

The Future in Overseas Outsourcing



A White Paper provided by Adams & Martin Group

For over a decade, businesses in India, the Philippines, Vietnam and other countries have prospered from the outsourcing of jobs by industries located in the United States.

Subsequently, financial services are outsourced and a steady stream of increasingly sophisticated work, including medical diagnostics, made its way to locations throughout Asia.

Included In This Document:

- Reasons for considering overseas outsourcing
- Potential obstacles of outsourcing
- How Privilege, Unauthorized Practice of Law and Confidentiality become potential obstacles to outsourcing
- A checklist for preserving supervision and control over outsourced projects

The legal profession is not immune to outsourcing. For several years now, law firms and corporate legal departments have experimented with outsourcing segments of their work to India and other locations. The legal department at General Electric was one of the first to engage in overseas outsourcing. Today, many corporations and even law firms are modifying their business models to include overseas outsourcing.

While the cost savings to overseas outsourcing are attractive, there are many considerations that must be weighed before shipping work offshore. The purpose of this article is to provide a description of the issues that should be evaluated prior to outsourcing document review offshore.

Overview

Numerous reports forecast the explosive growth of legal outsourcing to offshore locations. For example, one source forecasts the outsourcing of \$4 billion worth of legal services to India alone by the year 2015. Forrester Research estimates that this level of outsourcing represents nearly 80,000 U.S.-based jobs that could make their way to India.

Outsourcing to India is attractive to U.S. corporations for several reasons. The first is decreased cost. Outsourcing entities can offer labor cost reductions of up to 75% over U.S.-based attorneys. Second, with outsourcing, legal support becomes available virtually 24/7. The time difference in India means that two business days of work can be completed in one day. In other words, while domestic lawyers sleep, the outsourcing team is hard at work, and vice versa. Finally, a large and highly educated pool of qualified attorneys is available (there are nearly 200,000 foreign law school graduates each year) with limited employment options, making attractive the option to perform outsourced work at remarkably modest salaries. The high cost of document review in the U.S. makes this work a prime target for offshore outsourcing.

Potential Obstacles to Offshoring

Notwithstanding the lack of specific restrictions from the American Bar Association applicable to outsourcing legal services to India and other offshore locations, the existing Canons of Professional Responsibility governing the practice of law within the U.S. can present obstacles to such outsourcing. Outsourcing models that fail to adhere to the requirements of the Canons will expose a law firm's clients to the danger of waiving privilege, claims for the unauthorized practice of law and breach of client confidentiality.

A. Privilege

A major objection to outsourcing is the contention that the use of third party vendors to review and analyze documents will be challenged as a waiver of the attorney-client privilege with regard to any documents viewed by the outsourced employee. The basis for this argument is that the contract attorneys and/or legal staff employed by the offshore outsourcer are not licensed to practice law in the U.S. and are therefore third parties to the attorney-client relationship they are examining.

To date, no case law discussing this point exists. However, the majority of authorities examining the issue contend that the use of third party vendors by a law firm for document review, either domestic or offshore, does not waive the privilege. For example,

In *re Cendant Corp. Securities Litigation*, 343 F.3d 658, 661 (3d Cir. 2003) held that attorney-client privilege applies to nonlawyers who are employed to assist a lawyer in the performance of any professional legal services. So long as information disclosed to an outsourcing vendor is only to assist the client's counsel in rendering legal advice, the vendor is deemed an "agent" of the attorney and the privilege remains intact.

B. Unauthorized Practice of Law

Another obstacle cited by critics of offshore outsourcing is the allegation that the vendor is engaged in the unauthorized practice of law because its attorney employees are not licensed to practice law in the U.S. However, this argument has not gained much support because there still exists no uniform definition for the "authorized" practice of law. It is increasingly recognized that attorneys routinely engage legal support staff, including senior paralegals, technicians, and forensic experts to assist in their representation of clients. It is generally viewed that because the legal work being conducted offshore is at the request and under the direction of lawyers admitted in U.S. jurisdictions, who are in turn providing work to the client, there is no unauthorized practice of law. For an example, see the Colorado Bar Assoc. Ethics Op. 61 (1982, amended 1995) which held that when delegating work to a non-lawyer assistant, a lawyer should ensure that the lawyer (i) understands the assistant's abilities, limitations and training, and limits the assistant's responsibilities accordingly; (ii) educates and trains the assistant with respect to the applicable ethical standards; (iii) monitors and supervises the assistant to prevent any violation of ethical standards; (iv) continually monitors and supervises the assistant's work; (v) assures that the assistant does not engage in the unauthorized practice of law; (vi) assumes responsibility for the improper conduct of the assistant; and (vii) limits the assistant's direct contact with the client.

C. Confidentiality

Protecting the confidentiality of information provided to an outsourcer is critical since it often includes a client's financial information, proprietary business practices, product development, and testing and employment information. The most common way to provide for the protection of such information is to engage the outsourcer in a comprehensive confidentiality agreement. The agreement should be very specific in identifying the information to be designated confidential and should also specify the applicable law and venue for potential disputes.

Conclusion and Practice Pointers*

The golden rule for safeguarding your client's interests when engaging an outsourcer, either domestic or offshore, is for the

attorney to maintain close supervision of the vendor. Supervision and control are the keys to avoid claims of ethical violations.

Utilizing the following guidelines in vendor relationships is recommended in order to preserve supervision and control of each project:

- The general protocol and review guidelines should be drafted by the client and its counsel, not by the vendor
- The third party vendor should contractually agree to close supervision by the client's counsel
- The general review process should be sanctioned and approved by the client's counsel
- With the assistance of the client, counsel should provide screening instructions to the vendor and instruct them on the protocol for privilege determination
- A two-stage screening process should be implemented that permits the client's outside counsel to ensure that no privileged documents are being produced
- Counsel should monitor, supervise and direct the review and analysis to ensure compliance with the review protocol and screening instructions
- Counsel should make all final decisions of the analysis and personally review all final results of the privilege and relevancy reviews
- All final determinations of privilege and relevancy decisions should be made by the client's outside counsel

Note: Information targeted for offshore outsourcing must also be evaluated for impact on Homeland Security and export controls. Federal regulations prohibit the offshore outsourcing of certain information.

*For a comprehensive discussion and analysis see, *Erasing the Hurdles: Offshore Outsourcing of Litigation Services*, by Vijay Bondada, counsel in the New York office of Dickstein Shapiro Morin & Oshinsky LLP and Ram Vasudevan, CEO of QuisLex, Inc., Mealey's Litigation Report: Discovery, Vol. 3, #6, March 2006

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