



**Tuesday, October 21**  
**11:00 am-12:30 pm**

## **503 Outsourcing: The New Tsunami**

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## Faculty Biographies

### Mark A. Chudzinski

Mark A. Chudzinski serves as special counsel to Wolters Kluwer (North America), an Amsterdam-headquartered leading global information services and publishing company, which maintains operations in over 33 countries, serving professionals in the health, tax, accounting, corporate, financial services, legal, and regulatory sectors; its US businesses include CT, CCH, and Aspen Publishers. Mr. Chudzinski is principally involved in international licensing and contract management matters for CCH; he also advises other service providers in the IT and telecommunications industries.

He previously served as the general counsel of Ameritech International, the international division of the Midwest "Baby Bell," prior to its acquisition by AT&T. Prior to becoming an in-house legal advisor, Mr. Chudzinski was a partner in the corporate law department of Chicago-based Winston & Strawn, where he specialized in international corporate and commercial business transactions. He was previously associated with Coudert Brothers in its New York, London, and Sydney offices.

Mr. Chudzinski serves on the boards of the Chicago Legal Clinic and National-Louis University.

Mr. Chudzinski received his BA from Northwestern University, his JD from Northwestern University School of Law, and his MBA from Northwestern University's Kellogg Graduate School of Management. He also holds a post-graduate law degree from the University of Paris I – Pantheon Sorbonne.

### Howard B. Hill

Howard B. Hill is CEO and president of Quattro Legal Solutions, the legal processing subsidiary of Quattro BPO Solutions, a large Indian conglomerate in the knowledge processing industry. Mr. Hill is responsible for all aspects of the business and its service lines providing companies and their law departments high quality 24 hour solutions for high volume contract management, first level document review for litigation, investigations and acquisition due diligence and prior art searches, application drafting, and filing of patents and trademarks. His duties include the cross-cultural training and management of licensed attorneys and specialists from various locations around the world.

Prior to joining Quattro, Mr. Hill was a national partner of Pepper Hamilton, assistant general counsel for Chrysler during the Iacocca era and vice president and general counsel of an automotive parts company. He also worked in New York City, London, England, and Hong Kong with Coudert Brothers and Union Carbide specializing in international corporate legal matters.

He has been a member of the executive committee of the American Society of International Law, executive council of the American Branch of the International Law Association, International Business Council of Detroit, and the Michigan District Export Council, as well as president of the International Business Forum, Columbia Club of Michigan, and French American Chamber of Commerce in Michigan.

He is a graduate of Northwestern University and Columbia Law School and has done postgraduate study at the London School of Economics, Institute de Droit Compare, and CIDOC.

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**A PRACTICAL GUIDE  
TO  
OUTSOURCING LEGAL SOLUTIONS OFFSHORE**

Howard B. Hill

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**A PRACTICAL GUIDE TO OUTSOURCING LEGAL SOLUTIONS OFFSHORE**

By: Howard B. Hill  
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The practice of law has changed a great deal in the last few years. Technology and societal trends have led those changes.

No longer is the practice dominated by “men’s clubs” posing as law firms, the height of technology is not IBM electric typewriters and international communication is not dependent on punching holes in yellow paper tape for use in telex machines.

Outsourcing legal solutions from another country represents one such change. Now law will be practiced as a process, not just an art and lawyers, like their business clients, will tap resources abroad.

This change is not always understood much less welcome, but smart lawyers will see it as an opportunity, not a threat.

What follows is a brief guide to highlight the issues and elements of legal outsourcing. This is not intended to be an exhaustive tome which gathers dust on a shelf, but the beginning of a journey to understand the possibilities, which is actually read.

**What is Outsourcing?**

Outsourcing itself is not new; going offshore for services or resources is not new. What is new is the use of offshore resources on the other side of the globe to provide legal solutions for the home market.

Law firms and companies have long outsourced various non legal services, such as copying, messengers, food service, payroll, billing, accounts payable, word processing, marketing and promotional materials, product research and development and customer call centers. Indeed, companies already outsource their specialized legal work, particularly litigation, to law firms, who in turn outsource some of the needs required to perform those services to other companies, such as ediscovery companies who gather and manage documents for discovery.

The client companies have also outsourced many of their business functions to offshore locations, such as manufacturing, customer service centers and finance and accounting. For years, Ford Motor has had the majority of its accounts payable done in India.

Today's communications technology now makes it possible to tap intellectual talent available anywhere on the globe. India and the Philippines are the most common locations for off shoring legal assistance due to access to English speaking common law trained legal talent with a rigorous work ethic and significantly lower cost.

The inherent advantages of outsourcing offshore portend a huge market potential for the legal process outsourcing (LPO) industry. Nasscom, the leading Indian industry trade group on all business process outsourcing, predicts that the total potential legal market which could be outsourced is estimated to be \$6 billion by 2010 and \$15-\$20 billion by 2015. [www.economicstimes.indiatimes.com]. A recent report updated in July 2007 by the research company, ValueNotes, estimated total LPO revenue at \$146 million in 2006, and expected to grow to \$640 million by 2010. Forrester Research noted that LPO revenues had grown by 49% from 2006 to 2007. ValueNotes also reports that there are currently over 100+LPO firms in India employing around 7,500 people and predict that it will grow to 32,000 employees by the end of 2010. In short, the Indian LPO market potential is huge but still in its infancy. The market is fragmented and there are a number of smaller players expected to consolidate to a few major players with staying power.

Companies are also looking at setting up more than one overseas location in different time zones so they can pursue a "follow the sun" strategy, create a 24 hour workforce and minimize lengthy travel and time zone differences wherever possible. Alternate locations include Central/South America, Eastern Europe and Sri Lanka.

#### Why Should I Consider it?

- Preserve in-house resources for higher value work
- Lower costs by 30%-50%
- Obtain significant process improvements over how workload currently handled
- Improve quality for low level boring routine tasks
- Create virtual 24 hour work force
- Access additional resources on demand to handle workload surges arising from new legislative mandates, M & A activity or litigation, yet avoid the fixed costs of permanent personnel

As a result of these benefits, companies also generate a competitive advantage over others in their industry.

#### What Can Be Outsourced?

Anything not requiring an experienced attorney – high cost low level routine work that used to be done by first year associates, then by licensed paralegals and now

frequently by personnel with no legal training. Work requiring legal training could include the following:

- Document Review
  - Litigation Discovery
  - Due Diligence in M & A activity
  - Government Investigations such as Hart Scott Rodino 2<sup>nd</sup> requests
- Contract Management
  - Review of 3<sup>rd</sup> Party Agreements for Substantive Issues
  - Preparation of Draft Agreements using Pre-agreed Templates
  - Creation of Searchable Data Base of All Client Contracts, including pre-existing ones
- Intellectual Property
  - Prior Art Search and Analysis
  - Valuation of Technology
  - Patent/Trademark Application Drafting
  - Filing
  - Creation & Maintenance of Ongoing IP Registration/Renewal Database
- Legal Research
  - Ongoing research for targeted areas such as changes in federal/state regulation of financial institutions
  - General Legal Research
  - Preparation of Newsletters for Client Circulation

Some outsourced work for the legal industry doesn't require intensive legal training at all such as:

- Word Processing
- Data Entry (Data Base Creation/Maintenance)
  - Contract Management (New & Archived Documents)
  - Intellectual Property (Registration & Renewal Reminders)
- Finance & Accounting
  - Billing
  - Accounts Payable

Other work requiring technical research skills, such as prior art searches for patents and trademarks, may be best suited for scientists and engineers with technical training who understand the technology.

**What Issues Does Outsourcing Raise?****Quality**

Achieving quality in any endeavor is not the result of a catchy slogan but determined by hard work in a number of areas:

- Establishing & Monitoring Standardized Quality Procedures & Metrics for the task at hand by people trained and devoted to quality, such as certified black belts in Six Sigma who have achieved ISO 27001 and UK Data Privacy certification
- Supervision by Veteran US attorneys
  - Account Rep available in US during US business hours
  - Provide specialized expertise and knowledge of US legal market to tailor solutions to client needs
  - Conduct intensive training in the specific skills required for the assigned tasks
- Recruiting High Caliber Employees
  - Verifying their background and qualifications
  - Training focused on US market expectations
  - Ability to communicate in American English
  - Verifying their background and qualifications
  - Training focused on US market expectations
  - Ability to communicate in American English
- Having Team Supervisors who regularly review and correct work product of team members using statistical process controls based on parameters like:
  - Content Accuracy
  - Comprehensiveness
  - Language
  - Turnaround Time
- Regular Feedback Sessions between the client and the service provider tracking results achieved and difficulties to resolve to ensure that the work is getting done in accordance with the job requirements.
- Excellent Work ethic of the People and the Organization
- Resources & Equipment Required for Quality Performance

In India, quality and process training are taken very seriously. As a result, Indian reviewers typically achieve quality ratings of 95+% versus 70-75% for US based resources.

**Training**

Even for low level legal review, most LPOs use licensed attorneys who have been trained in the common law system. Each year, Indian law schools typically graduate over 80,000 attorneys so there is an ever increasing pool of available legal talent. [<http://www.livemint.com/2008/02/15000157/Offshore-biz-offers-young-lawy.html>]

The better LPOs supplement the law school knowledge by having experienced US/European lawyers train these attorneys in specific skills for the US market, such as the new federal ediscovery rules and hands on training actually reviewing documents to determine relevance and attorney-client privilege. Another example would be the drafting of patents for the US market. In the traditional UK/European system, the patent applications are very sparse while US applications must contain very detailed claims and specifications.

Besides regular legal training, there is American accent and culture training to facilitate communication between the client and the Indian provider. Again the better LPOs have this training to preclude the common complaints arising from call centers.

Finally, the better LPOs have US based and licensed attorneys supervising the work going to the client available in a US time zone so the client can have instant redress if any issue arises.

**Secrecy/Confidentiality of Data**

This is an issue in any outsourcing, whether it is copy services or legal services. What has changed is that no one is shipping boxes of documents across the globe, but connecting to secure servers operated by the client or its service provider. Not only is access password restricted, but each reviewer only sees those documents in its electronic file folder for the day. Access to a client's entire file is restricted.

**No LPO should be used who does not have ISO 27001 certification (the global standard for information security management) and Data Protection Act, UK 1998 certification** (stringent regulation in the UK and throughout Europe protecting personal data).

In addition, all computers are void of the usual methods for copying or transmitting copies of files to anywhere but the designated client location. No disk drives, USB portals or external email exist. Prior to being hired, all employees sign employment agreements with confidentiality and covenant-not-to-compete obligations.

In addition, each employee must sign in each day and cannot take laptops into or out of the building and their briefcases/bags are checked by hand by trained security personnel.

All areas inside buildings are secured by employee card access only. For certain clients, like financial institutions, biometrics and separate locked rooms provide additional protection. Where clients request, personnel assigned to them cannot perform services for a competitor.

#### Attorney-Client Privilege

There is little case law at the moment on the issue, but a lawsuit was recently filed in U.S. District Court for the District of Columbia, *Newman McIntosh & Hennessey vs. Bush*, alleging that any work sent abroad to a foreign national loses the attorney-client privilege because it is common knowledge that the US National Security Agency monitors all communications with foreign nationals and with this publication, the privilege is lost. Acumen Legal, an LPO based out of India has been named as a Defendant in this lawsuit, and has since filed a motion to dismiss. The filing is still too recent, but most DC attorneys think the case lacks merit because it would essentially mean the end of most international business. Based on their reasoning, even US law firms with overseas offices or those contacting foreign firms for opinions couldn't communicate with their foreign counterparts; in an era when litigation involves multiple subsidiaries in many countries, it is doubtful that this case will establish the precedent that the filer expects.

It should also be noted that there has existed for several years authority for the US Postal Service to monitor suspicious mail and yet no one has challenged that this constitutes publication and hence invalidates the attorney-client privilege.

What is required is that people take reasonable steps to preserve the privilege – no different that what is required today in the US.

#### Ethical Considerations - Unauthorized Practice of Law

The American Bar Association's Standing Committee on Ethics and Professional Responsibility recently issued Formal Opinion 08-451 dated August 5, 2008, which holds that "A lawyer may outsource legal and non legal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client...." (Copy of ABA Opinion is attached to this paper.)

The ABA Opinion then further delineates the lawyer's duties to manage any outsourced services – most of which parallel duties a lawyer owes to a client in any event. These include (i) the duty to supervise the 3<sup>rd</sup> party's competency and compliance with the professional rules of conduct in performing the duties to be outsourced, (ii) making appropriate disclosures to the client and receiving the client's consent where

confidential information is to be disclosed, (iii) protecting any confidential information from unauthorized disclosure either by the individuals connected with the outsourced service or in the foreign jurisdiction, (iv) charging only "reasonable fees" in this supervision or passing them on as a disbursement with only a proportionate allocation of overhead and (v) avoid assisting in the unauthorized practice of law. The ABA Opinion further encourages each lawyer to conduct its own due diligence on the competence, quality and training of the outsourced services. This is not only good ethics, but good practice in any event.

There are 2 leading state bar ethics opinions on outsourcing offshore: California [Los Angeles County Bar Association Opinion No. 518, June 19, 2006 [www.lacba.org/showpage.cfm?pageid=427](http://www.lacba.org/showpage.cfm?pageid=427) ] and New York. [Association of the Bar of the City of New York Formal Opinion 2006-3 (Aug.2006) [www.nycbar.org/Publications/reports/show\\_html.php?rid=503](http://www.nycbar.org/Publications/reports/show_html.php?rid=503) ] Both hold that outsourcing is permissible provided the US licensed attorney exercises the same supervision and obligations currently required for any lawyer. They must ensure the client's data is kept confidential, they must avoid conflicts of interest, they must supervise the work for which they can charge a "reasonable" / "appropriate" fee, they must advise the client/and get consent in some cases that they are using an LPO and they are ultimately responsible for the work product. In other words, lawyers have practically the same obligations as they do practicing law without an LPO.

It should also be noted that the work being outsourced is the routine type that is now being done by paralegals and all LPO work is done strictly for lawyers licensed to practice in the jurisdiction.

#### Fee Sharing

Fee sharing is an important element of the ethics of disclosure. Law firms are under no strict legal obligation to pass savings from off shoring onto the client, but do have obligations under the ethics rules. ABA Model Rule 1.5. on Fee sharing states: "the fee should be reasonable under the circumstances." Offering little in terms of specifics, the Rule is somewhat difficult to apply to LPO fee sharing.

Currently there are two billing models for offshore legal services. Markup and Expense Model. In the Markup Model, a law firm may add a surcharge to the actual LPO hourly rates as a fee for supervising the offshore work. The client still benefits from cost savings, but the amount of savings may be less. Nevertheless, it is consistent with the lawyer's duty to supervise and being ultimately responsible for the work product. In the Expense Model, the LPO charges are simply passed on without mark-up as an expense incurred by the law firm. This would be particularly appropriate where the amount of law firm supervision was minimal and the firm was involved in a competitive bid or RFP to secure the client work.

### Conflicts of Interest

Just as with law firms, LPOs must ensure that there are no conflicts of interest arising from a new client or when a new matter for an old client is contracted. The reputable LPOs cannot service both parties in litigation and must decline assignments that create any conflicts of interest. It is not only good ethics, it is good business. Most clients will ask before retaining an LPO or law firm.

### Malpractice

Because LPOs are not practicing law or rendering legal opinions, but providing a service directly to a licensed attorney, who does render legal opinions, the LPOs generally don't have separate malpractice insurance. However the reputable ones have 3<sup>rd</sup> party liability and errors and omissions insurance; as always, any client should satisfy themselves that the insurer is reputable and the coverage is acceptable in both amounts and risks covered.

In any event, the ultimate sanction for shoddy or incorrect work will be the loss of business and the high probability that the client harmed will make sure that other companies know not to use that LPO.

### Technology Compatibility/Connectivity

Thanks to the universality of Microsoft and Apple operating systems, office software, the optical cable laid during the dot com era and the standardization of internet and technical requirements for linking and securing the system, the issue of connectivity and compatibility is generally not a problem. However, it is one that needs to be reviewed upfront between the respective IT departments and an exact process mapped out.

Ironically, India may be more wired in some ways than the US market as India is one of the largest and growing cell phone and wireless users in the world.

### Business Continuity - Infrastructure Problems

One of the common concerns about India is electrical brownouts, which could erase data or a sudden labor strike which prevents access to the building or a fire which destroys a server. These are concerns that could happen anywhere at any time, but the issue is what preventative measures and emergency back-up exists to minimize any losses.

As India's economy has grown, there has been a struggle to keep up with sufficient electricity. Again, the reputable LPOs have back-up generators covering the

entire building, which automatically kick in the event of a brown-out. Many buildings in New York City do not have the electrical backup found with the major Indian companies. Many LPOs should also have several back-up servers at different remote locations so the data can be recovered at a moment's notice. This is also one of the reasons why only an LPO with ISO 27001 certification should be used.

### Employee Turnover

Companies are legitimately concerned about continuity of the people working on their matters. As new LPOs start, they offer higher salaries to attract experienced people, who like software engineers in Silicon Valley, engage in job hopping tempted by the higher compensation offered.

The measures to minimize turnover are not brain surgery and apply to any company or firm. How you treat your employees and are they given challenging assignments and value added training are measures which distinguish the LPOs with lower turnover. By comparison, it is estimated that among the US contract lawyer agencies, there is a 50% turnover with the resulting loss of continuity.

### Supervision

Many companies want a local "throat to grab" and that may suggest a combination of US and offshore sourcing. Some law firms actually station associates at the headhunter's war rooms to act as legal "pit bosses" to ensure consistency of review.

Current technology allows this to happen even though the review is 15,000 miles away. LPOs can schedule their work forces to coincide with US working hours so attorneys can talk directly with reviewers in real time. Again LPOs with a strong quality program also have US trained lawyers supervising as well.

Ironically, the reality is that most law firms today don't supervise on a daily basis many of their outsource providers, such as ediscovery companies and their data gathering.

### Political Ramifications – Loss of Jobs

In the current US economic and political environment, concern about losing jobs is a real one. One of the major fault lines in transitioning services to an offshore location is that the local employees may deliberately sabotage the pilot to support their case why the work should stay in the US.

While loss of jobs is a legitimate concern, reality shows that most of the work being sent offshore is not work that people really want to do. The former COO for

Milbank noted at a recent ABA meeting that their word processing group at night consisted mainly of out of work actors who were simply earning a living until they got their "big break". Many current US contract lawyers consist of people who have not passed the bar or not found jobs and only are doing the work until they find something more permanent. This perhaps explains the common error rate of over 50% in review.

If a pilot project and the subsequent transition plan are carefully implemented over a year, most people find other jobs within the organization or natural attrition occurs anyway.

### **Impact on US Attorney Career Paths**

A common refrain of law firms is that they can't outsource the low end work because they need it to train their new lawyers who graduate from law school with no practical experience. Again, most bright lawyers don't want to do the work that is outsourced because it is low level and very boring. After I graduated from Columbia Law School with the Lawrence A. Wien prize for best moot court oralist, my Park Avenue law firm sent me to an unheated warehouse in the Bronx for 3 months to review boxes of documents for a litigation that never came to trial. Shortly thereafter, I switched to the corporate department.

There is a natural progression of this type of work from 1<sup>st</sup> year associates to licensed paralegals to informal paralegals. The move to offshore is just another step in that progression.

### **Currency Fluctuations**

Businesses doing international transactions have been dealing with currency risk for years. Since currency shifts are known around the world in milliseconds, the best protection is providing for repricing, up or down, if the currency fluctuates outside a stated percentage band. Most company CFOs are also familiar with currency hedging programs which provide for forward purchases from 3<sup>rd</sup> parties of designated currency at locked in rates.

### **Political Turmoil in LPO's Host Country**

This can occur in almost any country, but again is a risk that can be managed by having the data and technology back-up spread over different locations and different countries. As costs rise in certain countries, the smart clients/LPOs already have established other locations from which to choose like Sri Lanka, the Philippines and Central America.

With respect to India, keep in mind that it is the largest and most diverse democracy in the world with over 1.1 billion people with every major and seemingly every minor religious and political belief represented. Preventative monitoring of this and other country locations will usually minimize any substantial risk.

### **Export Controls**

A final concern frequently raised is whether use of an LPO in which information is virtually transmitted overseas violates US and European export controls, such as the Export Administration Act.

Where the technology has true military ramifications, such as enriching nuclear fuel for bombs, the companies involved have definitive licensing restrictions and prohibitions and an LPO will not be used. However, where the information to be reviewed or handled is strictly commercial, such as a commercial dispute over a contract to supply business software, an LPO could normally be used although it may have to obtain a license.

In situations involving the export of technical information such as a patent license agreement, it may be necessary to first obtain an export license from the Department of Commerce. Generally such licenses are not terribly difficult to obtain if the technical information is not highly sensitive. The specifics of export controls are beyond the scope of this Guide; however, the client and the outsourcing company must be prepared to comply with export control regulations when applicable.

### **If I Decide to Outsource, How Should I Proceed?**

#### **What are the Models for Outsourcing?**

There are essentially 2 models for outsourcing: captive or third party provider.

With a Captive Center, companies set up, directly or with the interim help of a consultant or LPO, their own center in a foreign country to handle legal and business processing for the parent company. The company has to recruit, hire, train and manage the employees performing the LPO services. General Electric and Clifford Chance are two prime examples.

In the Third Party Service Provider model, a law firm or in-house legal department hires a third party provider LPO to perform the legal processing services for discreet tasks. It is the LPO who is responsible for finding, employing and managing the talent performing the services.

#### *Challenges In Setting Up & Running Captive Units:*

- High managerial effort involved in setting up the infrastructure for the offshore facility



- Limited ability to quickly attract local executive level talent
- Limited ability to quickly build / ramp up operations team to meet surges in workload
- Cost, time & effort involved in building and training a team
- Time and effort of executing pilot projects to prove the concept to business units in the home market
- Limited experience in lpo work restricts knowledge of best practices
- Lack economies of scale
- Due to local labor laws, difficult to shutdown centre if company decides to exit

#### *Benefits of Outsourcing to Third Party vs. Captive*

- Outsourcing to a third party services provider offshore is typically 15 percent cheaper than the offshore captive alternative
- Third-party model can usually lower costs by leveraging of scale and leaner processes
- Greater overhead management and higher investments in knowledge transfer required to set up and manage captive center
- The third-party model is better suited to minimize geographic/political risks, attract scarce talent not core to the business, and scale costs to match demand for processes with fluctuations in volume

#### **How Do I Locate, Select and Contract with an LPO?**

##### **Checklist for Selecting a Service Provider**

The issues involved in locating and deciding what LPO to use is no different than looking for any supplier for any service. Above all you want an entity of substance who will be there tomorrow, not 2 guys in a garage in India who happened to befriend a US classmate in college. Instead of LPO, next year they may be selling tennis rackets.

The following categories need to be examined:

- Company – History, Longevity
- Management – Background, Experience and Reputation
- Services Provided and Expertise to Provide
- Finances –Revenues, Capitalization, Bank Financing, Investors
- Facilities – Locations? US presence? Owned or Rented? Capacity for Expansion
- Infrastructure – Security Measures, Utility Back-Ups
- Employees - #, Turnover Rate, Training, Ability to Scale Up Quickly
- Training - US Legal Training/Supervision, Language, US Legal Culture

- Supervision – US Lawyers based in US
- Technology – Compatibility/Connectivity, Back-up Measures
- Quality – Certifications/ Programs in Place, Metrics, Guarantee
- Clients – References
- Fees
- Costs Charged Separately

Note of caution: There is no truth in advertising standard for websites; verify all claims on a LPO's website, particularly with respect to client references and number and expertise of employees. Do they count only permanent employees currently on the payroll fulltime or the total of everyone who may have worked at one time for them regardless of capacity and whether they still work for them full time, i.e. typists, law students?

Also keep in mind, that the LPO industry is still relatively new and in the infant stages of acceptance. A limited number of companies and firms have actually adopted LPO and most clients don't want their names used in advertising by any supplier. They have all attended the procurement school of "don't let suppliers get too comfortable" and are sensitive to the lost jobs issue with their employees and labor unions.

#### **Checklist of Unique Discussion Items for Outsourcing Contract**

- Scope and Description of Services Provided
- Number & Expertise Required for LPO Personnel
- Unique Infrastructure/Security/Data Recovery Requirements
- Mechanism/Procedure for Authorizing Change Orders
- Metrics of Performance – Deliverables & Timelines
- Fees
- Fee Adjustments
- Alternative Billing Methods (Hourly, FTE or Project Based)
- Risk/Reward Incentives (Graduated based on Quality Scores)
- Costs – What will be Charged and How Calculate Cost
- Payment Terms
- Currency Fluctuations
- Term
- Termination Rights/Costs
- Transition of Services Following Termination

### **Pilot Programs**

Because for most people, outsourcing legal solutions offshore will be a first, it is important to manage the transition wisely as it involves changes in organization, people and culture.

In addition, the primary advantage of a good LPO is that it will study an organization's current processes, recommend changes and map out a very detailed process map that will leave little to chance. After all, LPO stands for "legal process outsourcing", not just low cost labor broker.

This transition is best done initially by embarking on a pilot study in a small area in which the LPO and the client jointly designate, study, monitor and revise as needed. It allows time for both sides and their personnel to get to know the corporate culture and build personal relationships that will ultimately be the key to a successful plan.

Invariably, the client will discover aspects about its own way of doing business that they never knew before. One client for a contract management service discovered that there were 15,000 contracts annually that were never being sent to the legal department but were simply signed by the local business units without review.

A pilot will also allow the client to test an LPO's claims and decide whether they want to continue doing business with them on a larger scale, where the potential turmoil to the organization and risks of failure would be larger.

Because of the mutual learning curve on both sides, most LPOs are willing to offer pilot programs are significantly reduced cost.

### **Conclusion:**

Lawyers who resist change for the good are condemned to live in the past or at least in a museum with the other fossils.

The world may not be flat, but it has shrunk. Who wouldn't want to take advantage of assets which technology has placed in our backyard?

The mandate to control legal costs is there; you have an option to survive.

Howard B. Hill  
President & CEO, Quattro Legal Solutions, Inc.

### **Acknowledgments:**

Like any good LPO, this Guide is the work product of an experienced team. While the author assumes all responsibility for anything untoward stated herein, he wishes to thank and acknowledge the significant contributions of his teammates to this Guide and the growth of LPO. Specifically, I would like to recognize Tarun Bhattacharya, Navdeep Rajendra, John de Luca and A.B. Rajasekaran.

# AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL  
RESPONSIBILITY

Formal Opinion 08-451

August 5, 2008

## Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services

*A lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1. In complying with her Rule 1.1 obligations, a lawyer who engages lawyers or nonlawyers to provide outsourced legal or nonlegal services is required to comply with Rules 5.1 and 5.3. She should make reasonable efforts to ensure that the conduct of the lawyers or nonlawyers to whom tasks are outsourced is compatible with her own professional obligations as a lawyer with "direct supervisory authority" over them.*

*In addition, appropriate disclosures should be made to the client regarding the use of lawyers or nonlawyers outside of the lawyer's firm, and client consent should be obtained if those lawyers or nonlawyers will be receiving information protected by Rule 1.6. The fees charged must be reasonable and otherwise in compliance with Rule 1.5, and the outsourcing lawyer must avoid assisting the unauthorized practice of law under Rule 5.5.1*

Many lawyers engage other lawyers or nonlawyers, as independent contractors, directly or through intermediaries, on a temporary or an ongoing basis, to provide various legal and nonlegal support services. Outsourced tasks range from the use of a local photocopy shop for the reproduction of documents, to the retention of a document management company for the creation and maintenance of a database for complex litigation, to the use of a third-party vendor to provide and maintain a law firm's computer system, to the hiring of a legal research service to prepare a 50-state survey of the law on an issue of importance to a client, or even to the engagement of a group of foreign lawyers to draft patent applications or develop legal strategies and

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2008. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

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08-451 Formal Opinion

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prepare motion papers in U.S. litigation.

The outsourcing trend is a salutary one for our globalized economy. Labor costs vary greatly across the United States and throughout the rest of the world. Outsourcing affords lawyers the ability to reduce their costs and often the cost to the client to the extent that the individuals or entities providing the outsourced services can do so at lower rates than the lawyer's own staff. In addition, the availability of lawyers and nonlawyers to perform discrete tasks may, in some circumstances, allow for the provision of labor-intensive legal services by lawyers who do not otherwise maintain the needed human resources on an ongoing basis. A small firm might not regularly employ the lawyers and legal assistants required to handle a large, discovery-intensive litigation effectively. Outsourcing, however, can enable that firm to represent a client in such a matter effectively and efficiently, by engaging additional lawyers to conduct depositions or to review and analyze documents, together with a temporary staff of legal assistants to provide infrastructural support.

There is nothing unethical about a lawyer outsourcing legal and nonlegal services, provided the outsourcing lawyer renders legal services to the client with the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as required by Rule 1.1. Comment [1] to Rule 1.1 further counsels:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

There is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary "legal knowledge, skill, thoroughness and preparation." One lawyer may choose to do all of the work herself. Another may delegate tasks to a team of subordinate lawyers and nonlegal staff. Others may decide to outsource tasks to independent service providers that are not within their direct control. Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.

However, Rules 5.1 and 5.3 impose additional obligations on lawyers who have "direct supervisory authority" over other lawyers and nonlawyers. Rule 5.1(b) states that "[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Correlatively, Rule 5.3(b) requires lawyers who employ, retain, or associate with nonlawyers to "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." These provisions apply regardless of

whether the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm.<sup>2</sup>

The challenge for an outsourcing lawyer is, therefore, to ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately. When delegating tasks to lawyers in remote locations, the physical separation between the outsourcing lawyer and those performing the work can be thousands of miles, with a time difference of several hours further complicating direct contact. Electronic communication can close this gap somewhat, but may not be sufficient to allow the lawyer to monitor the work of the lawyers and nonlawyers working for her in an effective manner.

At a minimum, a lawyer outsourcing services for ultimate provision to a client should consider conducting reference checks and investigating the background of the lawyer or nonlawyer providing the services as well as any nonlawyer intermediary involved, such as a placement agency or service provider. The lawyer also might consider interviewing the principal lawyers, if any, involved in the project, among other things assessing their educational background. When dealing with an intermediary, the lawyer may wish to inquire into its hiring practices to evaluate the quality and character of the employees likely to have access to client information. Depending on the sensitivity of the information being provided to the service provider, the lawyer should consider investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures. In some instances, it may be prudent to pay a personal visit to the intermediary's facility, regardless of its location or the difficulty of travel, to get a firsthand sense of its operation and the professionalism of the lawyers and nonlawyers it is procuring.

When engaging lawyers trained in a foreign country, the outsourcing lawyer first should assess whether the system of legal education under which the lawyers were trained is comparable to that in the United States. In some nations, people can call themselves "lawyers" with only a minimal level of training. Also, the professional regulatory system should be evaluated to determine whether members of the nation's legal profession have been inculcated with core ethical principles similar to those in the United States, and whether the nation's disciplinary enforcement system is effective in policing

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2. Although Comment [1] to Rule 5.1 states that "[p]aragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers *in a firm*" (emphasis supplied), we do not believe that the drafters of the Model Rules intended to restrict the application of Rule 5.1(b) to the supervision of lawyers within "firms" as defined in Rule 1.0(c). A contrary interpretation would lead to the anomalous result that lawyers who outsource have a lower standard of care when supervising outsourced lawyers than they have with respect to lawyers within their own firm. As discussed below, the contrary is true in many respects.

its lawyers. The lack of rigorous training or effective lawyer discipline does not mean that individuals from that nation cannot be engaged to work on a particular project. What it does mean is that, in such circumstances, it will be more important than ever for the outsourcing lawyer to scrutinize the work done by the foreign lawyers – perhaps viewing them as nonlawyers – before relying upon their work in rendering legal services to the client.

Consideration also should be given to the legal landscape of the nation to which the services are being outsourced, particularly the extent that personal property, including documents, may be susceptible to seizure in judicial or administrative proceedings notwithstanding claims of client confidentiality. Similarly, the judicial system of the country in question should be evaluated to assess the risk of loss of client information or disruption of the project in the event that a dispute arises between the service provider and the lawyer and the courts do not provide prompt and effective remedies to avert prejudice to the client.

There are several additional considerations that must be taken into account under the Model Rules. First, at the outset, it may be necessary for the lawyer to provide information concerning the outsourcing relationship to the client, and perhaps to obtain the client's informed consent to the engagement of lawyers or nonlawyers who are not directly associated with the lawyer or law firm that the client retained. In Formal Opinion 88-356, 3 we opined that when a lawyer engaged the services of a temporary lawyer, a form of outsourcing, an obligation to advise the client of that fact and to seek the client's consent would arise if the temporary lawyer was to perform independent work for the client without the close supervision of the hiring lawyer or another lawyer associated with her firm. Relying on Rule 1.2(a), requiring lawyers to consult with clients as to the means by which the clients' objectives are to be pursued, Rule 1.4, relating to client communication, and Rule 7.5(d), prohibiting lawyers from implying that they practice in a partnership or other organization when that is not the fact, we concluded that clients are entitled to know who or what entity is representing them, and thus could veto the lawyer's use of a temporary lawyer.

Relatedly, the lawyer may not make affirmative misrepresentations to the client regarding the status of lawyers and nonlawyers who are not in the lawyer's employ under Rule 7.1, requiring truthfulness in communications regarding lawyer services, and Rule 8.4(c), prohibiting dishonesty, fraud, deceit, or misrepresentation.

We recognize that Formal Opinion 88-356 held that the client ordinarily is not entitled to notice that its legal work is being performed by a temporary lawyer. We stated that "[c]lient consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to

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3. ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 88-356 (Dec. 16, 1988) (Temporary Lawyers).

the representation is inherent in the act of retaining the firm.” However, that statement was predicated on the assumption that the relationship between the firm and the temporary lawyer involved a high degree of supervision and control, so that the temporary lawyer would be tantamount to an employee, subject to discipline or even firing for misconduct. That ordinarily will not be the case in an outsourcing relationship, particularly in a relationship involving outsourcing through an intermediary that itself has the employment relationship with the lawyers or nonlawyers in question.

Thus, where the relationship between the firm and the individuals performing the services is attenuated, as in a typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client’s informed consent. The implied authorization of Rule 1.6(a) and its Comment [5] thereto to share confidential information within a firm does not extend to outside entities or to individuals over whom the firm lacks effective supervision and control.

Also, the outsourcing lawyer should be mindful of the obligation to “act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”<sup>4</sup> This requires the lawyer to recognize and minimize the risk that any outside service provider may inadvertently – or perhaps even advertently – reveal client confidential information to adverse parties or to others who are not entitled to access.<sup>5</sup> Written confidentiality agreements are, therefore, strongly advisable in outsourcing relationships. Likewise, to minimize the risk of potentially wrongful disclosure, the outsourcing lawyer should verify that the outside service provider does not also do work for adversaries of their clients on the same or substantially related matters; in such an instance, the outsourcing lawyer could choose another provider.

Second, the fees charged by the outsourcing lawyer must be reasonable and otherwise comply with the requirements of Rule 1.5. In Formal Opinion No. 00-420,<sup>6</sup> we concluded that a law firm that engaged a contract lawyer could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client. This is not substantively different from the manner in which a conventional law firm bills for the services of its lawyers. The firm pays a lawyer a salary, provides him with employment benefits, incurs office space and other overhead costs to support him, and also earns a profit from his services; the client generally is not informed of the details of the financial relationship between

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4. Rule 1.6, cmt. 16.

5. Cf. ABA Comm. on Ethics and Prof’l Responsibility Formal Op. 95-398 (Oct. 27, 1995) (Access of Nonlawyers to a Lawyer’s Data Base).

6. ABA Comm. on Ethics and Prof’l Responsibility Formal Op. 00-420 (Nov. 29, 2000) (Surcharge to Client for Use of a Contract Lawyer).

the law firm and the lawyer. Likewise, the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer; the restraint is the overarching requirement that the fee charged for the services not be unreasonable. If the firm decides to pass those costs through to the client as a disbursement, however, no markup is permitted. In the absence of an agreement with the client authorizing a greater charge, the lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies for the individuals under contract.<sup>7</sup> The analysis is no different for other outsourced legal services, except that the overhead costs associated with the provision of such services may be minimal or nonexistent if and to the extent that the outsourced work is performed off-site without the need for infrastructural support. If that is true, the outsourced services should be billed at cost, plus a reasonable allocation of the cost of supervising those services if not otherwise covered by the fees being charged for legal services.

Finally, the outsourcing lawyer must be mindful of the admonition of Rule 5.5(a) to avoid assisting others to “practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction....” This Committee lacks the authority to express an opinion as to whether the provision of legal services by any particular lawyer, nonlawyer, or intermediary constitutes the unauthorized practice of law. Ordinarily, an individual who is not admitted to practice law in a particular jurisdiction may work for a lawyer who is so admitted, provided that the lawyer remains responsible for the work being performed and that the individual is not held out as being a duly admitted lawyer. We note only that if the activities of a lawyer, nonlawyer, or intermediary employed in an outsourcing capacity are held to be the unauthorized practice of law, and the outsourcing lawyer facilitated that violation of law by action or inaction, the outsourcing lawyer will have violated Rule 5.5(a).

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7. See ABA Comm. on Ethics and Prof’l Responsibility Formal Op. 93-379 (Dec. 6, 1993) (Billing for Professional Fees, Disbursements and Other Expenses).