequately and appropriately.”\textsuperscript{206} The ABA acknowledges that the physical separation between a supervising attorney and the offshoring vendors creates a supervision issue.\textsuperscript{207} To overcome this issue, the ABA suggests that, “at minimum,” the attorney should conduct reference checks on the party that will be completing the work and any third-party vendor.\textsuperscript{208} In addition, the ABA suggests investigating the security of the vendor’s premises, computer network, and even its recycling and refuse disposal procedures.\textsuperscript{209}

Attorneys must take their ethical obligations seriously. If an attorney violates ethical obligations, the attorney may be disciplined. Attorneys may be disbarred, suspended, or reprimanded for ethical violations.\textsuperscript{210} With much at stake, it is essential that attorneys carefully evaluate the ABA opinion to ensure that they uphold all ethical obligations when offshoring.

\textbf{IV. RECOMMENDATION}

While the LPO industry is booming, Part III details several looming issues that businesses, firms, and attorneys need to carefully consider before outsourcing legal work. Since the industry is so new, there are no standards for how attorneys should handle mistakes or mishaps.\textsuperscript{211} To avoid mistakes, this Part recommends steps firms, businesses, and attorneys can take to prevent negative consequences for clients or themselves. This Part also suggests that state and local bar associations take action to ensure that offshoring attorneys are aware of their obligations and to provide realistic guidance on how those obligations may be met.

Firms and businesses should conduct an individual cost-benefit analysis when deciding whether to offshore legal work. Price and service options are only two factors that need to be considered. Firms and businesses need to diligently assess their work quality and ensure that offshoring will not result in a waiver of attorney-client privilege or a breach of ethical obligations.

To preserve the attorney client privilege, firms and businesses need to investigate employee training, workplace practices, and computer and storage systems. Firms and businesses should seek vendors that recognize the importance of maintaining confidentiality. Offshoring employees should receive training on how to handle confidential information. Vendors should also have established and enforced workplace

\begin{itemize}
\item \textsuperscript{205} Id.
\item \textsuperscript{206} Id. at 3.
\item \textsuperscript{207} See ABA Opinion, supra note 202, at 3 (noting that physical separation and time differences challenge outsourcing lawyers to oversee projects).
\item \textsuperscript{208} Id.
\item \textsuperscript{209} Id.
\item \textsuperscript{210} See RESTATEMENT, supra note 177 at ch 1, topic 2, tit. C, intro.
\item \textsuperscript{211} See Lin, supra note 155 (reporting that at an LPO summit in January 2008, Gregg Kirchhoefer, an outsourcing attorney with Kirkland & Ellis, commented on the lack of standards in the industry).
\end{itemize}
practices that work to maintain confidentiality. At the most basic level, vendors should have a policy against employees discussing or sharing confidential information with third-parties. In addition, vendors should offer computer and storage systems designed to maintain confidentiality. For example, vendors may offer encrypted storage, paperless workflow, or restricted access to data to help preserve confidentiality.

To prevent ethical breaches, attorneys should also closely review the ABA Opinion and determine if they can meet the standards it sets forth. For example, the ABA recommends reference checks and site evaluation. While some firms and businesses may be able to travel to offshoring sites to complete thorough investigations, smaller firms or businesses may not have the resources to visit the offshoring vendor. If supervising attorneys are not able to travel to the offshoring site, attorneys may be forced to rely upon a LPO vendor’s assurances that its employees are competent and that the vendor makes client confidentiality a priority; this, for obvious reasons, is not ideal.

Although the ABA’s Opinion provides some helpful considerations, state and local bar associations should aid attorneys by providing more specific guidance. Although the ABA has issued an opinion on offshoring, state and local bar associations govern local attorneys. While local rules may follow the Model Rules provided by the ABA, state and local bar associations are free to interpret the rules and draft their own opinions.

Instead of acquiescing to the ABA Opinion, state and local bars should draft their own opinions to provide more guidance to practicing attorneys. State and local bars should consider the realities of offshoring—an industry driven by cost savings and prone to breaches of ethical standards. They should aid attorneys by drafting an opinion with examples of what would constitute a breach of ethical obligations. With so much at stake for practicing attorneys, it would be helpful to have specific examples of what constitutes an ethical breach in the context of offshoring.

In addition, state and local bar associations should put pressure on the unregulated industry of offshoring. Bar associations should consider requiring a standardized test, similar to the GLP, for all employees of LPO vendors. State and local bar associations could specify that the exam test ethical issues, much like the Multistate Professional Responsibility Exam that most U.S. attorneys must take. In addition, the exam could be formulated to test competency, which would assure U.S. attorneys that the offshoring employees have met at least a baseline level of competency. If state and local bars allowed U.S. attorneys to offshore only to those vendors that require the test, firms, businesses, and individual attorneys would no longer have to rely solely on the assurances of the offshoring vendors. While a certification test would not ensure that all

---

212. ABA Opinion, supra note 202, at 3.
213. For example, the ABA decided that attorneys do not violate the Model Rules by reviewing opposing parties’ electronic documents for metadata. Boris Reznikov, To Mine or Not to Mine: Recent Developments in the Legal Ethics Debate Regarding Metadata, 4 SHIDLER J.L. COM. & TECH. 13 (2008), available at http://www.lctjournal.washington.edu/Vol4/a13Reznikov.html. The stance taken by the ABA contradicts views from ethics committees in other jurisdictions that have determined that lawyers who examine metadata are acting unethically. Id. Attorneys practicing in states that have issued other opinions regarding metadata must follow the state’s policy instead of the ABA opinion. Id.
214. The vast majority of jurisdictions use the MPRE; however, some, like Wisconsin, do not require the exam. See National Conference of Bar Examiners, Jurisdictions Using the MPRE in 2010, http://www.ncbex.org/multistate-tests/mpre/mpre-faqs/jurs0 (last visited Jan. 19, 2010) (listing all of the U.S. jurisdictions that required the MPRE in 2010).
offshoring employees are adhering to ethical standards, it would at least ensure that offshoring employees are aware of ethical rules that govern the practice of law in the United States.

State and local bars could also require that offshore vendors adhere to other standards, such as security, training, supervision, and confidentiality. In mandating vendors to take action, state and local bar associations may be able to force some regulation in the industry. Putting pressure on vendors to comply with standards may be more practical than the ABA’s proposal of having each individual offshoring attorney assume additional responsibilities.

V. CONCLUSION

While offshoring may provide cost savings and operational benefits, the benefits must be evaluated in light of the expenses and other issues surrounding offshoring. Clients need to be aware of the legal implications of offshoring, including the possibility of a breach of confidentiality and a waiver of attorney-client privilege. Supervising attorneys need to be aware of their ethical and legal obligations, and should protect themselves, their clients, and their firms or businesses accordingly. State and local bar associations should draft their own opinions and consider putting pressure on the offshoring industry in order to provide standards and to protect both U.S. clients and attorneys.